

The Case Law of the ECJ and the Internet (2004 – 2014)

Introduction

It is no exaggeration to say that the new means of communication arising from use of the Internet have, in the past ten years, transformed the world in which we live. Information is now exchanged in quantities and at a speed that would have been unimaginable for previous generations and this explosion in the number and scope of human contacts, often between individuals who have never actually met, has inevitably given rise to a wide range of new legal disputes and questions.

European Union law does not exist in a vacuum and it is not therefore surprising that this revolution in electronic communications has found an echo in the caseload of the Court of Justice of the European Union (hereinafter, the 'Court'). I would like to mention five specific areas of Union law in which the Court has been called upon to rule in cases that involve communications via the Internet and to illustrate each of those by referring in detail to one case that exemplifies the kind of issues that have arisen.

Firstly, the Union's internal market rules, in particular those relating to the freedom to provide services and the free movement of goods, have given rise to several cases before the Court. A number of those related to disputes concerning online betting and, in particular, the extent to which Member States are entitled to regulate that activity, bearing in mind that it involves a provision of services to individuals many of whom are likely to be domiciled in another Member State.¹ In essence, the Court has taken the view that Member States remain free, in the absence of legislative harmonisation at EU level, to regulate online betting by means of national measures, but that any such measures must respect the principle of proportionality and must not, in particular, involve any discrimination against operators legally carrying on business in another Member State. In the context of free movement of goods, the Court has also dealt with a case arising from a preliminary reference made by the *Baranya Megyei Bíróság* (District

* Vice-President of the Court of Justice of the European Union, and Professor of European Union Law, University of Leuven. All opinions expressed are personal to the author.

¹ See, in particular, case C-46/08 *Carmen Media Group* (EU:C:2010:505) and joined cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Markus Stoß and Others* (EU:C:2010:504).

Court of Baranya) here in Hungary, *Ker-Optika*,² which related to the sale of contact lenses via the Internet, I shall return to that case later.

In another important case, *Gysbrechts and Santurel Inter*,³ the Court was asked to provide a ruling in relation to alleged breaches of the Belgian law on distance selling. The dispute arose from transactions between a Belgian undertaking and a French customer who had made an order online by means of the company's internet site and received the goods ordered by post. When the customer failed to pay, the Belgian undertaking brought an action against him. The customer responded by lodging a complaint which led to an investigation by the Belgian Economic Inspection Board. The latter found that there had been failures to fulfil obligations to provide information on the right of withdrawal provided for by the Belgian law on consumer protection. Considering that measures taken by the undertaking to correct those failures were not adequate, the board brought criminal proceedings and it was in the context of those proceedings that a Belgian appeal court, the *Hof van Beroep te Gent*, put questions to the Court concerning the compatibility with EU law of the national prohibitions allegedly breached. In response, the Court ruled that Article 29 EC⁴ does not preclude national rules which prohibit a supplier, in cross-border distance selling, from requiring an advance or any payment from a consumer before expiry of the withdrawal period, but that it *does* preclude a prohibition, under those rules, on requesting, before expiry of that period, the number of the consumer's payment card.

Secondly, the question of intellectual property protection in the context of the Internet has come before the Court on several occasions. In *Google France and Google*,⁵ the Court was asked whether or not the unauthorised use of keywords for the purpose of facilitating access to internet advertising infringed registered trade marks to which those keywords were identical or confusingly similar; I shall deal with that case in more detail in a few minutes. In *L'Oréal and Others*⁶ the issue was whether trade mark owners have a right to obtain injunctions against operators of online marketplaces in order to prevent sales of infringing products through those websites. In substance, the Court replied in the affirmative, holding that trade mark owners are indeed entitled to such protection. In *Scarlet Extended*⁷ and *Netlog*⁸ the Court was asked whether copyright owners may require an internet service provider to enforce an internet filtering mechanism in order to prevent copyright violations, either through peer to peer file sharing or through a social networking platform. The Court found that the imposition of such injunctions would not strike a fair balance between the right to intellectual property, on the one hand, and the freedom of ISPs freely to conduct their business, the right to protection of personal data and the freedom to receive or impart information, on the other hand. Consequently, the Court held

² Case C-108/09 *Ker-Optika* (EU:C:2010:725).

³ Case C-205/07 *Gysbrechts and Santurel Inter* (EU:C:2008:730).

⁴ Since replaced by Article 35 TFEU.

⁵ Cases C-236/08 to C-238/08 *Google France and Google* (EU:C:2010:159).

⁶ Case C-324/09 *L'Oréal and Others* (EU:C:2011:474).

⁷ Case C-70/10 *Scarlet Extended* (EU:C:2011:771).

⁸ Case C-360/10 *Netlog* (EU:C:2012:85).

that the imposition of such injunctions was precluded by EU law. Finally, in *ITV Broadcasting*⁹ the question was whether the streaming service operated by an internet company infringed the TV broadcaster's right to authorise, or prohibit, any communication to the public of its programmes; in essence, the Court ruled that a streaming service of that sort did indeed breach the TV broadcaster's right.

Thirdly, the rise of the Internet has inevitably led to private international law disputes as to where cases should be litigated since it has greatly increased the number of transactions involving a buyer and seller of goods or services who are based in different Member States. In *Pammer and Hotel Alpenhof*¹⁰ the issue was whether a consumer who has entered into a contract over the Internet may sue the other party to the contract in the Member State of his or her own domicile and, conversely, whether he or she can be sued by the other party to the contract in a Member State other than the one where he or she, as consumer, is domiciled. I shall say more about those two cases later on. Similarly, in *eDate Advertising and Martinez*¹¹ the Court was asked to determine, in substance, before which Member State court or courts a person could bring an action for damages where it was alleged that his or her image rights had been damaged by content made available on the Internet. The Court ruled, in substance, that under Article 5(3) of Regulation n° 44/2001 (the 'Brussels I Regulation'),¹² according to which the courts for the place where the harmful event occurred or may occur are competent to rule in cases relating to tort, delict or quasi-delict, a person who considers that his or her personality rights have been infringed by means of content published online has the option of bringing an action for damages either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his or her own interests is based. That person may also, instead of bringing a single action for liability in respect of all the damage caused, sue before the courts of each Member State in whose territory content placed online is or has been accessible. Those latter courts have jurisdiction only in respect of the damage caused in the territory of their own Member State.

Also in the field of private international law, the *G* case¹³ concerned a situation where an individual brought an action, whose purpose was to have certain photographs of herself that were of a pornographic nature, removed from the Internet, against the owner of the relevant domain name and internet site, in circumstances where that defendant could not be located. The civil court (*Landgericht*) in Regensburg, Germany, put questions to the Court on the interpretation of the relevant Union law rules, in particular Article 4(1) of the Brussels I Regulation, which provides that where the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State, and Article 5(3) of that regulation, to which I referred a moment ago. The Court ruled, in substance, that

⁹ Case C-607/11 *ITV Broadcasting* (EU:C:2013:147).

¹⁰ Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* (EU:C:2010:740).

¹¹ Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* (EU:C:2011:685).

¹² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

¹³ Case C-292/10 *G* (EU:C:2012:142).

Article 4(1) of the Brussels I Regulation does not preclude the application of Article 5(3) of that regulation to an action for liability arising from the operation of an internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown where the court seised of the case does not possess firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union. The Court also held that European Union law does not preclude the issue of judgment by default against a defendant who cannot be located and on whom the documents instituting proceedings have therefore been served by public notice under national law, provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant. However, it also decided that a default judgment issued against a defendant whose address is unknown may not be certified as a European Enforcement Order, within the meaning of Regulation No 805/2004,¹⁴ whose objective is to facilitate the enforcement of uncontested claims.

Fourthly, two important cases where judgment was given just this year raise issues relating to data protection in the context of internet communications. The recent ruling in *Google Spain and Google*,¹⁵ relates to the so-called ‘right to be forgotten.’ It concerns an individual who objects to the fact that a Google search under his name continues to direct users to newspaper reports concerning a real-estate auction that took place in 1998 connected with attachment proceedings against him under national law prompted by the social security debts that he then owed. In substance, the Court ruled in favour of that individual, holding, in particular, that under the relevant provisions of Directive 95/46,¹⁶ the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, including in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful. Moreover, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without its being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of the fundamental rights conferred on him by Articles 7 and 8 of the *Charter of Fundamental Rights of the European Union*, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of

¹⁴ Regulation (EC) N° 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.

¹⁵ Case C-131/12 *Google Spain and Google* (judgment of ECJ, 13 May 2014). In particular, points 3 and 4 of the operative part.

¹⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31; in particular, Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of that directive.

results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that is not the case if it appears, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

The *Digital Rights* case¹⁷ raises the question whether Directive 2006/24¹⁸ which, in essence, requires Member States to keep records of the existence, but not the content, of all electronic communications between individuals, as well as of the locations of the devices used to make those communications, so that this information should remain available for at least six months, if required, for the purposes of identifying and preventing serious crime, is compatible with EU law and, in particular with the right to privacy and to the protection of personal data, as well as with the principle of proportionality. I shall discuss the Court's ruling later in this speech.

Fifthly, in the context of EU competition law, the Court was called upon in *Pierre Fabre Dermo-Cosmétique*¹⁹ to give a ruling on the legality of an absolute ban on internet sales in the framework of a selective distribution arrangement. I shall discuss the issues raised by that case more fully in the final section of this speech.

I Internal Market Law – Ker-Optika: The Internet and the Free Movement of Good

The last ten years have shown that the Internet has opened up new opportunities for some companies, whose activities were previously limited to one Member State, to penetrate foreign markets. That is the case, in particular, for small and medium-sized businesses which, although lacking the economic resources to set up a branch in another Member State, decide to offer their goods for sale in other Member States via the Internet. Thus, the Internet opens a window of opportunity for sales growth, whilst avoiding the risks associated with major investments.

However, Member States may decide to restrict, or even ban, the on-line sale of certain goods, in order to protect public health. That is the case, for example, in respect of certain medicines or other health-related products whose misuse may give rise to serious health risks.

It follows that the on-line sale of goods raises questions as to the scope of the jurisdiction that Member States continue to enjoy to regulate the sale of such products, notwithstanding the fact that such regulation inevitably limits the free movement of goods. In *Ker-Optika*,²⁰ the ECJ was confronted with that very question. The facts of the case are as follows.

¹⁷ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Others* (EU:C:2014:238).

¹⁸ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

¹⁹ Case C-439/09 *Pierre Fabre Dermo-Cosmétique* (EU:C:2011:649).

²⁰ *Ker-Optika* (n 2).

Ker-Optika, a limited partnership governed by Hungarian law, sold contact lenses via its Internet site. However, under the Hungarian legislation in force at that time, the selling of contact lenses required either a specialist shop with a minimum area of 18 square-meters or sales premises separated from the optician's workshop. Furthermore, sales of contact lenses could only be made where the services of a properly-qualified optometrist or ophthalmologist were used. Accordingly, the Hungarian authorities prohibited Ker-Optika from selling contact lenses. The latter challenged that decision before the District Court of Baranya which, in substance, referred two issues to the Court for a preliminary ruling.

First, the Hungarian court asked whether Directive 2000/31,²¹ which approximates certain national provisions on information society services,²² applied to a situation such as that in the main proceedings. Directive 2000/31 states that it is for the Member State where the information society service provider is established to ensure that such provider complies with those national provisions that fall within the coordinated field of the Directive. In this regard, it provides that 'Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.'²³ It also states that 'Member States shall ensure that their legal system allows contracts to be concluded by electronic means.'²⁴ Second, the referring court asked whether the Hungarian legislation at issue was compatible with the Treaty provisions on the free movements of goods.

At the outset, the Court drew a distinction between the act of selling *per se* (which consists in the making of a contractual offer on-line and the conclusion of a contract by electronic means) and the delivery of the product sold (which often takes place via mail). Furthermore, in certain individual cases the customer obtains medical advice before the sale or the supply takes place.²⁵

Next, the Court found that Directive 2000/31 is applicable to the act of selling *per se* but not to the delivery of the product sold. This is so because that directive covers the sale of goods on-line²⁶ and does not exclude from its scope of application the sale of medical devices such as contact lenses via the Internet.²⁷ The Court also pointed out that those findings were not affected by the fact that the selling or the supply of contact lenses may be subject to the requirement that the customer first obtain medical advice. In its view, '(a precautionary ophthalmological) examination is not inseparable from the selling of contact lenses, given that [i]t can be carried out independently of the act of sale, and the sale can be effected, even at a distance, on the basis of a prescription made by the ophthalmologist who has previously examined the customer.'²⁸

²¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJL178/1.

²² See Articles 1(2) and 2(1) of Directive 2000/31.

²³ See Article 4(1) of Directive 2000/31.

²⁴ See Article 9(1) of Directive 2000/31.

²⁵ *Ker-Optika* (n 2) para 22.

²⁶ See Recital 18 of Directive 2000/31.

²⁷ See Article 1(5) of Directive 2000/31.

²⁸ *Ker-Optika* (n 2) para 37.

Accordingly, regarding the first question, the Court ruled that a ‘national provision which prohibits the selling of such lenses via the Internet falls, in principle, within the scope of Directive 2000/31.’²⁹

As to the second question, the Court noted that, since Directive 2000/31 only covered the act of selling *per se*, the rules governing the supply of contact lenses set out in the Hungarian legislation at issue in the main proceedings needed to be examined under primary EU law, that is to say under the provisions of the EU Treaties themselves.

The Court began by deciding whether the free movement of goods or the freedom to provide services was applicable to the case at hand. Drawing on its previous findings in *Doc Morris*,³⁰ a case involving the sale of prescription and non-prescription medicines for human use via the Internet, it ruled that ‘a national measure concerning an arrangement characterised by the sale of goods via the Internet and the delivery of those goods to the customer’s home is to be examined only with regard to the rules relating to the free movement of goods and, consequently, with regard to Articles 34 TFEU and 36 TFEU.’³¹

Next, referring to the *Commission v Italy* case,³² where it classified the measures which may potentially fall within the scope of Article 34 TFEU into three different categories, the Court of Justice held that the sale of contact lenses via the Internet and the delivery of those goods constituted a ‘selling arrangement’. Accordingly, in light of its well-known ruling in *Keck and Mithouard*,³³ the Court recalled that national provisions restricting or prohibiting certain selling arrangements may be regarded as preventing market access, *unless* those provisions (1) apply to all relevant traders operating within the national territory *and* (2) affect in the same manner, in law and in fact, the selling of domestic products and of those imported from other Member States.

In this regard, the Court noted that, whilst the legislation at issue applied to all traders alike, ‘the prohibition on selling contact lenses by mail order (deprived) traders from other Member States of a particularly effective means of selling those products and thus significantly (impeded) access of those traders to the market of the Member State concerned.’³⁴ Accordingly, it reasoned that, since that legislation did not affect in the same manner the sale of contact lenses by Hungarian sellers, on the one hand, and the sale of lenses by traders from other Member States, on the other hand, it constituted a measure having equivalent effect to a quantitative restriction which was prohibited by Article 34 TFEU, unless it could be objectively justified and, furthermore, complied with the principle of proportionality.³⁵

In that connection, the Hungarian government argued that its legislation sought to protect the public health of contact lens users. The Court indeed recognised that aim as a legitimate

²⁹ *Ibid*, para 40.

³⁰ Case C-322/01 *Deutscher Apothekerverband* (EU:C:2003:664).

³¹ *Ker-Optika* (n 2) para 44.

³² Case C-110/05 *Commission v Italy* (EU:C:2009:66).

³³ Cases C-267/91 and C-268/91 *Keck and Mithouard* (EU:C:1993:905, paras 16 and 17).

³⁴ *Ker-Optika* (n 2) para 54.

³⁵ *Ibid*, paras 54 to 56.

objective among those set out in Article 36 TFEU as being capable of justifying an obstacle to the free movement of goods.³⁶

Next, the Court of Justice went on to examine whether the legislation at issue was appropriate for securing the attainment of the objective pursued. It replied in the affirmative. Since there are indeed risks to public health associated with the use of contact lenses, the Court of Justice found that, by reserving the supply of contact lenses to the opticians' shops which offered the services of such an optician, the legislation at issue in the main proceedings ensured the protection of the health of those users.

However, the Court of Justice also found that the legislation at issue in the main proceedings went beyond what was necessary to attain that objective because there were less restrictive alternatives to an outright ban on the sale of contact lenses via the Internet.

First, under the Hungarian law in force at the time, the sale of contact lenses by an optician was not made conditional upon a precautionary examination being undertaken or of medical advice being given. Since those medical precautions were optional for lens wearers, it was 'primarily the responsibility of each contact lens user to make use of them.'³⁷ In any event, the on-line seller of contact lenses could be required to publish on its website a notice reminding customers of the benefits associated with receiving the services of an optician prior to making use of contact lenses. Second, whilst it is true that the choice as to the best type of contact lenses for an individual to wear should be made by an optician, that determination needs to be made, as a general rule, only once, when contact lenses are first supplied. In that regard, it would suffice for the Member State concerned to require the customer to order his or her contact lenses in accordance with that initial prescription. A customer could also be required to undergo a new eye examination or to obtain a new medical prescription after the passage of a certain period of time.³⁸ Third, the Court recognised that advice given by a qualified optician may contribute to the prevention of health risks. However, it also held that a Member State may require the economic operators concerned to make available to the customer a qualified optician whose task is to give to the customer, at a distance, individualised information and advice on the use and care of the contact lenses.³⁹

Accordingly, the Court of Justice ruled that Articles 34 TFEU and 36 TFEU, together with Directive 2000/31, precluded national legislation that authorised the selling of contact lenses only in shops which specialised in the sale of medical devices.

³⁶ Ibid, para 59.

³⁷ Ibid, para 68.

³⁸ Ibid, para 71.

³⁹ Ibid, para 73.

II Intellectual Property Law – Google and Google France: Internet Search and Trade Marks

In *Google France and Google*,⁴⁰ the Court was seized of questions for a preliminary ruling, put to it by the French *Cour de Cassation*, arising from disputes concerning the use, as keywords in Google's paid internet referencing service, of signs which correspond to trade marks, without consent having been given by the proprietors of those trade marks. Those keywords had been chosen by clients of the referencing service provider and accepted and stored by that provider. The clients in question either marketed imitations of the products of the trade mark proprietor – in case C-236/08, where the trade mark proprietor was the Louis Vuitton company – or were, quite simply, competitors of the trade mark proprietor, as was the situation in the two other cases, and the trade mark owners wished to prevent the unauthorised use, by such third parties, of their trade marks as keywords for the purpose of collating internet search results.

The *Cour de Cassation's* first question focused on the possible liability of the client who paid Google for the use of the relevant signs. In particular, it wanted to know whether the purchase and use by a third party of a keyword corresponding to a trade mark constituted, in itself, an infringement of the trade mark proprietor's exclusive right rights in that mark conferred on him or her by Article 5 of Directive 89/104.⁴¹ The Court began by recalling that, in accordance with its own case law and by application of Article 5(1)(a) of Directive 89/104 as well as, by the same token, of Article 9(1)(a) of Regulation n°40/94⁴² in the case of Community trade marks, the proprietor of a trade mark is entitled to prohibit a third party from using, without the proprietor's consent, a sign identical with that trade mark when that use is *in the course of trade*, is *in relation to goods or services which are identical with, or similar to, those for which that trade mark is registered*, and *affects, or is liable to affect, the functions of the trade mark*.⁴³

The first issue to be examined was thus whether the use made of a trade mark by a client of Google, in this context, constituted use 'in the course of trade'. The Court found that, in light of the commercial purpose for which such a client stored the relevant keywords, he or she was indeed using the trade marks at issue in the course of trade.⁴⁴ Next, the Court examined whether that commercial use of the trade marks took place 'in relation to goods or services' identical or similar to those covered by the trade mark. The Court found that in case C-236/08 the answer was clear since goods were indeed being offered by a third party under a sign identical with Vuitton's trade marks in adverts displayed, following a Google search, under the heading 'sponsored links'. In the other two cases, on the other hand, the trade marks were not so displayed. Nevertheless, the Court observed that where a sign identical with a trade mark is selected as a keyword by a competitor of the proprietor of the trade mark with the aim of offering

⁴⁰ *Google France and Google* (n 5).

⁴¹ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1.

⁴² Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1.

⁴³ *Google France and Google* (n 5) para 49.

⁴⁴ *Ibid.*, paras 50 to 59.

internet users an alternative to the goods or services of that proprietor, there is a use of that sign in relation to the goods or services of that competitor.⁴⁵ It also observed that even in cases where the advertiser does not seek to present its goods or services to internet users as an alternative to those of the proprietor of the trade mark but, on the contrary, seeks to mislead internet users as to the origin of its own goods or services by making them believe that they originate from the proprietor of the trade mark, there is use ‘in relation to goods or services’. The Court therefore concluded that this criterion was satisfied in all three cases.

Concerning the requirement that the use at issue should affect, or be liable to affect, the functions of the trade mark, the Court broke down its analysis into two parts, examining first whether there was any adverse effect of the trade mark’s function of indicating origin. The Court held that this function is adversely affected by virtue of the fact that the trade mark is used as a keyword if the advert shown as a result does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the advert originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.⁴⁶ However, the Court went on to observe that it is for the national court to assess, on a case-by-case basis, whether the facts of the dispute before it indicate adverse effects of that sort.⁴⁷ Where a third party’s advert suggests that there is an economic link between that third party and the proprietor of the trade mark, the conclusion must be that there is an adverse effect on the function of indicating origin.⁴⁸ Where that advert is vague to such an extent on the origin of the goods or services at issue that normally informed and reasonably attentive internet users are unable to determine whether or not the advertiser is a third party *vis-à-vis* the proprietor of the trade mark the conclusion must also be that there is an adverse effect on that function of the trade mark.⁴⁹ On the other hand, the Court found that use of a sign identical with another person’s trade mark in a referencing service such as that at issue is not liable to have an adverse effect on the advertising function of the trade mark. The adverse effect on the trade mark’s function as an indication of commercial origin was, however, sufficient in itself to satisfy this criterion.

In the light of the above the Court ruled that Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation N°40/94 mean that the proprietor of a trade mark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trade mark which that advertiser has, without the consent of the proprietor, selected in connection with an internet referencing service, goods or services identical with those for which that trade mark is registered, where that advertisement does not enable an average internet user to ascertain whether or not the goods or services referred to originate from the proprietor of the trade mark.⁵⁰

⁴⁵ Ibid, para 69.

⁴⁶ Ibid, para 84.

⁴⁷ Ibid, para 88.

⁴⁸ Ibid, para 89.

⁴⁹ Ibid, para 90.

⁵⁰ Ibid, para 1 of the operative part.

The other two questions put by the *Cour de Cassation* related to the possible liability of Google itself. The second question related to the possibility that the provider of a paid referencing service, such as Google, might be covered by Article 5 of Directive 89/104. The Court answered that question in the negative. Referring back to its analysis of the concept of use ‘in the course of trade’ the Court ruled that the service provider does not ‘use’ the trade mark for commercial purposes itself but rather enables its client to do so. The third question concerned the interpretation of Article 14 of Directive 2000/31,⁵¹ under which the provider of an information society storage service is not liable for the information stored at the request of its client provided that it does not have actual knowledge of an illegality and that it acts expeditiously to remove that information once it acquires such knowledge. This question was important with respect to Google’s potential liability before it was informed by the trade mark owner of the allegedly unlawful use of his or her trade mark. The Court held that the rule laid down in Article 14 applies to an internet referencing service provider where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. Provided it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser’s activities, it failed to act expeditiously to remove or to disable access to the data concerned.⁵²

III EU Private International Law – Pammer and Hotel Alpenhof: Internet Travel Bookings

Article 2 of the Brussels I Regulation⁵³ provides that actions against a person domiciled in a Member State must, as a general rule, be brought in the courts of that State. Article 5(1) of that Regulation also provides that cases resulting from a contractual relationship may, alternatively, be decided by the courts in the place of performance of the relevant contractual obligation.

However, in the case of consumer contracts, it follows from Articles 15 and 16 of the Brussels I Regulation that, where a business, whilst not active in the Member State in which the consumer is domiciled, nevertheless ‘directs its activities’ to that Member State, the consumer can bring proceedings before the courts of the Member State of his own domicile and can be sued only in that Member State.⁵⁴ In two joined cases, *Pammer* and *Hotel Alpenhof*⁵⁵ the ECJ was asked by the Austrian *Oberster Gerichtshof* (Supreme Court) whether a business ‘directs its activities’ to a Member State within the meaning of Article 15(1)(c) of that Regulation when it uses

⁵¹ Directive 2000/31/EC (n 21).

⁵² *Google France and Google* (n 5) para 3 of the operative part.

⁵³ Regulation n°44/2001 (n 12).

⁵⁴ See, more particularly, Articles 15(1)(c), 16(1) and 16(2) of the Brussels I Regulation. Thus, the notion of ‘consumer’ under the Brussels I Regulation only covers ‘passive consumers’.

⁵⁵ *Pammer and Hotel Alpenhof* (n 10).

a website to offer its services to consumers. If so, then consumers domiciled in those other States could benefit, in the event of a dispute with that business, from the more favourable rules of jurisdiction laid down by Articles 15 and 16 of the Brussels I Regulation.

In case C-585/08, Peter Pammer, who resided in Austria, wished to undertake a sea voyage on a freighter from Trieste (Italy) to the Far East. He therefore booked a voyage with the German company Reederei Karl Schlüter, through a German travel agency specialising in the sale on the internet of voyages by freighter. At the beginning of the voyage, Mr. Pammer refused to embark on the ground that the conditions on board the vessel did not, in his view, correspond to the description which he had received from the agency. He therefore sought reimbursement of the sum that he had paid for the voyage. Since Reederei Karl Schlüter reimbursed only part of that sum, Mr. Pammer brought proceedings in the Austrian courts. The German company contended that those courts lacked jurisdiction on the ground that it did not pursue any professional or commercial activity in Austria.

In case C-144/09, Oliver Heller, a German resident, reserved a number of rooms, for a period of a week, at the Hotel Alpenhof, in Austria. The reservation was made by email, since the hotel's website, which Mr. Heller had consulted, indicated an email address for that purpose. Mr. Heller found fault with the hotel's services and left without paying his bill. The hotel then brought an action before the Austrian courts for payment of that bill. In his defence, Mr. Heller raised a plea of lack of jurisdiction, submitting that, as a consumer resident in Germany, he could be sued only in the German courts.

The Court began by holding that the mere use of a website by a business in order to engage in trade does not in itself mean that its activity is 'directed to' other Member States, although, of course, any such site is necessarily accessible there. In order for the rules laid down in the Regulation to be applicable in relation to consumers from other Member States, the Court indicated that the trader must have manifested his or her intention to establish commercial relations with such consumers.

The Court then examined the evidential factors that might prove that the trader was envisaging doing business with consumers domiciled in other Member States. Such evidence might include clear expressions of the trader's intention to seek the custom of those consumers where, for example, it offered its services or its goods in several named Member States or paid a search engine operator for an internet referencing service in order to facilitate access to its site by consumers domiciled in those particular Member States.⁵⁶

Nevertheless, other less obvious pieces of evidence may also be capable of demonstrating the existence of an activity 'directed to' the Member State of the consumer's domicile. These may include, for example, (i) the international nature of the activity itself, such as certain tourist activities, (ii) the mention of telephone numbers with the international code, (iii) the use of a top-level domain name other than that of the Member State in which the trader is established or the use of neutral top-level domain names such as '.com' or '.eu', (iv) the description of itineraries

⁵⁶ Ibid, para 81.

from one or more other Member States to the place where the service is provided and (v) the mention of an international clientele composed of customers domiciled in various Member States, in particular through accounts written by such customers.⁵⁷ Likewise, if the web site permits consumers to use a language or a currency other than that generally used in the trader's Member State, this can also constitute evidence demonstrating the cross-border nature of the trader's activity.⁵⁸ On the other hand, the Court indicated that the mention on a web site of the trader's email address or geographical address, or of its telephone number without an international code, does not constitute such evidence as that information does not indicate whether or not the trader is directing its activity to one or more Member States since that information is equally relevant for purely domestic transactions.⁵⁹

The ECJ concluded that it was for the referring court to determine, in the light of those factors and on the basis of the evidence presented to it, whether it was apparent from the traders' websites and overall activity that they were envisaging doing business with consumers from the relevant Member States in the sense that they were minded to conclude contracts⁶⁰ with them.⁶¹

IV Data Protection – Digital Rights: The Limits on Data Storage by the Public Authorities

In the *Digital Rights* case,⁶² the Court of Justice was asked, in essence, to examine whether Directive 2006/24⁶³ was valid in light of Articles 7, 8 and 52(1) of the Charter. That Directive sought to 'harmonise Member States' provisions concerning the retention, by providers of publicly available electronic communications services or of public communications networks, of certain data⁶⁴ which are generated or processed by them, in order to ensure that the data are

⁵⁷ *Ibid.*, para 83.

⁵⁸ *Ibid.*, para 84.

⁵⁹ *Ibid.*, para 77.

⁶⁰ *Ibid.*, para 2 of the operative part.

⁶¹ It is also worth noting that in a subsequent case *C-218/12 Emrek* (EU:C:2013:666), involving a dispute between a French second-hand car dealer and his German client, in circumstances where the latter had learned of the dealer's business from acquaintances and not from the dealer's internet site – which did indeed provide contact details including French telephone numbers and a German mobile telephone number, together with the respective international codes – the Court held that Article 15(1)(c) of the Brussels I Regulation does not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile, namely an internet site, and the conclusion of the contract with that consumer. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity.

⁶² *Digital Rights Ireland and Others* (n 17).

⁶³ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 106/54.

⁶⁴ *Digital Rights* (n 62) para 26. That data included: 'data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' ☞

available (to the competent national authorities) for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as organised crime and terrorism, in compliance with the rights laid down in Articles 7 and 8 of the Charter.⁶⁵

Whilst it was true that Directive 2006/24 did not permit the retention of the content of communications or of any information consulted using an electronic communications network, the Court pointed out that it did make it possible to know the identity of the person with whom a subscriber or registered user had communicated and the means by which that communication was effected, as well as to identify the time and the place of the communication, and to know the frequency of the communications of the subscriber or registered user with certain persons during a given period.⁶⁶ Directive 2006/24 also allowed for the data to be retained and used without the subscriber or registered user being informed, thereby 'generat(ing) in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance';⁶⁷ in other words, to borrow the famous expression coined by George Orwell in his dystopian novel 'Nineteen Eighty-Four',⁶⁸ the feeling that 'Big Brother is watching you'.

In the Court's view, this showed that the retention of data and the access of the competent national authorities to those data, as provided for by Directive 2006/24, 'directly and specifically affect(ed) private life' which is protected by Article 7 of the Charter.⁶⁹ It also constituted the processing of personal data within the meaning of Article 8 of the Charter. Given that Directive 2006/24 limited the exercise of the rights laid down in Articles 7 and 8 of the Charter, it had to comply with the requirements laid down in Article 52(1) thereof.

In that connection, the Court observed, first, that Directive 2006/24 did not adversely affect the essence of the rights set out in Article 7 of the Charter, since it did 'not permit the acquisition of knowledge of the content of the electronic communications as such'. In the same way, the rights set out in Article 8 of the Charter were not deprived of their essence since the Directive required Member States to adopt 'appropriate technical and organisational measures against accidental or unlawful destruction, accidental loss or alteration of the data'.⁷⁰

Second, the Court noted that Directive 2006/24 pursued two objectives of general interest recognised by the EU, namely 'the fight against international terrorism in order to maintain international peace and security'⁷¹ and 'the fight against serious crime in order to ensure public security'.⁷²

communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services.

⁶⁵ Ibid, para 24.

⁶⁶ Ibid, para 26.

⁶⁷ Ibid, para 37.

⁶⁸ Published in 1949.

⁶⁹ Ibid, para 29.

⁷⁰ Ibid, paras 39 and 40.

⁷¹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461) para 363.

⁷² Case C-145/09 *Tsakouridis* (EU:C:2010:708) paras 46 and 47).

Third, the Court examined whether Directive 2006/24 complied with the principle of proportionality. By drawing on the case law of the European Court of Human Rights,⁷³ it took the view that, in light of the extent and seriousness of the interference with the fundamental right to private life brought about by the provisions of that Directive, the Union's legislative discretion was reduced.⁷⁴

Next, the Court went on to find that the retention of data in connection with electronic communications was an appropriate means of attaining the objective pursued by Directive 2006/24, as such retention was indeed a valuable tool for criminal investigations.⁷⁵

Finally, the Court of Justice observed that 'derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary'.⁷⁶ This meant that, when adopting that Directive, the Union legislator was under the obligation to lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. However, the Court gave three reasons for its conclusion that this test was not satisfied in the case of Directive 2006/24.

The first reason was that 'Directive 2006/24 cover(ed), in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime'.⁷⁷ It thus entailed a wide-ranging and particularly serious interference with the fundamental rights of practically the entire European population.

As to the second reason, that Directive failed to provide either substantive or procedural criteria 'delimiting the access of the competent national authorities to the data and to their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference'.⁷⁸ In particular, the Court observed that Directive 2006/24 did not lay down any criterion identifying the persons authorised to have access to the data. Nor did it limit the use of the data retained by those persons to what was strictly necessary in light of the objective pursued. Most importantly, access by the competent national authorities to the data was not subject to a prior review by any court or independent administrative body.⁷⁹

The third reason was that, in accordance with Directive 2006/24, data were to be retained for a minimum period of six months and a maximum of 24 months, regardless of its usefulness for the purposes of preventing serious crime. This meant that the period of retention was not determined according to objective criteria that were apt to ensure that this period was limited to what was strictly necessary.⁸⁰

⁷³ ECtHR, *S. and Marper v. the United Kingdom* [GC], (nos. 30562/04 and 30566/04, § 102, ECHR 2008-V).

⁷⁴ *Digital Rights Ireland and Others* (n 17) para 48.

⁷⁵ *Ibid.*, para 49.

⁷⁶ *Ibid.*, para 52.

⁷⁷ *Ibid.*, para 57.

⁷⁸ *Ibid.*, paras 60 and 61.

⁷⁹ *Ibid.*, para 62.

⁸⁰ *Ibid.*, paras 63 and 64.

Moreover, Directive 2006/24 also failed to provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access to and use of that data. In particular, this was so because providers of electronic communications services could, for reasons of economic feasibility, limit the level of security which they would apply. In addition, the irreversible destruction of the data at the end of the data retention period was not guaranteed and it was possible for the data to be retained outside the EU.⁸¹

Accordingly, the Court of Justice held that Directive 2006/24 was incompatible with Articles 7, 8 and 52(1) of the Charter. Consequently, that Directive was declared invalid.

V Competition Law – Pierre Fabre: Legality of a ban on internet sales

The *Pierre Fabre Dermo-Cosmétique* case⁸² concerned a decision by the French Competition Authority, applying Union as well as French law, in which it decided that an absolute contractual ban on internet sales, imposed by the company of that name (hereinafter ‘Pierre Fabre’) on the pharmacists within its selective distribution network, could benefit neither from the block exemption provided for in Regulation n°2790/1999⁸³ nor from an individual exemption pursuant to Article 81(3) EC.⁸⁴ Pierre Fabre brought an action for annulment of that decision before the *Cour d’appel de Paris* (Paris Court of Appeal) which decided to send a question to the Court for a preliminary ruling. In substance, the referring court wished to know, firstly, whether the contractual clause at issue amounted to a restriction of competition ‘by object’ within the meaning of Article 101(1) TFEU, secondly, whether a selective distribution contract containing such a clause and falling within the scope of Article 101(1) TFEU might benefit from the block exemption established by Regulation No 2790/1999 and, thirdly, whether, the contract might alternatively benefit from the exception provided for in Article 101(3) TFEU.

On the first issue the Court ruled that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts, in principle, to a restriction of competition by object within the meaning of Article 101(1) TFEU. However, the Court recalled that the organisation of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question require such a network in order to preserve its quality and ensure its proper

⁸¹ Ibid, paras 67 and 68.

⁸² *Pierre Fabre Dermo-Cosmétique* (n 19).

⁸³ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.

⁸⁴ Since replaced by Article 101(3) TFEU.

use and, finally, that the criteria laid down do not go beyond what is necessary. The Court therefore held that a clause such as the one at issue is only prohibited where, following an individual and specific examination of its content and objective and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified. The Court added that it is for the referring court to examine whether the contractual clause at issue prohibiting de facto all forms of internet selling can be justified by a legitimate aim, but, referring to its judgment in *Ker-Optika*,⁸⁵ the Hungarian case about which I have already spoken, recalled that in the light of free movement of goods, it has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales. The Court also stated that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.⁸⁶

The Court dealt with the second and third issues together. It found that the block exemption established by Regulation No 2790/1999 was not applicable to a selective distribution contract containing a clause that prohibited de facto the Internet as a method of marketing the products covered by the contract. As regards the exception provided for in Article 101(3) TFEU, the Court indicated that a selective distribution contract such as the one at issue may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met, but that it did not have sufficient information before it to assess whether the particular contract to which the case at hand related actually satisfied the conditions set out in Article 101(3) TFEU. The Court was therefore unable to provide further guidance to the referring court in that respect.⁸⁷

Conclusion

It is often said that human history moves more and more quickly as the years go by. Indeed, the past ten years since Hungary joined the European Union have seen momentous changes both within our Union and globally. Many of those changes, notably the rapid shift to an ever more globalised and interconnected world economy, have been driven by the communications revolution that is reflected in the cases that I have described this morning. As those cases illustrate, the Court has played its part in helping the Union to adapt its legal rules to the challenges posed by those changes, establishing a balance between our traditional ways of ordering the world and the novel issues raised by this disruptive technology.

⁸⁵ *Ker-Optika* (n 2) para 76.

⁸⁶ *Pierre Fabre Dermo-Cosmétique* (n 19) paras 34 to 47.

⁸⁷ *Ibid*, paras 48 to 59.

I firmly believe that all of our Member States are in a stronger position to face these changes – technological, economic, geopolitical even – and indeed to take advantage of the opportunities that they bring, within the framework of our shared European Union, governed as it always was and continues to be, by our powerful common values and, in particular, by our firm attachment to the rule of law.