Editorial: issue 2/2018

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The current issue of ERA Forum gathers a series of articles previously presented at ERA seminars, dealing with current topics of EU contract and consumer law, EU insurance law, EU labour law, EU tax law, EU public procurement, the rule of law and ECHR law.

ERA organised a legal policy debate on the highly controversial 2015 Proposal for a Digital Content Directive in November 2017. This proposal aims at setting out rules for B2C contracts for the supply of digital content, from downloads of music or software to digital services such as cloud computing and social media. The article by Romain Robert and Lara Smit focuses on Art. 3(1) of the proposal and the use of data as a contractual counter-performance. Often, traders provide services ‘for free’ in exchange for data which in turn is generally used for advertising purposes. The EDPS’ view is that the Proposal for a Digital Content Directive would actually interfere with the newly adopted General Data Protection Regulation.

In the field of consumer law, a new Package Travel Directive was adopted in November 2015 in order to reflect new market trends and technical innovations in the travel market. EU countries had to transpose the new rules into national law by 1 January 2018, which will be applicable from 1 July 2018. In this context, Stephen Mason presents the main changes, particularly the new definitions, which aim at including more travel arrangements and increased consumer protection.

Another issue of consumer protection which has been on the EU Agenda for a number of years now is collective redress. In April 2018 the European Commission

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proposed a new deal for European consumers, a package which aims to allow EU consumers to fully enforce their rights under EU law. This includes the proposal for a new Directive enabling certain qualified entities to seek redress on behalf of consumers who have been harmed by an unlawful commercial practice. This proposal builds on the Commission's 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. Alexandre Biard analyses the European Commission's report of January 2018 which assesses the practical implementation of the 2013 Recommendation, which, unsurprisingly, concludes that the recommendation has failed to secure a consistent and coherent framework for collective redress across the EU and reflects on the follow-up EU initiatives on collective redress in the field of consumer law and beyond.

Regarding insurance law, Dieter Pscheidl's article deals with the interaction of the Insurance Distribution Directive 2016/97 with other key pieces of legislation (such as Directives 'Solvency II', 'Distance Marketing', 'E-commerce' and Regulations 'PRIIPs' and 'Rome I') and identifies several issues to consider in the future review of the Directive.

Moving now into EU Labour Law, EU Judge Jiří Malenovský writes about the recent case law of the European Court of Justice on the so called 'dynamic' clauses. In transfer of undertakings, clauses in the employees' contracts stating that their employment is governed by the collective agreement and by any subsequent collective agreements that amended or replaced it, are often described as being 'dynamic', as opposed to 'static' clauses, which would only seek to apply the terms incorporated by the collective agreement at the time of the transfer. The recent decision of the European Court of Justice in *Asklepios Kliniken Langen-Seligenstadt GmbH v Felja Herron* and rules that the Directive on transfer of undertakings does not prevent a 'dynamic' clause from having effect in all circumstances.

In November 2017 ERA organised its Annual Conference on EU VAT Law. Two contributions from this conference are included in this issue. Herman van Kesteren's article deals with recent judgments of the CJEU on the exemption provided under Article 132(1)(f) of VAT Directive 2006/112/EC which deals with cost sharing agreements. Stephen Dale deals with the digitalisation of the global economy and the responses at international, EU and national level to maintain tax revenues.

Another field of law covered in this issue is public procurement, with two contributions which stem from the Annual Conference on EU Public Procurement organised in March 2018. Firstly, EU Judge Endre Juhász writes about the jurisprudence of the Court of Justice in the area of public procurement covering the years 2016 and 2017. As he explains, 2016 was a particularly rich year with the unprecedented number of 31 judgments or orders pronounced in this field. This is probably due to the implementation of new EU Directives in the field, namely Directive 2014/23/EU on the award of concession contracts, Directive 2014/24/EU on public procurement, and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. Secondly, Tünde Tátrai and Anita Németh devote their paper to corruption in public procurement, by exploring the modes of application of risk indicators or 'red flags' tools in public procurement. The so-called

red flags refer to the specific risks of economic misconduct or fraudulent behaviour identified in the phases of preparation, selection of tenders and execution of contracts.

The rule of law is also a topic which is currently high on the EU agenda. On 2 May 2018, the European Commission proposed a new mechanism to protect the EU budget from financial risks linked to generalised deficiencies regarding the rule of law in the Member States. These new tools would allow the EU to suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the rule of law deficiencies. Maria José Reis Rangel de Mesquita, member of the Constitutional Court of Portugal, provides a critical analysis of the Commission's proposal.

Finally, this issue includes an article from Katarina Jesenko on the case law of the European Court of Human Rights concerning freedom of expression pertaining to environmental issues. Although the right to a clean and/or healthy environment is not guaranteed under the European Convention, environmental issues have been tackled by the Court in its jurisprudence under various provisions, most frequently under Articles 2, 3, 6, 8 and 10 and under Article 1 of Protocol 1 to the Convention. The article focuses on the protection granted under Article 10 of the Convention which provides the rights to access to information and to public participation.