EU Contract Case Law, April – June 2024

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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 April 2024 and the end of June 2024. Out of a total of 231 judgments decided in this period, 26 had a contract law dimension.

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

1 Unfair contract terms

1.1 Principles of Equivalence, Effectiveness and *Audi Alteram Partem* as Means for the Interpretation of Unfair Contract Terms Law in the Case of Assignment of the Consumer Claim to a Supplier: Judgment in Case C-173/23 *Eventmedia Soluciones*

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1.2 Moment When the Consumer is Reasonably Aware of the Unfairness of a Term as Point When the Limitation Period for Restitutions Starts Running: Judgment in Case C-561/21 *Banco Santander (Départ du délai de prescription)*

This preliminary reference concerns the application of statutes of limitation to claims for restitutions grounded in the finding that a consumer contract term is unfair and, thus, null and void. The statute of limitation is a technical issue with enormous practical importance since it represents a ground to avoid the restitution of sums unduly received by a professional.

In *Caixabank and Banco Bilbao Vizcaya Argentaria* , the Court of Justice held that the limitation period cannot start running from the day the contract because since the consumer might be unaware of the unfairness of the term at the time, the principle of effectiveness is violated (judgment of 16 July 2020, C-224/19 and C-259/19, EU:C:2020:578, para 91). The Spanish referring judge presents a series of criteria that could be used to determine when the limitation period starts running: the moment when the decision declaring the term unfair and, thus, null and void becomes final; subordinately, the date the national Supreme Court has recognized that similar declarations of invalidity has restitutory effects; subordinately, the date when the CJEU held that restitution claims such as the one under consideration could be subject to a limitation period.

Despite, the subordinate order of the criteria as presented by the national judge, the CJEU offers a partially affirmative answer to the first question, but then considers and rejects explicitly the second and third criteria.

The Court opens its analysis with a general remark regarding the importance of restitutions to ensure the effectiveness of the system of protection established by Directive 93/13, citing in particular, *Gutiérrez Naranjo and Others* and *Bank M.* (Judgments of 21 December 2016, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, para 66, and of 15 June 2023, C-520/21, EU:C:2023:478, para 61) to

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support the view that finding a term unfair 'must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term' (para 23).

Against this background, the Court of Justice moves from the observation that procedural rules that have not been harmonized must comply with the principles of effectiveness and equivalence. The CJEU considers first the duration of the limitation period, which is 15 years. Said period is considered compatible with the principle of effectiveness, provided that the period is 'eatablished and known in advance' by the consumer (para 31). This conclusion is convincing, considering that in previous occasions, periods of 3, 5, and 10 years had been found compatible with the principle of effectiveness.[1]

Moving to the matter of when the period starts, the CJEU rely on the idea of the consumer as a weaker and, in particular, uninformed party to reaffirm that the period cannot start on the day the contract was concluded. Convincingly, the period can start 'on the date on which the decision finding the contractual term concerned to be unfair and declaring it void on that ground became final' because on said date 'the consumer is fully aware of the unlawfulness of that term' (para 35).

At this point, the Court of Justice creates some abstract flexibility, which is hard to see how to operationalize in practice, to the apparent detriment of the legal certainty a statute of limitation is meant to ensure. In fact, the Court adds that Directive 93/13 'does not preclude the seller or supplier from having the right to prove that that consumer was or could reasonably have been aware of that fact before the delivery of a judgment finding that term to be void' (para 38). It is rather difficult to identify a time after the contract was concluded but before the term is found unfair by a decision with the force of *res judicata*. In fact, to the extent the professional is resisting the claim that the term was unfair, it is hard to accept that said professional can claim that the consumer could be fully aware of the unlawfulness of that term as the Court demands. A bright line consisting in the date the decision finding the terms unfair becomes final is convincing both in terms of consumer protection and legal certainty.

This consideration is reinforced by the analysis supporting the rejection of the other two starting dates proposed by the referring judge, which consist in the date of delivery of important court decisions on this matter, as noted above. In fact, the rejection of both dates rests heavily on the need to ensure the effectiveness of the right to restitution (paras 47-48). In particular, the Court notes that 'it would be contrary to Directive 93/13 to allow the seller or supplier to benefit from its inaction' in situations where legal specialists can reasonably foresee that a contract term will be found unfair by a court (para 53).

In sum, the Court of Justice has convincingly rejected the possibility of making limitation periods start at dates that would be advantageous to traders who have used unfair terms. Convincingly, the CJEU considers the date when the decision finding a term unfair acquires the force of *res judicata* to be an appropriate starting point for the limitation period. Unconvincingly, the Court has granted the trader the opportunity to claim that consumers were fully aware of the right to restitution at a hard-to-specify previous time, to the potential detriment of consumer protection and sure detriment of legal certainty.

2 Online Platforms

2.1 Consumer Protection as an Indirect Objective of Regulation 2019/1150: Judgment in Joined Cases C-664/22 and C-666/22 *Google Ireland*

The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) has referred a series of preliminary questions to the Court of Justice concerning, in particular, the coordination between Directive 2000/31 (E-Commerce Directive) and Regulation 2019/1150 (P-2-B Regulation). The questions in the preliminary references are similar, to the point that some have been joined and, in any event, several paragraphs are identical in the CJEU judgments. These are the

[1] See, Judgments of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paras 62 and 64; of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria*, C-224/19and C-259/19, EU:C:2020:578, para 87; and of 8 September 2022, *D.B.P. and Others (Mortgage loans denominated in foreign currency)*, C-80/21 to C-82/21, EU:C:2022:646, para 92.

first decisions concerning the P-2-B Regulation and see the Italian government challenged by a number of tech giants (namely Amazon, Airbnb, Expedia and Google).[2]

The questions are all related to complaints regarding the new powers granted to the Italian telecommunication authority (AGCOM), allegedly to ensure the compliance of the Italian legal system with the P-2-B Regulation. The Court of Justice finds that the challenged provisions of Italian law violate EU law. In essence, the challenged provisions imposed, among others obligations, registration, contributions to the authority equivalent to 0,15% of the national annual turnover, and information sharing duties under pain of fines between 2% and 5% of the annual turnover.

As asked by the referring judge, the Court examines the compatibility of the national measures with Article 56 TFEU, Article 16 of Directive 2006/126 and Article 3 of E-Commerce Directive. As a first step, the CEJU points out that the E-Commerce Directive is the most relevant EU instrument. On the one hand, Article 56 TFEU has residual application in this case, since the considered directives 'give concrete expression to the freedom to provide services enshrined in' it (para 51). On the other hand, the E-Commerce Directive is *lex specialis* to Directive 2006/123, pursuant to Article 3(1) of Directive 2006/123.

As a second step, the Court of Justice reminds that the E-Commerce Directive enshrines the so-called 'home country control principle':[3] the information society service must comply only with the measures of the country of establishment which fall within the scope of the coordinated field, regardless of the Member State where the service is being provided. Article 3(4) establishes the conditions for a Member State to intervene in derogation of this principle.

Third, the Court rejects the submission of the Italian government that the contested national measures do not fall within the coordinated field because they all 'constitute requirements relating to the exercise of the activity of an information society service' (para 67).

Fourth, the CJEU examines the applicability of Article 3(4) in relation to the contested measures. The examination is divided into two parts. In the first part, the Court is inclined to classify the contested measures as 'general and abstract in scope' (para 74), while Article 3(4) applies only to specific measures; if the referring judge agrees, the implication is that the contested measures violate EU law. In the second part, the Court of Justice focuses on the substantive conditions that need to be satisfied for the application of this exception. In this regard, the Court finds that 'it cannot be inferred from the fact that national measures were adopted with the stated aim of ensuring the application of Regulation 2019/1150 that those measures are necessary to secure one of the objectives listed in Article 3(4)(a)(i) of Directive 2000/31' (para 87) and, in particular, consumer protection.

This judgment and its twins raise significant concerns, regardless of one's view regarding the compatibility with EU law of the Italian measures under scrutiny. In fact, the distinctions the CEJU relies upon are not entirely convincing. The distinctions are, first, between general and abstract versus specific measures and, second, between direct and indirect consumer protection.

On the one hand, it seems hardly possible for specific measures not to exist when general and abstract measures are in place and they are applied by an administrative body. More precisely, the Italian legal system introduces general and abstract administrative norms that have a set of conditions of application (*ratione loci*, *temporis*, *materiae* and *personae*). Essentially, the home country control principle establishes that national measures are inapplicable *ratione loci* – that is, because a provider is established in another Member State. Still, every Member State has the power and the duty to discipline the activity of providers established in its territory. Said discipline is performed via general and abstract measures.

In this context, the E-Commerce Directive establishes a general immunity for 'foreign' providers within the coordinate field. This immunity is unlawfully ignored by specific acts, such as the AGCOM 'decision of 25 June 2019 [which] automatically entered Google in a register' and the 'decision of 9 November 2020 [which] required Google to pay a financial contribution to cover its operating costs'

[2] See Judgments of 30 May 2024, *Expedia*, C-663/22, EU:C:2024:433; of 30 May 2024, *Airbnb and Amazon Services Europe*, C-662/22 and C-667/22, EU:C:2024:432.

[3] K. E. Sørensen, 'The Country-of-Origin Principle and Balancing Jurisdiction between Home Member States and Host Member States' (2019) 30(1) *European Business Law Review* 37.

(paras 27 and 28). By focusing on the general and abstract measures constituting the grounds of these AGCOM decisions, the CJEU has failed to identify the correct national measure to scrutinize.

On the other hand, the reliance on the distinction between direct and indirect consumer protection is unconvincing for at least three reasons plainly grounded in EU law. First, Recital 3 P-2-B Regulation the CJEU relies upon to introduce the distinction actually open as follows: 'Consumers have embraced the use of online intermediation services. A competitive, fair, and transparent online ecosystem where companies behave responsibly is also essential for consumer welfare'. Admittedly, Article 1 presents as the regulation's objective only 'ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities'. Still, Recital 3 P-2-B Regulation clearly states that the protection of consumers' interests or welfare is central to the market design the P-2-B Regulation explicitly contributes to implement. In competition law, whether consumers are harmed directly or indirectly is explicitly immaterial.[4] It is thus hard to understand why the same distinction matters in the context of the P-2-B Regulation; the Court's silence on this point is unfortunate.

Furthermore, the exception to the home country control principle pursuant to Article 3(4) of Directive 2000/31 is also reconstructed unconvincingly. The provision generically requires that the measure is justified by the 'reason' of consumer protection. At the same time, Recital 3 P-2-B Regulation establishes a nothing-less-than 'essential' connection between fair and transparent platform-to-business practices and 'consumer welfare'. Against this background, relying on the rule-exception distinction to conclude that the 'reason' covers 'direct objective' but not 'indirect objective' is too formal to be convincing.

None of the above means that the Italian legal system did not violate EU law. Indeed, even if one were to accept that grounds for derogating from the home country control principle existed, significant substantive and procedural obstacles still existed. Substantively, the restrictive measures had to be proportionate. Procedurally, Article 3(4)(b) of Directive 2000/31 establishes the need to interact with the country of origin and the European Commission before taking a measure. Nothing in the case file indicates that this procedure was followed.

In sum, the overall impression is that the Court of Justice cut argumentative corners and hastily reached a result that had plenty of opportunities to achieve with more solid reasoning, to the detriment of the rule of law. If these concerns are well-founded, the present judgment and its twins have, in part, misrepresented and, in part, unduly strengthened the home country principle.

3 Labour law

3.1 Harm Caused by the Infringement of Free Health SAssessment Provision as a Damage to be Proven: Judgment in Case C-367/23 *EA*

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4 Essential services

4.1 Change in Conditions of Renewable Support Schemes Agreements does not Violate the Principle of Protection of Legitimate Expectations of Investors: Judgment in Case C-148/23 *GSE v Erg Eolica Ginestra Srl and Others*

This preliminary reference concerns a dispute between the GSE, the Italian public company that manages inventive mechanisms for promoting renewable sources, and twenty-one energy company owners of renewable power plants, which had benefitted from the green certificate scheme until 2011. Following the transposition of Directive 2009/28/EC (thereon, the RED I) on the promotion of

[4] Seminal on this matter, Judgment of 6 October 2009, *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P EU:C:2009:610, paras 63-64. For a discussion, see F. Esposito, *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century*, Edward Elgar Publishing, 2022, 102-104.

renewable resources, the Italian national legislation replaced the green certificate scheme with another type of incentive, known as the feed-in-tariff scheme. To be able to benefit from the feed-in-tariff, those renewable power plants had to enter a contract with GSE called the GRIN agreement (*Gestione Riconoscimento Incentivo*).

Different from the green certification scheme, GRIN agreements impose additional obligations on undertakings, such as the mandatory installation of equipment to enable GSE to collect metering data, limitations on the assignment of credits, and GSE's power to unilaterally alter or terminate incentives if the plant concerned is sold to third parties or due to false or inaccurate data. These changes motivated the undertakings to challenge the legality of the GRIN agreement before the national court. They claimed that the unilateral change of the legal conditions imposed by this agreement violated the objective of the RED I to offer investors a degree of certainty, the principle of the protection of legitimate expectations, and the freedom to conduct business enshrined in Article 16 of the European Charter of Human Rights. The Court of Justice answers in the negative.

The Court starts its reasoning by answering whether Articles 1 and 3 of the RED I, read in light of Recitals 8, 14, and 25 thereof, the principle of legal certainty and the protection of legitimacy expectation, must be interpreted as precluding national legislation to replace green certification schemes by the GRIN agreements. While Article 1 of the directive established a common framework for the promotion of renewable energy, Article 3(1) and (2) set targets for Member States, and Article (3)(3) allows them to achieve these targets through the design of a support scheme. Reading Article 3(3) in light of Recital 25, Member States must ensure the proper functioning of these support schemes, which are important means of maintaining investors' confidence. Said so, the CJEU argues that the need to offer certainty to investors recognized in Recitals 8 and 14 of the RED I cannot, as such, affect the discretion of the Member States to adopt and maintain efficient support schemes (para 38). Therefore, RED I does not 'preclude the Italian legislature from replacing the green certificates by the incentive feed-in-tariff, bringing to an end, for certain undertakings, the advantage conferred on them by the first scheme and requiring those undertakings to conclude an agreement with GSE' (para 39).

Second, the Court of Justice moves to interpret whether the Italian legislation complies with the general principles of law, which include the principles of legal certainty and the protection of legitimate expectations. Despite it is for the referring court to assess this compatibility, the present judgment provides guidance on this matter. In particular, the Court recalls that compliance with the principle of legal certainty means twofold: 'on the one hand, that rules of law be clear and precise and, on the other, that their application be foreseeable by those subject to the law, in particular where they may have adverse consequences' (para 42). In the present case, the Court finds that the Italian legislation, as well as the provision of the GRIN agreement, appear to set out clearly and precisely the gradual withdrawal of the green certificate scheme and its replacement by the feed-in tariff scheme (para 45). Moreover, and crucially, the CJEU states that applying those provisions was foreseeable for renewable energy producers operating before or after the Italian legislation entered into force (para 48), which undermines the investors' claim regarding disappointed legitimate expectations. It is worth noting that the Court does not explain how renewable generators could foresee the change in support schemes before the Italian legislation change, particularly for those who invested in those power plants before the RED I.

Third and last, the Court of Justice refers to its precedent in *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others* to state that the interpretation of Article 16 of the Charter relates to the freedom to conduct a business within the limits of liability for undertakings' acts, the economic, technical and financial resources at their disposal and the freedom of contract (judgment of 15 April 2021, C-798/18 and C-799/18, EU:C:2021:280, paragraphs 56 and 62) (para 62). In the present case, the obligation of the undertakings benefiting from the green certificate scheme to conclude the GRIN Agreement with GSE does not appear to affect that contractual freedom (para 66), nor the undertakings's right to make free use of the economic, technical and financial resources at their disposal (para 63).

By concluding that the change in the conditions of renewable support scheme agreements does not violate the objectives of RED I concerning investors's certainty, the principle of legitimate expectations, or the freedom to conduct business, the Court of Justice makes two important statements. On the one hand, it reassures Member States that investors' disputes concerning changes in renewable support schemes will not necessarily have a claim in law based on EU law; on the other hand, these changes must be justified by the need to ensure the long-term proper functioning of energy markets towards the increasing of renewable energy consumption.

5 Public procurement

5.1 Tenderer Unlawfully Excluded from a Procedure for the Award of a Public Contract as Loss of Opportunity: Judgment in Case C–547/22 *INGSTEEL*

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6 Private international law

6.1 Enforceability of the Jurisdiction Clause Incorporated in a Bill of Lading against the Third-party Holder: Judgment in Joined Cases C-345/22 to C-347/22 *Maersk*

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