

Abstract: This article provides an overview of the most relevant cases decided by the Court of Justice of the European Union concerning contract law. The present issue covers the period between the beginning of January 2024 and the end of March 2024. Out of a total of 123 judgments decided in this period, 37 had a contract law dimension.

Keywords: Court of Justice, EU contract law, most relevant cases, first trimester 2024

1 General contract law

1.1 Qualification of User's Consent to the Processing of Personal Data as 'Personal Data' under Article 4 GDPR: Judgment in Case C-604/22 *IAB Europe*

The preliminary ruling concerns the interpretation of the concepts of 'personal data' and 'data controller' within the meaning of Article 4(1) and (7) of Regulation (EU) 2016/679 ('GDPR').

The question referred to the Court of Justice originates from an administrative sanction imposed by the Belgian Data Protection Authority against the IAB Europe, a non-profit association that brings together companies operating in the advertising and digital marketing sector. Specifically, the members of the association adhere to a framework of protocols and contractual obligations called 'Transparency & Consent Framework' ('TCF') that ensures conformity with the GDPR when such operators sell user's profiles via an online auction with the intention of buying and selling advertising space on Internet sites or applications. As this system involves a considerable exchange of data relating to natural persons, it must be compliant with the relevant legislation. Technically, the IAB enables the sharing of a Transparency and Consent String ('TC String') made of letters and characters, which contains an Internet or application user's preferences concerning the release of consent to the processing of personal data.

The IAB appealed the administrative fine received and denied any violation of the GDPR. The referring judge brings an action before the Court of Justice to clarify whether a TC String such as the one described can be considered as personal data and, if so, whether IAB Europe must be qualified as a data controller under the TCF in respect of the processing of the same String.

Regarding the first question, the CJEU begins by noting that any information capable of identifying a natural person falls within the concept of 'personal data' pursuant to Article 4(1) GDPR. Indeed, by defining the concept of 'personal data' as 'any information', the EU legislator emphasizes the intention to encompass all kinds of information, both objective and subjective (para 36). The Court specifies that the information processed must make it possible to identify a natural person, regardless of whether such recognition occurs directly or indirectly (para 38). Therefore, for information to constitute personal data, it is not necessary to autonomously identify or make the data subject identifiable. Moreover, according to Recital 26 GDPR, the identifiability of a person must be assessed

* **Corresponding author: Fabrizio Esposito**, PhD, LLM (EUI), Assistant Professor of Private Law, NOVA School of Law and CEDIS (Centre for Research on Law and Society), Lisbon, Portugal, E-mail: Fabrizio.Esposito@novalaw.unl.pt.

** **Lucila de Almeida**, PhD, LLM (EUI), Abreu Chair in ESG Impact at NOVA School of Law and CEDIS (Centre for Research on Law and Society), Lisbon, Portugal; and Part-time Professor at European University Institute, Florence School of Regulation, Robert Schuman Center of Advanced Studies, Fiesole, Italy, E-mail: Lucila.deAlmeida@novalaw.unl.pt.

*** **Elisa Valletta**, PhD Student at Ferrara University, and Contract Instructor at Luigi Bocconi University of Milan, Italy, E-mail: Elisa.Valletta@unibocconi.it.

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in the light of all the means available to the controller or a third party, not limiting the notion at issue to data collected and stored by just one controller (paras 40-41).

The latter clarification is vital to the resolution of the first preliminary question. Indeed, the TC String includes information regarding a user's inclinations before a request to give consent to the processing of data concerning them. By associating such information with an identifier such as, by way of example, the IP address of the device used by the customer, a precise natural person can be identified, and a profile of that individual can be drawn up based on the choices they made in the past (paras 43-44). Therefore, although a TC String does not permit the identification of a natural person by itself, it still constitutes personal data under the definition provided by Article 4(1) (paras 50-51).

Turning to the second question, the national judge asks whether in light of Article 4(7) GDPR it is possible to qualify as a 'data controller' an association that offers its members a 'standard whereby it prescribes to them how that string should be generated, stored and/or distributed practically and technically' (para 31). In order to answer the question, the Court of Justice states that Article 4(7) GDPR provides a wide definition of 'data controller' with the aim of ensuring effective protection of individuals affected by the processing. When outlining the notion in issue, the provision does not assume or mandate the identification of a single body to which the processing shall be attributed, since it may instead be carried out by a plurality of entities equally subject to the obligations enshrined in the European regulation (para 56). According to Article 26(1) GDPR, in the latter case, a shared ownership of the processing occurs between 'joint controllers', who mutually determine the terms and purposes of the processing (para 57). However, joint controllership does not imply that each controller is equally responsible for the same data processing. Indeed, the operators 'may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed in the light of all the relevant circumstances of the particular case' (para 58).

Against this background, the Court of Justice distinguishes between two data processing operations. Firstly, IAB members enter information on users' consent into the TC String, in compliance with a framework of rules imposed by the association itself. Subsequently, operators process the data obtained to elaborate on their own marketing strategies (e.g., developing targeted advertising based on user profiling).

The Court of Justice concludes that an association that draws up a system of binding rules and contractual obligations, which also determine the way personal data relating to users' preferences regarding consent to processing are stored and shared, must be qualified as a joint controller of the processing together with its members. However, the organization cannot automatically be held responsible for processing carried out at a later stage by web page or application providers (para 77).

The interpretative question submitted to the Court of Justice has consequences with regard to contractual matters. Indeed, the case discussed reflects the recent spread inclusion of consent to the processing of personal data within contractual models that require the identification of natural persons through the use of information collected. Furthermore, data brokers are now central players in the so-called data-driven economy, since they collect data directly or purchase it from other companies, and aggregate that information with data gained from other sources. The final information resulting from this process is sold or exchanged with third parties. Given the competitive advantage that companies gain through data processing, data brokering has become a lucrative industry in the digital business landscape, creating additional intersections between contract law and data protection.¹

1.2 Transparency, Access Justice and Proportionality of a Penalty as Means for the Interpretation of General Provisions of Contract Law in a Supply Agreements: Judgment in Case C-371/22 *G Frais de résiliation anticipée*

The case concerns a dispute between G, a small-medium enterprise (SME thereon), and the electricity supplier W, located in Poland. On 23 February 2015, the parties concluded an electricity supply agreement at the retail level with a fixed price and an expiration date in December 2016. The parties also agreed to the possibility of earlier termination under the condition that W could charge a penalty fee corresponding to the price of the electricity that was supposed to be purchased by G until the

¹ On the issue, see M. Durovic and M. Montanaro, 'Data Protection and Data Commerce: Friends or Foes?' (2021) 17(1) *European Review of Contract Law* 1.

expiration day of the agreement, which is known as the 'take or pay clause'. On 25 February, two days after starting the agreement, G terminated the supply agreement, switching the energy supplier to a new energy utility company. As a result, W charged G the termination penalty fee, as suggested in the contract. G, in turn, contested the validity of the charge before the national court.

By the judgment of 7 February 2020, the District Court of the City of Warsaw considered the penalty fee charged by W justifiable according to Article 484(1) of the Polish Civil Code for two reasons. Firstly, the national civil law does not request for a contractual penalty to be subject to proof of the existence of the damage. Secondly, the amount claimed corresponds to what the parties have agreed in the abovementioned energy supply agreement. The decision motivated G to appeal to the referring judge, which seeks guidance on the interpretation of Articles 3(5) and (7) of Directive 2009/72 on the common rules of the electricity market in light of the application of Article 484 of the Polish Civil Code.

The Court of Justice starts its reasoning by refreshing the wording of Article 3(5) of Directive 2009/72, which establishes that customers willing to switch energy suppliers must have this change performed by operators within three weeks. Moreover, Article 3(7) requires the Member States to take appropriate measures to protect final customers and guarantee a high level of consumer protection, referring to more protective measures applied to residential customers as established in Annex I.

Although Directive 2009/72 does not define consumers, final customers mean customers purchasing electricity for their own use according to Article 2(9), while household customers are customers purchasing electricity for their own household consumption, excluding commercial or professional activities, within the meaning of Article 2(10). For the Court, it follows from the foregoing that the wording of Article 3(5) and (7) is limited, in substance, to the following three protective rights (para 36). First, it guarantees that final customers can, if they wish, effectively and easily change electricity supplier in compliance with the terms and the conditions of its electricity supply contract; secondly, it ensures that contractual terms and conditions are transparent, and thirdly, provides a mechanism for settling disputes which could arise between final customers and their electricity supplier (para 36). Moreover, the CJEU also clarifies that Member States must adopt the measures in Annex I, which establishes in paragraph 1(a) that household customers have the right to switch suppliers without any fee, reserving to Member States the discretion of extending these rights to other final customers (para 39).

However, the Court of Justice notes that the non-extension of protective measures of Annex I to final customers other than residential customers might not lead to the interpretation of Article 484(1) of the Polish Civil Code suggested by the national courts. It follows from the context of Directive 2009/72 that such national legislation must ensure that customers have the right to choose their suppliers, are informed in a clear and understandable manner of their rights, and are enabled to enforce them through a dispute resolution mechanism (para 44). Moreover, the ultimate purpose of Directive 2009/72 is to create competition in the internal market of electricity. Allowing customers to switch suppliers with better offers is a means to this end (para 45).

The Court then reaches a relevant conclusion. On the one hand, Articles 3(5) and (7) do not oppose the measures in the Polish Civil Code, which does not provide any criteria for the calculation of such a penalty or its possible reduction. On the other hand, Articles 3(5) and (7) require that such a contractual stipulation must be clear, understandable, and freely agreed upon, as well as provide for a possibility of appeal, administrative or jurisdictional. Within this framework, the adjudication authority can assess the proportionate nature of this penalty in view of all the circumstances and, where appropriate, impose its reduction or elimination (para 55).

2 Consumer Credit

2.1 Unpaid Interest as Part of the Compensation for Early Termination of a Consumer Credit Agreement Related to Residential Immovable Property: Judgment in Case C-536/22 *VR Bank Ravensburg-Weingarten*

On 11th January 2019, the applicants entered into a consumer credit agreement with VR Bank concerning a net loan of EUR 236,000 for the purchase of real estate. On 30th June 2020, they terminated the contract and paid the bank the sum of EUR 27,614.17 as compensation for early repayment of the price. However, the applicants demanded the return of the amount paid, claiming

that the creditor was not entitled to receive any compensation. The national judge seized by the parties issues the manner of how to calculate the compensation due to the creditor in the event of early repayment of the claim. In particular, it asks the Court of Justice three questions for the interpretation of Article 25(3) of Directive 2014/17.

The first question concerns whether the notion of 'compensation' in the abovementioned EU provision can include, by way of loss of earnings suffered by the creditor, the interest not received due to early repayment. On that question, the Court first points out that the EU provision does not preclude national legislation that entitles the creditor to be compensated for the costs directly attributable to the early repayment of the credit (para 36). The CJEU observes that, in the light of the wording of Article 25(3) and the aims pursued by the directive, the European legislator did not intend to limit the creditor's right to compensation to the costs of administrative management alone or to exclude any economic loss suffered in terms of unpaid interest (paras 38-40). On the contrary, it states that such an interpretation would be contrary to the underlying rationale of the directive. In particular, according to the combined provisions of Articles 1 and 25(3), as well as Recital 66, Member States are free to determine the cost elements relevant to the quantification of the sum to be compensated to the creditor, provided that the amount is not unfair or objectively unjustified (para 46).

Therefore, with regard to the first fundamental question, the Court of Justice rules that Article 25(3) of Directive 2014/17 'must be interpreted as not precluding national legislation which, for the purposes of the compensation of the creditor in the event of early repayment of a consumer credit relating to residential immovable property, takes into account the creditor's loss of profit borne directly by the creditor as a result of that early repayment and, in particular, the financial loss sustained by that creditor, as the case may be in connection with the remaining contractual interest that will no longer be received'. This is 'provided that the compensation is fair and objective, that no penalty is imposed on the consumer and that the compensation does not exceed that financial loss' (para 48).

The second question referred by the national judge concerns whether, for the purposes of calculating the compensation, national law is required to specify how the creditor actually uses the amount repaid in advance. More specifically, it asks whether Article 25(3) Directive 2014/17 permits the calculation of the loss of profit on the basis of the difference between the contractual interest not paid and the return which the creditor would have obtained by reinvesting the funds from the credit itself.

In order to answer the question, the judgment recalls the Advocate General's Opinion, which stated that if the compensation is fair and objective as required under the rule, there is no obstacle to it being calculated on the basis of a hypothetical parameter (para 52). Furthermore, the Court of Justice states that 'as regards the permissibility of the 'asset/liability method', it is for the referring court to verify whether the calculation of the return resulting from the reinvestment of the funds derived from a credit which has been repaid early on the basis of a flat-rate reinvestment in safe securities on the capital market with identical maturities complies with the requirements laid down in Article 25(3) of Directive 2014/17, namely that the compensation is fair and objective, that no penalty is imposed on the consumer and that the compensation does not exceed the creditor's financial loss' (para 53). Therefore, with regard to the second question, the CJEU holds that the applicable directive does not require the calculation of compensation to involve an assessment of the creditor's actual use of the amount repaid early (para 54).

Finally, the third and last question concerns the scope of Article 25(3) of the directive. It asks whether the provision covers cases in which the consumer has discharged their obligations in advance following the termination of a consumer credit agreement concerning residential immovable property. On this point, the Court states that Directive 2014/17 does not regulate aspects relating to the broader law of contract, such as the formation and validity of a contractual agreement (para 28). In light of Recital 66 of the directive, Article 25 'aims to enable consumers to discharge their obligations before the date agreed in the credit agreement so that they can make the best possible use of the single market, in particular by comparing offers in order to find the best products to meet their

needs' (para 31).² Consequently, the provision is also applicable in cases where the consumer has fulfilled his obligations in advance following the termination of the contract.

3 Air passenger rights

3.1 Filled Out Online Form as a 'Signed Agreement' for Reimbursement of a Cancelled Flight Ticket: Judgment in Case C-76/23 *Cobult*

In its judgment of 21st March 2024, the Court of Justice ruled on whether a passenger can choose the form of compensation for flight cancellation by filling in an online form pursuant to Article 7(3) Regulation 261/2004.

To cope with the possible cancellation of scheduled flights, TAP Air Portugal allows its passengers to choose how they wish to have their tickets refunded by filling in an online form. In particular, the module outlines two alternative options: ticket reimbursement through the airline's issuance of a travel voucher or other form of reimbursement, such as cash payment. To express the latter preference, it is necessary for the client to contact the customer service department in advance, which conducts a fact finding. The conditions of acceptance set forth in the online form specify that if the passenger chooses to obtain a refund in the specific form of an airline voucher, he or she will be precluded from obtaining monetary compensation.

Cobult UG, as the assignee of the rights of a passenger of TAP, requested the latter to refund the ticket previously purchased by the customer of a cancelled flight through cash refund. The air carrier rejected the request, stating that the cancelled trip had already been reimbursed in the air voucher mode, thus ruling out the possibility of requesting a further refund in monetary terms.

The national judge seeks guidance on the interpretation of the terms 'signed agreement of the passenger' within the meaning of Article 7(3) Regulation 261/2004. Under the provision, 'the compensation [...] shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services'. Therefore, the passenger concerned is primarily entitled to cash reimbursement. As a subsidiary remedy, he or she may obtain compensation by air voucher, provided that there is a prior agreement signed by the client (para 20).

To interpret the provision, the Court of Justice clarifies that the term 'agreement' '[...]' requires the passenger's free and informed consent to obtaining reimbursement of the cost of his or her ticket by a travel voucher.' (para 22). On the other hand, as for the requirement that such an agreement must be 'signed' by the passenger concerned, the Court notes a linguistic clash between the versions of the provision. Indeed, the Danish, German, Estonian, Croatian, Hungarian, Dutch, Polish, Portuguese, Romanian, Slovak, Slovenian, and Swedish versions of the provision in question require the reimbursement to be made not on the basis of a 'signed agreement' but rather on the basis of a 'written agreement' of the passenger.

According to settled case law of the CJEU, the interpretation of a provision of European origin cannot be based solely on the language version attributed to it, since it is necessary to ensure a uniform application of supranational law in all Member States. Therefore, any divergence between language versions must be resolved in the light of the underlying *ratio* of the provision in question (para 25).

According to Recitals 1, 2, 4, and 20 of Regulation 261/2004, in order to prevent passengers from suffering serious inconvenience, airline customers have the right to receive all necessary information so that they can make an informed choice as to how to exercise their right to assistance under Article 8 of the aforementioned regulation. In view of the purpose underlying the law under consideration, the air carrier is required to present unequivocally on its website the procedures for refunding the airline ticket in the event of flight cancellation. In particular, the implementation of the choice to receive reimbursement in cash must take place according to a procedure that avoids the insertion of additional steps designed to discourage the passenger (paras 31-33).

Finally, the Court settles the interpretative question by stating that the expression 'signed agreement' means 'express, definitive and unequivocal acceptance of the reimbursement of the cost of the ticket by a travel voucher, by the sending of a form filled in by that passenger on the website of the operating air carrier without that form including the handwritten or digital signature of that passenger' (para

² This view fits with and is justified by the account of the EU internal market in F. Esposito, *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century*, Edward Elgar Publishing, 2022.

34). The air carrier is thus obliged to set out clearly and ‘in a fair manner’ the options available to the customer (para 37).

4 Package travel

4.1 Average Traveller as Well-Informed, Reasonably Observant and Circumspect Considering Personal Factors of Vulnerability: Judgment in Case C-299/22 *Tez Tour*

On 29 February, the Court of Justice of the European Union delivered two decisions concerning the interpretation of Directive 2015/2302 in disputes prompted by the COVID-19 outbreak. The preliminary reference in case C-299/22³ raises various issues of a systematic nature, including the relationship between the average consumer (and traveller) standard and personal factors of vulnerability.

The traveller was supposed to fly to Dubai on 1 March 2020 to enjoy the services bundled in a package travel. However, on 27 February, the traveller asked the organizer to cancel the trip and be allowed to book a different trip at a later date, once COVID-related risks would have decreased. The organizer denied such request and the traveller filed a lawsuit.

The referring judge formulates four questions, all having to do with the concept of ‘unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination’ within the meaning of Article 12(2) of the directive. Said provision grants the traveller the right to full reimbursement when such circumstances exist. Instead, Article 12(1) entitles the traveller to a reimbursement of the amount paid, reduced of a termination fee. Thus, the right to receive the sum equal to said fee depends on the interpretation of Article 12(2).

The first question focuses on whether ‘unavoidable and extraordinary circumstances’ exist only if there is an official recommendation qualifying the destination as a ‘risk area’. The Court answers in the negative, pointing out that nothing in the wording of the directive supports the proposed interpretation, which also runs contrary to the harmonization objective of the directive since the procedure for issuing said recommendations is ‘not uniform in the various Member States’ (paras 34-36). The Court of Justice then analyses the matter from the perspective of the national rules of evidence, which are not harmonized by Directive 2015/2302 but must, nevertheless, comply with the principle of effectiveness. From this perspective, the CJEU finds that national rule of evidence requiring the issues of said recommendations would violate said principle because ‘such circumstance may exist independently of the adoption of any official recommendation or decision’ (para 40).

The answer to the second question is arguably the most significant in this case, and perhaps this whole case review, because it fundamentally softens the boundaries between the concepts of average and vulnerable consumers. It should be noted that Recital 25 of Directive 2015/2302 introduces a duty to ‘take into account the specific needs of travellers who are particularly vulnerable because of their age or physical infirmity, which the trader could reasonably foresee.’ This duty is thus narrower than the duty under Article 5(3) Directive 2005/29 since said provision prohibits unfair commercial practices which ‘are likely to or materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee’. This consideration is important to fully appreciate the expansive effect of the Court of Justice’s reasoning in this case and its potential in the future.

The question asks whether ‘personal factors relating to the individual situation’ of the traveller are relevant to assess the impact of the circumstances and if said assessment is to be made from ‘the perspective of an average traveller’ (paras 46-47). The Court of Justice answers in the affirmative.

First, the wording of Article 12(2) does not require that the trip is ‘objectively impossible’ (para 48). The plain meaning is consistent with the fact that Recital 31 includes in the list of situations justifying the free termination situations (in particular, terrorism and significant health risks) that do not make

³ The other decision is Judgment of 29 February 2024, *Kimi Tours*, C-584/22, EU:C:2024:188.

‘absolutely impossible to perform the package concerned’ (para 49). Furthermore, the Court finds the interpretation consistent with Article 13(6) in that this provision grants the right to terminate for lack of conformity that substantially affects performance, without making it absolutely impossible. Next, the Court of Justice discusses the relevance of personal factors, moving from the observation that the wording of Article 12(2) does not exclude their relevance, provided that they are ‘established objectively’ (paras 54-55). The Court continues noting that personal factors may indeed influence the impact of the relevant circumstances on the contract performance. Nevertheless, said personal factors are only relevant for the application of this provision when they ‘influence the assessment of the consequences objectively attributable to the occurrence’ of the relevant circumstances (para 57). The CJEU finds contextual support to this interpretation in Article 5(1)(a)(viii) and Recital 25. The former imposes to inform about the suitability of the package for travellers with reduced mobility. The latter states that, when informing travellers, traders shall ‘take into account the specific needs of travellers who are particularly vulnerable because of their age or physical infirmity, which the trader could reasonably foresee’. Textual considerations are finally complemented by teleological ones. The goal of consumer protection (Recital 7) ‘encompasses travellers who are in a more vulnerable situation’ (para 61).

It is at this point that the decision opens uncharted territories. In fact, traditionally, EU law has used the categories of average and vulnerable consumers as alternatives.⁴ However, having recognized the relevance of personal factors of vulnerability, the Court of Justice still finds that the ‘significance of the consequences’ shall be evaluated from the perspective of the average traveller, ‘following the example of the criterion applied in other areas of EU law relating to consumer protection’ (paras 63 and 71). The Court further clarifies that since the decision is prospective in nature (a ‘prediction’; para 67), the appropriate time for the assessment is the date of termination of the package.

The third question focuses on the relevance of the information available to the traveller at the time of stipulation of the contract. In other words, the question is **whether the traveller who knew or should have known about the unavoidable and extraordinary circumstances can still benefit from the protection granted by Article 12(2)**. The Court of Justice provides a reasonably qualified answer.

The CJEU first observes that while the provision does not explicitly mention the issue, the terms ‘unavoidable and extraordinary’ themselves tend to indicate that that concept covers only situations which, on the one hand, did not exist on that date and, on the other hand, were unforeseeable’ (para 74). Paragraph 75 formulates somewhat opaque ~~semantic~~ considerations: ‘An existing situation cannot by its very nature be classified as ‘unavoidable’, even if it may have been so before it materialised. Furthermore, a hypothetical situation, if foreseeable, cannot be classified as ‘extraordinary’’. They are complemented by considerations about Recitals 30 and 31 suggesting that the right to terminate relates to **‘an unforeseen change of circumstances’** (para 77). This finding is also in line with the protective objectives of the directive, once circumstances that ‘were already known or were foreseeable’ must be **‘considered ‘accepted for the purpose of their journey’** (para 78) and the traveller cannot rely on them. Nevertheless, the Court of Justice explains that ‘significant changes’ in an ongoing situation may be capable of satisfying the conditions for the application of Article 12(2), which is for the national court to verify (paras 81-82).

In conclusion, while the answer to the second question arguably transforms a central element of EU contract law, namely the distinction between average and vulnerable consumer, the answer to the third one clearly connects Article 12(2) of Directive 2015/2302 to traditional contract law debates concerning changes of circumstances.

5 Non-discrimination law

⁴ See Judgment of 16 May 1989, *Buet and Others v Ministère public*, C-382/87, EU:C:1989:198. See ~~also however, among others~~, N. Reich, ‘Vulnerable Consumers in EU Law’, in D. Leczykiewicz and S. Weatherill, *The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law*, Hart Publishing 2018, ~~offering an analysis of the concept of vulnerability in EU law that fits with the present decision.~~

5.1 Dismissal Without Reason of Employees with Fixed-Term Contracts When Those with Indefinite Contracts Are Entitled to Them as Discrimination Receiving Protection Under Article 47 of the Charter: Judgment in Case C-715/20 *K.L.*

The dispute in the main proceedings concerns the dismissal, without any statement of reasons, of a fixed-term part-time employee before the term was reached. The Polish Labour Code, which governs said contract, establishes that a statement of reason is required only in case of employment contracts of indefinite duration. The referring judge takes the view that the Polish Labour Code violates the principle of non-discrimination enshrined both under EU law and Polish law and asks to the Court of Justice to confirm this position regarding EU law, which is resisted against by the Polish government. The Court sides with the referring judge articulating in detail how this violation leads to rights the employee can rely upon in the dispute with the employer, without putting into question the view that directives do not have horizontal direct effect.

The CJEU reaches this conclusion with a very detailed set of steps. The main legal instrument interpreted is the framework agreement put into effect by Directive 1999/70. The Court begins its analysis observing that the contract between the parties clearly falls into the scope of application of said framework agreement because the contract is a fixed-term employment relationship and Clause 4 of the framework agreement covers the 'employment conditions of workers', which include also the conditions for the termination of the contract (paras 33-40). On these grounds, the CJEU investigates whether the principle of non-discrimination has been violated.

In this regard, the Court of Justice points out that the principle of non-discrimination is, according to Clause 1(a) of the framework agreement a means to improve the quality of fixed-term work. In particular, Clause 4 'prevent(s) an employer using such an employment relationship to deny those workers rights which are recognised for permanent workers' (para 42). In so doing, Clause 4 is 'a specific expression of one of the fundamental principles of EU law, namely the general principle of equality' (para 43) and it cannot be interpreted restrictively.

In this context, disparity of treatment with 'comparable permanent workers' can be acceptable only if justified on 'objective grounds' (para 45). The Court observes that the situations appear comparable given 'the general nature of the legislation at issue in the main proceedings' (para 48), while formally stressing that the referring judge has the final word. Moreover, the disparity of treatment is objectively verified, since the worker with a fixed-term employment contract enjoys the protection against unfair dismissals pursuant to Article 8 of the Polish Labour Code, but would need to start a proceedings without knowing the reasons leading to the dismissal. It is thus apparent that permanent workers are in a better position since they are 'able to assess a priori the prospects of success' of an action against unfair dismissal, but workers with a fixed-term contract are not (para 54). Moreover, an early termination 'disrupt(s) the normal of course of the employment relationship' irrespective of it being of indefinite or fixed duration (para 55).

As objective grounds for the disparity, the Polish government presents 'the social and economic function of a fixed-term employment contract and that of a contract of indefinite duration' (para 60) and the 'legitimate objective of a 'national social policy aimed at full productive employment'', which 'requires great flexibility of the labour market' (para 61).

The Court of Justice disagrees, leaving the final word to the national judge. First, the Court observes that existence of 'a general, abstract norm' is not enough to establish objective grounds (para 58). Instead, 'the difference in treatment found to exist [must] be justified by the presence of precise and specific factors, characterising the employment condition to which they relate, in the specific context in which it occurs and on the basis of objective and transparent criteria' (para 59). On these grounds, the CJEU stresses that accepting justifications such as the ones provided by the Polish government would do nothing less than rendering 'meaningless' the objectives of the framework agreement and 'it would be tantamount to perpetuating a situation that is disadvantageous to fixed-terms workers' (para 64).

Having addressed the matter from a substantive point of view, the Court of Justice is now faced with the consequences in the main proceedings of finding Polish law incompatible with the framework agreement. In this regard, the Court reminds of the duty of interpretive conformity and its limit, namely a *contra legem* interpretation of national law (para 70). If an interpretive solution is not possible, ~~while~~ the framework agreement has only vertical direct effect (against the state) but not horizontal (against the employer). However, following the approach set out in *Engelberger* (Judgment of 17 April

2018, C-414/16, EU:C:2018:257, para 78⁵), Article 47 of the Charter offers a viable alternative. Accordingly, the national judge will have to disapply 'the Labour Code to the extent necessary to ensure the full effect of that provision of the Charter' (para 81)

6 Essential Services

6.1 Mandatory Purchase of Green Certificates on Importers from Italian Renewable Energy Producers as Compatible with EU Law: Judgment in Case C-558/22 *Fallimento Esperia and GSE*

With this decision, the Court of Justice revisited the landmark cases *Essent Belgium* (Judgment of 29 September 2016, C-492/14, EU:C:2016:732, and Judgement 11 September 2014, C-204/12, EU:C:2014:2192) concerning the compatibility of national laws imposing support schemes favouring national renewable energy production. Particularly in this case, the support scheme concerns a mandatory purchase of Italian green certificates in proportion to the quota of energy imported that did not demonstrate the guarantees of origins from renewable source producers.

The controversy of the present case follows the decision of 28 June 2016 of the Italian energy regulator, ARERA, to issue a fine of approximately EUR 3 million on Esperia SpA for failing to purchase Italian green certificates with respect to the electricity imported into Italy in 2010 and produced using non-renewables sources. Esperia SpA disputed the validity of the fine. The referring court then requested the interpretation of the compatibility of Article 11 of Legislative Decree No 79/1999 with several provisions of EU law, namely the Renewable Energy Directives of 2001 and 2009, Articles 28, 30, 34, and 110 TFEU relating to the free movement of goods, and Articles 107 and 108 TFEU concerning State aid rules.

Before answering the referred question, the judgment dedicates a few paragraphs to preliminary observations to contextualize and explain the complexities of the support scheme established by Italian law, which is indeed necessary to understand the reasoning of the Court. Article 11(1) of Legislative Decree No 79/1999 imposes the obligation on electricity importers and domestic producers from non-renewable sources to feed a quota of renewable sources into the national electricity network. As an alternative, Article 11(3) creates conditions to discharge the same operators from this obligation. Either the electricity importer or producer of non-renewable sources should submit guarantees of origins acquired from other producers of renewable energy sources in other Member States, on the condition these other producers feed energy injected into the Italian electricity grid, or acquired green certificates issued by GSE, an entity controlled by the Italian Ministry of Economic Affairs, to Italian producers of renewable electricity. Green certificates are the Italian denomination given to guarantees of origin issued by GSE. Guarantee of origins are tradable electronic documents issued by Member States to renewable energy producers to prove that a certain volume of energy injected into the grid network is produced through renewable sources. Since these electronic documents are tradable, depending on their market value, they can also be a means to subsidize renewable energy production.

As the first step, the Court of Justice interprets the provisions of the Renewable Energy Directives of 2001 and 2009, Directives 2001/77 and 2009/28. For the Court, none of the EU legislations sought to fully harmonize support schemes (paras 46 and 52). Moreover, Articles 3(1) and (2) of both directives must be interpreted as the national support schemes that are appropriate means to achieve national indicative targets for the consumption of renewable energy by 2030 (paras 47 and 54). Therefore, the Renewable Energy Directives do not preclude a national support scheme exclusively favouring the national production of green electricity (para 54) insofar as it is in accordance with the principle of proportionality, being for the referring court to apply the proportionality test (para 56). As regards the TFEU's provision invoked, the Court of Justice first assesses whether the measure at issue may come within the scope of Articles 107 and 108 TFEU. Classifying a measure as State aid necessitates fulfilling four conditions: intervention by the State or through State resources, effect on trade between Member States, distortion of competition, and selective advantage. While the effects on trade between the Member States and on competition are evident (para 63), the judgment gives

⁵ On this case see, *inter alia*, A. Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights' (2019) 15(2) *European Constitutional Law Review* 294.

more attention to the classification of the measures as an intervention of the State or through State resources and selective advantage.

The Court of Justice reminds that to categorise advantages as State aid, they must be granted directly or indirectly through State resources and be attributable to the State (para 67). In this context, the provision of green certificates to national producers and the mechanism ensuring their value are analysed to determine if they involve State resources. The Court concludes that the support scheme is not only a State intervention introduced by a legislative act (para 69), but also that the aid was indirectly granted by State resources. Although the advantage represented by the awarding of these certificates to national green electricity producers appears to be financed solely by resources from the producers or importers (para 74), Article 11(3) of the Legislative Decree No 79/1999 requires GSE to buy green certificates where they exceed the number required by the operators obliged to purchase them, preventing oversupply of green certification and controlling its price.

However, regarding the last condition for constituting a State aid (selective advantage), the Court argues that the differentiation between undertakings caused through the support scheme 'results from the nature of the overall structure of the system of which they form part' (para 91). In other words, 'the differentiation between producers of green electricity and producers and importers of electricity from non-renewable sources may be justified by the nature and general scheme of the general system regulating the production, marketing, and consumption of electricity in Italy', 'taking into account the need to ensure environment protection' (para 92). Therefore, the Court concludes that Articles 107 and 108 TFEU must be interpreted as not precluding the support scheme mechanism at issue for not fulfilling the condition of selective advantage.

Last, the Court of Justice assesses the compatibility of the national measure at issue with Articles 28, 30, 34, and 110 TFEU relating to the free movement of goods. In the present case, the Court argues the measure at issue constitutes barriers to imports. However, the obligation on importers to purchase Italian green certificates to import their electricity, which is not demonstrated through guarantee of origins, can be justified by the promotion of the production of electricity from renewable energy sources (para 109). It follows from the foregoing that the measure at issue is in accordance with the principle of proportionality. The Court finds that the measure 'appears appropriate for the purpose of promoting the use of renewable sources with a view to protecting the environment and the health and life of humans and animals and preserving plants' (para 118). Furthermore, the intervention of the GSE in placing or purchasing green certificates in the event of shortage or oversupply is appropriate to guarantee the well function of the green certificates (*ibid.*). About the second condition of the proportionality test, the CJEU concludes that the support scheme is necessary for the 'effectiveness of the system of support national production and the consumption of green electricity' (para 119).

The Court of Justice's decision is important because it develops its precedents in *Essent Belgium's* saga, where the Court considered national measures that benefitted national renewable producers with free access to the network grid and mandatory purchases of national guarantees of origins as discriminatory and/or disproportional. In the present case, the Court not only had the chance to revisit the proportionality test in an analogous case but also to assess the Italian support scheme against EU State aid law, reaching different conclusions.

7 Private international law

7.1 The Violation of an Agreement Conferring Jurisdiction as a Reason to Refuse to Recognise the Judgment of a Different Member State Court: Judgment in Case C-90/22 *Gjensidige*

ACC Distribution concluded a contract with Rhenus Logistics for the transport of computer equipment, which the latter undertook to ship from the Netherlands to Lithuania. In view of the loss of part of the goods during transport, the insurance company Gjensidige ADB paid ACC Distribution compensation of EUR 205,108.89. Subsequently, Rhenus Logistics applied to the Netherlands national judge to ascertain the limitation of its liability. ACC Distribution and Gjensidige claimed lack of jurisdiction in the present case since ACC Distribution and Rhenus Logistics had previously agreed to submit any disputes relating to the performance of the international transport contract to the jurisdiction of the Lithuanian judges.

Given the existence of such an agreement, the referring judge asked for a preliminary ruling on the interpretation of Article 45 of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In particular, the national judge asked whether the court of a Member State may legitimately refuse to recognize the decision of a national court of another Member State by virtue of the prior agreement by which the parties to a contract had identified a different court for the resolution of any disputes relating to the contract concluded (para 49). In particular, the request for a preliminary ruling stems from the provisions of Article 25 of the regulation, according to which 'If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State'.

The Court of Justice argues its decision on the basis of two subsections of Article 45 of Regulation 1215/2012.

First of all, the CJEU notes that the first paragraph of Article 45 of the regulation provides an exhaustive list of grounds on which recognition of a decision may be denied (para 61). Specifically, Article 45(1)(a) states that any interested party may request that recognition of a judgment be denied if it is contrary to national public policy (para 51). The public policy exception must be interpreted restrictively given the objective of the regulation to limit non-recognition of a decision because it is incompatible with the public policy of a Member State to exceptional cases only (para 62). Indeed, 'recourse to the public policy exception provided for in Article 45(1)(a) of Regulation No 1215/2012 can be envisaged only where recognition of the judgment delivered in another Member State would be at variance to an unacceptable degree with the legal order of the Member State addressed inasmuch as it would breach a fundamental principle' (para 66).

The Court of Justice further notes that Article 45(1)(e)(ii) provides that recognition of a judgment may be denied upon application of a party if contrary to Article 24 of the regulation, which designates the courts with exclusive jurisdiction to deal with disputes in the specified matters, regardless of the domicile of the parties (paras 54-55). In particular, the referring judge asked whether this subparagraph could be interpreted more broadly to include Article 25 of the regulation on prorogation of jurisdiction. On this point, the CJEU notes that 'The clear and unequivocal wording of Article 45(1)(e)(ii) of Regulation No 1215/2012 is of itself sufficient to conclude that no such broad interpretation of that provision is permissible, lest it lead to an interpretation *contra legem* of that provision' (para 57). On this point, the Court of Justice implements a literal interpretation of the regulation with the intention of not distorting the scope pursued by the European Union legislator (paras 58-59).

Indeed, the regulation aims to ensure simple and rapid recognition of judgments given in one Member State throughout the European Union, without the need for an excessively complex procedure (para 60). Afterwards, the judgment states that 'The EU legislature clearly chose not to include the fact that a judgment conflicts with the provisions of Section 7 of Chapter II of Regulation No 1215/2012, on prorogation of jurisdiction, as one of the grounds on which its recognition can be refused. The protection of agreements conferring jurisdiction, which is an aim of that regulation, therefore does not result in a breach of such an agreement being, in itself, a ground for refusing recognition' (para 73).

In the light of the above findings, the Court of Justice concludes that, according to Regulation 1215/2012, Member States judges are not entitled to justify the refusal of the recognition of the judgment issued by a different Member State on the basis of 'an agreement conferring jurisdiction, within the meaning of Article 25 of that regulation, that forms part of that contract' (para 76).

Accordingly, the plea raised by ACC Distribution and Gjensidige concerning the alleged lack of jurisdiction of the court seised is unfounded.

Note: The primary responsibility for the identification of the EU case law with a contractual dimension lies with Lucila de Almeida, who also wrote sections 1.2 and 6.1; Fabrizio Esposito is responsible for the general structure and coherence of the text and wrote sections 4.1 and 5.1; Elisa Valletta wrote sections 1.1, 2.1, 3.1, and 7.1.