“Digital Law and the Influence of the CJEU Case Law”

„Digitales Recht und der Einfluss der EuGH-Rechtsprechung”

« Le droit numérique et l’influence de la jurisprudence de la Cour de Justice de l’Union européenne »

Prof. Dr. Verica Trstenjak
OVID:
(Roman poet, 43 BC)
The Metamorphoses
(The Creation of the World)

The Golden Age

“...Needless was written law, where none opprest:
The law of Man was written in his breast:
No suppliant crowds before the judge appear'd,
No court erected yet, nor cause was heard:
But all was safe, for conscience was their guard....”
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   - Importance of the CJEU
   - Case law: Messner, Alpenhof, Air Berlin, Elite Taxi …

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I. Introduction
II. CJEU and the Case Law

The Court of Justice of the European Union (CJEU), Luxembourg
Importance of the CJEU Judgments

• EU directives, EU regulations – interpretation, invalidity....
• in a concrete case in a Member State
• interpretation of EU law is binding in all the Member States
• a Member State can be ordered to pay financial sanctions
• *erga omnes* effect
• judgments binding for 500 million EU citizens, 28 MS
• 23 (24) official languages
CJEU: Ruled on many Cases in the Field of Consumer Law

- Distance selling
- Warranty
- Package holidays
- Product liability
- Unfair contract terms
- Online contracts
- Air passenger rights
- Copyright
- Insurance law
- Other
Online Contracts
New Technologies – New Legal Questions

- Copyright
- Consumer rights
- Final price
- Data protection
- Credit card payment
- Jurisdiction for online contract
- Right of withdrawal
- Compensation for the use of goods in case of withdrawal
- Returning the goods

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CJEU can Influence (Consumer) Law through Different Procedures

- **Reference for a preliminary ruling**
  
  Art. 267 of the Treaty on the Functioning of the EU - TFEU

- **Action for failure to fulfil an obligation** (Art. 258-260 TFEU)
  
  infringement procedure:

  EU Commission → Member States

- **Other procedures**
References for a Preliminary Ruling, Art. 267 TFEU

Dialogue: CJEU – National Courts

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New references for a preliminary ruling (1987–2016)  
(per Member State and per year)  
Source: Annual Report of the CJEU for 2016

| Year | BE | BG | CZ | DK | DE | EE | IE | EL | ES | FR | HR | IT | CY | LV | LT | LU | HU | MT | NL | AT | PL | PT | RO | SI | SK | FI | SE | UK | Others | Total |
|------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|    |     |
| 1987 | 15 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  9 | 144 |
| 1988 | 30 |    |    | 4  |    | 34 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 16 | 179 |
| 1989 | 13 |    |    |    | 2  | 47 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 14 | 139 |
| 1990 | 17 |    |    |    | 5  | 34 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 12 | 141 |
| 1991 | 19 |    |    |    | 2  | 54 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 14 | 186 |
| 1992 | 16 |    |    |    | 3  | 62 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 18 | 162 |
| 1993 | 22 |    |    |    | 7  | 57 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 12 | 204 |
| 1994 | 19 |    |    |    | 4  | 44 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 12 | 203 |
| 1995 | 14 |    |    |    | 8  | 51 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 24 | 251 |
| 1996 | 30 |    |    |    | 4  | 66 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 5  | 256 |
| 1997 | 19 |    |    |    | 7  | 46 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 6  | 239 |
| 1998 | 12 |    |    |    | 7  | 49 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 3  | 264 |
| 1999 | 13 |    |    |    | 3  | 49 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 2  | 255 |
| 2000 | 15 |    |    |    | 3  | 47 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 5  | 255 |
| 2001 | 10 |    |    |    | 5  | 53 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 224 |
| 2002 | 18 |    |    |    | 8  | 59 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 3  | 237 |
| 2003 | 18 |    |    |    | 3  | 43 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 216 |
| 2004 | 24 |    |    |    | 4  | 50 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 210 |
| 2005 | 21 |    |    |    | 1  | 4  | 51 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 249 |
| 2006 | 17 |    |    |    | 3  | 3  | 77 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 221 |
| 2007 | 22 |    |    |    | 2  | 5  | 59 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 221 |
| 2008 | 24 |    |    |    | 1  | 6  | 71 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 288 |
| 2009 | 35 |    |    |    | 8  | 5  | 3  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 302 |
| 2010 | 37 |    |    |    | 9  | 3  | 10 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 385 |
| 2011 | 34 |    |    |    | 22 | 5  | 6  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 423 |
| 2012 | 28 |    |    |    | 15 | 7  | 8  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 404 |
| 2013 | 26 |    |    |    | 10 | 7  | 6  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 450 |
| 2014 | 23 |    |    |    | 13 | 6  | 10 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 428 |
| 2015 | 32 |    |    |    | 5  | 8  | 7  |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 436 |
| 2016 | 26 |    |    |    | 18 | 5  | 12 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1  | 470 |

Total: 820

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CJEU Case Law – Consumer Protection - Digital Rights (Examples)

- C-302/16, Krijgsman
- C-290/16, Air Berlin
- C-434/15, Elite Taxi/Uber
- C-191/15, Verein für Konsumenteninformation
- C-322/14, El Majdoub
- C-573/13, Air Berlin
- C-478/12, Maletic
- C-359/12, Timmel
- C-190/11, Mühlleitner
- C-49/11, Content Services
- C-585/08 and C-144/09, Pammer and Hotel Alpenhof
- C-489/07, Messner
- C-205/07, Gysbrechts
Final Price, Cancellation fees
Air Berlin C-290/16 (judgment 6 July 2017)
preliminary ruling from Bundesgerichtshof (DE)

Problem

• **Cancellation fee** 25 Euro (in case a passenger cancels a flight)
• Display of **(final) prices** on website **(separate amounts?)**

Legal framework

• Regulation 1008/2008 on rules for the operation of air services
• Directive 93/13 on unfair terms
Air Berlin C-290/16

CJEU Judgment

- Cancellation fees charged by airline companies may be assessed for unfairness

- **Price:** air carriers must specify separately the amounts payable by customers in respect of taxes, airport charges and other charges, surcharges or fees

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Air Berlin - CJEU Judgments

Importance

- Influence on the EU regulation, the EU directive: Importance of requests for a preliminary ruling

- The CJEU judgment binding in all 28 MS, for all air companies

- To enable consumers to compare the prices for air services of different air companies

- Final answer cannot be found in the EU regulation; it is found in the CJEU case law
Responsibility of the Consumer in Case of Return of Goods — Online Contracts

Right of withdrawal?

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Online Contracts

Example: buying a book, computer etc. online

“Old” questions

• Price
• Quality
• Guarantee

“New” questions

• Jurisdiction (Brussels I Regulation)
• Applicable law (Rome I Regulation)
• Rights of the consumer
Mesner (C-489/07)

• Reference for a preliminary ruling (Amtsgericht Lahr, Germany)

• Directive 97/7 - Distance Selling Directive (old)

• Responsibility of the consumer in case of a withdrawal from the contract

• Question: Germany - BGB – correct transposition of Directive 97/7?
(Old) Distance Selling Directive 97/7
Legal Framework

• Right of withdrawal from the contract

• right of consumer to return the goods

• the only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods (Art. 6(1) of the Directive 97/7/EC (old))
Question (Messner)

May a seller claim compensation for the value of the use of the consumer goods in case of a consumer’s withdrawal from the contract on the basis of Directive 97/7?
Messner – argumentation AG
Difference testing – use

testing
= to try on

use
= to use goods
= wearing a dress
Article 6(1) and Article 6(2) of Directive 97/7 precludes a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract.

Directive 97/7 does not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law (e.g. good faith or unjust enrichment), on condition that the efficiency of the right of withdrawal is not affected.
Messner - Importance of the Judgment

• No general responsibility on the part of the consumer to pay compensation for the use of goods

• Exceptions if the consumer acts in a manner incompatible with the principles of civil law

• Uniform interpretation in all MS

• Final answer cannot be found in the EU directive; it is found in the CJEU case law (today in the new Directive 2011/83)
Influence of the Case Law – EU Level

Case Messner and
new Directive 2011/83/EU on Consumer Rights

• **Art. 14 (1) - 2** of the Directive – Right of withdrawal:

  “The consumer shall only bear the **direct cost of returning the goods [...].**”

• **Art. 14 (2):**

  “The consumer shall only be liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods [...].”

Case Messner?
Influence of the Case Law – EU Level
Case Messner (C-489/07) – the Influence on CESL

COM(2011) 635 final

Proposal for a REGULATION on a Common European Sales Law (CESL)

• Art 45/3: *Obligations of the consumer in the event of withdrawal*

“The consumer is liable for any diminished value of the goods only where that results from handling of the goods in any way other than what *is necessary to establish the nature, characteristics and functioning of the goods.*“

(Juncker Commission withdrew (2015) the proposal from legislative procedure)
Influence of the Case Law – National Level

Messner and the German Civil Code (BGB)
Jurisdiction of the Courts for Online Contracts

Slovenia

Hotel Luxemburg

Austria

ITALY

http://www.ente.at/images/dummy.jpg

http://www.business-directory-slovenia.com/slowenien.gif

http://www.ente.at/images/dummy.jpg


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Hotel Alpenhof (C-144/09)

- **Reference for a preliminary ruling** (Oberster Gerichtshof, Austria)

- **Regulation 44/2001** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation") *(today new Regulation 1215/2012)*

- Jurisdiction → „directing“ commercial or professional activities to consumer’s Member State (Art. 15(1)(c) of the Brussels I Regulation)

- **Facts:**
  - German consumer reserved a hotel room in Austria via email (did not pay)
In favorem jurisdiction for consumer:
only if the trader directs its activities to the consumer’s MS

„1. In matters relating to a contract concluded by ... the consumer ... jurisdiction shall be determined by this Section...if:

... (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State ..., and the contract falls within the scope of such activities.”
Question
(Hotel Alpenhof)

When does a person who pursues commercial or professional activities “direct” his activity to the Member State of the consumer's domicile within the meaning of Article 15(1)(c) of Regulation 44/2001?

* * *

Interpretation: “directs” – *ausrichtet, dirige*
The following criteria, listed by way of example, are evidence for ‘directing’ the activity of the trader to the Member State of the consumer’s domicile:

- the **international nature of the activity**, 
- mention of **itineraries** from other Member States for going to the place where the trader is established, 
- use of a **language or a currency** other than the language or currency generally used in the Member State in which the trader is established, 
- mention of **telephone numbers** with an international code, 
- outlay of expenditure on an **internet referencing service**, 
- use of a top-level **domain name** other than that of the Member State in which the trader is established (for example: .eu, .com), 
- mention of an **international clientele** composed of customers domiciled in various Member States.

It is for the **national courts** to ascertain whether these criteria are fulfilled.
CJEU, Hotel Alpenhof and Austria

BESCHLUSS

RECHTSSACHE:

Klagende Partei
Hotel A* Ges.mbH
5541 Altenmarkt im Pongau

Beklagte Partei
Oliver H*
D-70173 Stuttgart

vertreten durch:
Rechtsanwalt Dr. Manfred Buchmüller GmbH
Hauptstr. 65
5541 Altenmarkt

vertreten durch:
HOSP, HEGEN
Rechtsanwaltpartnerschaft
Hellbrunner Straße 9
5020 Salzburg

Wegen: eingeschränkt EUR 1.000,00 samt Anhang (Sonstiger Anspruch - allgemeine Streitsache)

1.) Das Bezirksgericht St. Johann/Pg. ist international nicht zuständig.

2.) Die Klage wird zurückgewiesen.

3.) Die klagende Partei ist schuldig, der beklagten Partei binnen 14 Tagen bei Exekution die mit EUR 4.567,00 (darin enthalten EUR 572,22 USt. und EUR 1.133,66 Barauslagen/Reisekosten) bestimmten Prozkosten zu ersetzen.
CJEU: Hotel Alpenhof - Importance

- **Uniform interpretation** in all the MS

- The **criteria** for the MS are listed **in the CJEU judgment** (not in the Regulation 44/2001)

- A national court must **verify** the criteria (from the CJEU judgment)

- Development of information society (e.g.: online contracts and new legal problems)
Sharing economy and CJEU

- Protection of users
- New legal problems
- Liability?
Elite Taxi C-434/15

- Request for a preliminary ruling from the Juzgado de lo Mercantil de Barcelona

- Passenger transport
- Services in the internal market: taxi and Uber
- Uber as information society service?
- Unfair competition

- Legal framework:
  - Directive 2000/31 on certain legal aspects of information society services; others
  - TFEU Art. 56 (freedom to provide services) and Art. 58 (Services–Transport)
Elite Taxi C-434/15

problem

Technology company?

App

Transportation company?
Court of Justice of the European Union
PRESS RELEASE No 50/17
Luxembourg, 11 May 2017

Advocate General’s Opinion in Case C-434/15
Asociación Profesional Elite Taxi v Uber Systems Spain, SL

According to Advocate General Szpunar, the Uber electronic platform, whilst innovative, falls within the field of transport: Uber can thus be required to obtain the necessary licences and authorisations under national law

Uber cannot claim the benefit of the principle of the freedom to provide services guaranteed by EU law for information society services
Elite Taxi C-434/15

• No judgement

• AG (11 May 2017):
  - UBER is predominantly an urban transportation company
  - Undoubtedly the supply of transport

- European Commission: sharing (collaborative) economy....
III. Conclusion

• Importance of the CJEU case law

• Importance of the preliminary ruling procedure – active role of national courts

• Active role of consumer organisations

• Future of digital society and digital law
III. Conclusion

Digital technology

Case law

Digital law

Digital technology

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Thank you for your attention!
Danke für Ihre Aufmerksamkeit!
Merci!
Villmols Merci!

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All photos from Google, text from CJEU judgements, press release!