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Schebesta, H.

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Comment & Analysis

Hanna Schebesta*

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Case Note on Schwabe/Queisser Pharma (C-524/18)

I. Facts and legal questions

The case concerns a preliminary ruling request to the Court of the Justice of the EU (CJEU) by the German Federal Court of Justice (*Bundesgerichtshof, BGH*) in a proceeding between two companies that are active in the nutrition sector, Dr Willmar Schwabe and Queisser Pharma. The case raised questions about the labelling of references to non-specific health benefits under the Nutrition and Health Claim Regulation.[1]

Queisser markets a food supplement called Doppelherz® aktiv Ginkgo + B -Vitamine + Cholin, which combines eight ingredients, including zinc as well as vitamins B1 (thiamin), B2, B5 (pantothenic acid) and B12. The package stated a general claim in the front, namely: 'B vitamins and zinc for the brain, nerves, concentration and memory'. The back contained several specific authorised health claims about B vitamins and zinc in relation to the brain, nerves, concentration and memory: 'Vitamin B1 and vitamin B12 contribute to normal energy metabolism and normal function of the nervous system as well as supporting normal mental capacity', 'Vitamin B2, like vitamin B1, plays a role in normal energy metabolism and the normal function of the nervous system. It furthermore contributes to protecting cells against oxidative stress', 'The trace element zinc contributes to normal cognitive function and helps to protect cells against oxidative stress.'

Schwabe brought an action against Queisser at the Regional Court, Düsseldorf, Germany (*Landgericht Düsseldorf*). The action was based on various consumer and information law provisions of Regulation No 1924/2006 on Nutrition and Health Claims (NHCR), the German Unfair Competition Act[2] (section 5 on misleading advertisement that implements the Unfair Commercial Practices Directive[3]), and the German Code on Foods, Consumer Staples and Animal Feed[4] (specific section on misleading consumers in the food sector). The action was dismissed both by the regional court in 2014, and upon appeal by the Düsseldorf Higher Regional Court (*Oberlandesgericht Düsseldorf*) in 2016. Schwabe then appealed on points of law to the BGH. The latter referred two questions to the CJEU under the preliminary reference procedure:

Article 10(3) of the NHCR requires general, non-specific health-related benefits to be "accompanied" by specific authorised health claims. (1) The first question asks whether this criterion is satisfied even if that reference is situated on the front and the authorised claims are situated on the back of an outer packaging, without there being an indication to the claims on the back. (2) The second question asks whether substantiation by generally accepted scientific evidence under Article 5(1)(a) and Article 6(1) of the NHCR is necessary for these general, non-specific benefits.

The EU legal framework for foodstuffs is multi-layered. The main basic act for the food law area is the General Food Law Regulation, which contains general principles enshrining consumer protection.[5] The Food Information to Consumers Regulation[6] equally contains general rules on consumer protection and information quality. Health claims are specifically regulated in the NHCR.[7] In addition, there are legal instruments dealing with particular types of foodstuffs, such as supplements,[8] which were not at issue in the present case, although the product was a supplement. In addition to the – plentiful – secondary legislation, there is a thick undergrowth of 'tertiary law' in the food law domain, in the shape of Commission implementing and delegated acts.

Under the NHCR, health claims are any claims suggesting that "*a relationship exists between a food category, a food or one of its constituents and health*".[9] Claims are understood very broadly and non-categorical, namely as any message or representation that is not mandatory.[10] Article 10(1) NHCR prohibits health claims unless they comply with the general requirements for nutrition and health claims and the specific requirements for health claims, and are authorised in accordance with the Regulation. The case at hand focuses on the interpretation of Article 10(3) NHCR, which additionally specifies that "*Reference to general, non-specific benefits of the nutrient or food for overall good health or health-related well-being may only be made if accompanied by a specific health claim*".

Of particular relevance for the case at hand is the European Commission Implementing Decision[11] that states in Section 3 (1) that the "*specific authorised health claim accompanying the statement making reference to general non-specific health benefits, should be made 'next to' or 'following' such statement*".

* Associate Professor, Law Group, Wageningen University & Research (the Netherlands), Hanna.Schebesta@wur.nl.

1 Regulation (EC) No 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods [2006] OJ L 404 (NHCR).

2 2010 Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*) (BGBl. I 2010 S. 254).

3 Directive (EC) No 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149 (UCPD).

4 Article 11(1) of the Code on Foods, Consumer Staples and Animal Feed (*Lebensmittel-, Bedarfsgegenstände- und Futtermittelgezetzbuch*) (BGBl. I 2013 S. 1426), in the version applicable to the case in the main proceedings, entitled 'Provisions to protect against deception'.

5 Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] *OJ L 31 (General Food Law Regulation)*.

6 Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers [2011] *OJ L 304* (Food Information to Consumers Regulation).

7 Regulation (EC) No 1924/2006 (fn 1).

8 Directive 2002/46/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements [2002] *OJ L 183*.

9 Article 2(2)(5) NHCR (fn 1).

10 Article 2(2)(1) NHCR (fn 1).

11 Commission Implementing Decision 2013/63 adopting guidelines for the implementation of specific conditions for health claims laid down in Article 10 of Regulation No 1924/2006 of the European Parliament and of the Council [2013] OJ L 22.

The first legal issue concerned the interpretation of the requirements in Article 10(3) NHCR that general (non-specific) health references can be made only if 'accompanied' by a specific authorised health claim. The question rose whether a general (non-specific) statement placed on the front of the package in combination with a specific claim placed on the back of the package would comply with the requirements of "accompanied". The referring court expressed doubts whether "accompanied" could be understood as a requirement of *spatial* proximity, and also questioned, whether a reference with the use of an asterisk would satisfy this requirement.

The second legal issue concerned the question whether non-specific health references needed to comply with the general conditions for nutrition and health claims in Articles 5(1)(a) and Article 6(1) NHCR, which enshrine the requirement that all nutrition and health claims must be based on and substantiated by generally accepted scientific evidence.

II. AG Hogan's opinion

The Opinion was prepared by Advocate General Hogan,[12] although he considered that the second legal question had already been sufficiently dealt with by AG Bobek in *Nelsons*.[13]

As a preliminary issue, AG Hogan argued that general and specific (read: authorised) health claims must be seen as two categories of health claims. The word "accompany" would suggests that it is sufficient for specific health claims required by Article 10(3) to be prominently displayed elsewhere on the packaging.[14] In order to reach his conclusion, AG Hogan needed to set aside the wording of the Commission's Implementing Decision, which he did, stating that *"it is axiomatic that in a Union founded on respect for the rule of law, the actual wording of Article 10(3) of the regulation cannot be changed or amended or otherwise enlarged by reason of Guidelines such as these"*.[15]

AG Hogan based his finding in particular on the *Teekanne*[16] case, and held by analogy that it could be expected from a consumer that reads a general health statement on the front of the packaging to also consult information on the back of the packaging.[17] On this basis, AG Hogan argues that a consumer can be presumed to consult back-of-pack information. However, he relegates the decision of what can be expected from a consumer in light of complex information on the back of the packaging with a mix of statements back to the national courts in light of the facts of a given case.[18] In terms of result, the Opinion opens a wide margin of application to the national court.

For the second question, AG Hogan referred to the Opinion by AG Bobek in the *Nelsons*[19] case on the same issue, although the judgment never proceeded to treat the legal question. Interestingly, the *Nelsons* case concerned a trade mark, which under the NHCR was to be regarded as a nutrition or health claim. AG Bobek had argued that 'specific health claims' are a *"logical subset"* of 'health claims'.[20] He further conducted thorough research into the legislative history of the NCHR – the initial proposal by the European Commission prohibited claims about non-specific benefits for overall good health or well-being. The prohibition was deleted and resulted in a compromise in the form of Article 10(3) NHCR.[21] The latter was thus a very deliberate compromise within the legislative process against prohibiting claims about general benefits entirely.

AG Bobek concluded that general, non-specific benefits of Article 10(3) did not require direct scientific evidence within the meaning of Article 5(1)(a) and Article 6(1) of that Regulation. He did find, however, that they require indirect evidence, in the form of generally accepted scientific evidence for the specific claim which must accompany the references to general, non-specific benefits.[22]

III. Judgment

In answering the first question, the Court first underlined the importance of health as a main goal of the NHCR, and stated that it is essential for consumers to have the *"necessary information to make a choice in full knowledge of the facts"*.[23]

The CJEU follows earlier case law and the AG Opinions in drawing a distinction between general (non-specific) and specific health claims. Under Article 10(1) NHCR, health claims must comply with the general and specific requirements of the NHCR, and they require authorisation. The CJEU agrees with both AG Hogan and Bobek that Article 10(3) introduces a distinction between two categories of health claims, namely, specific health claims that follow Article 10(1) and 'general' health claim that constitute a reference to general, non-specific benefits which must be accompanied by a health claim appearing on those same lists.[24]

The Court mentions Implementing Decision 2013/63,[25] acknowledging that the Decision specifies that an authorised health claim accompanying the statement making reference to those benefits must appear 'next to' or 'following' that statement.[26] For the Court this source of law is apparently not conclusive, and -without further discussion- the Court continues to interpret Article 10(3) NHCR. It rules that 'accompanying' includes both a substantive and a visual dimension,[27] and it requires the location of the two claims to be such that an average consumer understands the link between them. The Court holds that the visual location of the various elements on the packaging is a factor to assess whether the 'accompanying' requirement is met.[28] This visual dimension *"should be understood as referring to the immediate perception by the average consumer, reasonably well informed and reasonably attentive and circumspect, of a direct visual link between the reference to general, non-specific health benefits and the specific health claim, which requires, in principle, spatial proximity or immediate vicinity between the reference and the claim"*.[29] The Court continues to explain how such a direct visual link could look like in practice: *"a direct visual link could be satisfied, exceptionally, by means of an explicit reference, such as an asterisk, where that ensures, in a manner that is clear and perfectly comprehensible to the consumer, that, in spatial terms, the content of the health claims and the reference match"*.[30] Generally, however, the Court ruled that NHCR article is violated if the general, non-specific health benefits are on the reverse side of the packaging compared to the specific health claim intended

12 Case C-524/18 *Dr. Willmar Schwabe* EU:C:2019:727, Opinion of AG Hogan.
13 Case C-177/15 *Nelsons* EU:C:2016:474, Opinion of AG Bobek.
14 Ibid, para 61.
15 Ibid, para 59.
16 Case C-195/14 *Teekanne* EU:C:2015:361.
17 Opinion of AG Hogan (fn 13), para 65.
18 Ibid, para 66.
19 Case C-177/15 *Nelsons* EU:C:2016:888.
20 Opinion of AG Bobek (fn 14), para 46.
21 Ibid, paras 50-51.
22 Ibid, para 113.
23 Case C-19/15 *Verband Sozialer Wettbewerb* EU:C:2016:563, para 39 and the case-law cited.
24 CJEU, *Schwabe* (fn 5), para 38.
25 Commission Implementing Decision 2013/63 (fn 12).
26 CJEU, *Schwabe* (fn 5), para 39.
27 Ibid, para 40.
28 Ibid, para 43.
29 Ibid, para 47.
30 Ibid, para 48.

to accompany it – unless there is a clear reference, such as an asterisk.[31]

Concerning the second question, the Court found that the scientific evidence within the meaning of Articles 5(1)(a) and 6(1) NHCR is necessary, but that this requirement is satisfied when a mention of benefits is accompanied by specific authorised health claims.

IV. Comments

The judgment reaches high levels of complexity in answering relatively minor and straightforward technical questions. In this section, I raise and outline two fundamental concerns about the judgment: (1) From a substantive point of consumer protection against misleading information on foodstuffs it is questionable that the judgment 'got it right'. (2) From the EU Law point of view, the judgment appears to undermine the legal value of implementing acts as sources of law, and thereby indirectly the institutional balance.

1. Did the judgment 'get it right'?

The argumentation about the NHCR in this judgment underappreciates what characterizes the EU food law domain – it is one of the safest and most stringent regulatory frameworks for food systems in the world. Health attributes are so-called credence goods, i. e. properties which cannot be assessed by the consumer. The EU system therefore enshrines a strict system whereby all health credence attributes of food stuffs are tested before they may be used in statements on a food product. In this line, the NHCR institutes a total prohibition on any health claim, unless it is authorized. An authorization means that there has been a safety assessment by the European Food Safety Authority (EFSA) that succeeded in establishing a cause and effect relationship between the nutrient, substance, food or food category and the claimed effect. Only if a claim can be scientifically underpinned, will an entry be made in a list of permitted health claims made on foods. These lists of permitted health claims establish for each nutrient, substance, food or food category the exact wording of all effects that may be claimed and further specify any necessary conditions (including restrictions) for their use. Potentially unappreciated by the average consumer, all statements about health on a food product are scientifically vetted by the EFSA and authorized in a Committee Procedure.

The risk regulatory system enshrined in Article 10(1) NHCR allows only authorised health claims, in the shape of specific pre-formulated statements about nutrients/foods and specific effects. Article 10(2) NHCR lists several additional items of mandatory information that must be provided on the label, such as a statement about the importance of a balanced diet. The following Article 10(3) NHCR then states that "*Reference to general, non-specific benefits of the nutrient or food for overall good health or health-related well-being*" may only be made if accompanied by an authorized health claim. Article 10(4) NHCR establishes a mandate to the European Commission to make implementing rules, which the Commission did.

The Implementing Decision considers that "easy, attractive" statements may be "helpful" to the consumer and, indeed, more "consumer-friendly". However, it raised the concern that the statements "*possibly lead[... consumers] to imagine other/better health benefits of a food than those that actually exist*". For this reason, the non-specific overall statements need to be accompanied by an authorised health claim, which should be made 'next to' or 'following' such statement.

Behavioural sciences confirm the risks identified in the Implementing Decision, namely the overgeneralization of health benefits as the 'magic bullet effect' and incorrect inferences about product characteristics as the 'halo effect'.[32] In fact, behavioural scientists argue that "*[a]lthough such overgeneralization and halo effects may be beneficial from a commercial point of view to motivate consumers to purchase the product for healthful reasons, these processes are at odds with the ambition of information transparency and consumers' right to know*".[33]

As the contested legislative history of the article makes clear, Article 10(3) NHCR really is an exception to, not to say flaw in, the scientific foundation of health claims in the EU food system. By requiring diffuse health claims to appear immediately next to authorised health claims, the Implementing Decision strikes a well-considered balance between on the one hand the communication advantages that broader claims present, and, on the other hand the need to safeguard the exclusivity of the EFSA-vetted authorised health claims. From a content point of view, the Commission's solution appears to be adequate. It is, therefore, puzzling why it was disregarded and – on such a technical point – the CJEU chose to create a new food law rule (the asterisk) that deviates from the solution elaborated under stakeholder consultation in a food-specialised Directorate General, and agreed to by technical experts of all the Member States in the Committee Procedure.

Ultimately, the judgment comes to a similar position as the Implementing Decision, but enlarges it with the possibility to place an asterisk as a way of linking diffuse statements to specific authorised health claims. In my view, this solution still has the effect of weakening the clarity of health claims. Under the current (Implementing Decision) system, *all* "units" of health claim information contain an authorised claim and are therefore true (in a scientifically demonstrable way). With the judgment, producers can now place non-verifiable, diffuse claims everywhere on the package, as long as they have an asterisk – these dilute the informational value of the authorised claims. The judgment therefore privileges commercial interests in marketing communication over citizen's rights to accurate and verified health information.

The CJEU is bound by the questions as referred in the preliminary procedure, tasked with interpreting EU law only, and does not proceed to resolve the underlying national case by applying the law to the facts. However, if one examines the contested health statement in the dispute, one might argue that it does not fulfil the qualification of Article 10(3) NHCR. The article explicitly and in all languages describes "a *reference* to non-specific benefits of a nutrient or food *for overall good health or health-related well-being*". Article 10(3) statements are not simply non-specific claims; they are defined as references to *overall good health effects*, and in my view this notion has not been interpreted restrictively enough.[34] The non-specific claim which was contested in the present judgment was 'B vitamins and zinc for the brain, nerves, concentration and memory'. In fact, this claim appears more akin to specific claims, which illustrates quite well how this general statement waters down the clarity of the authorised health claims.

For instance, the Queisser Doppelherz supplement contained B-vitamins, zinc and choline. For choline, three claim clusters

31 Ibid, para 50.
32 Erica van Herpen, Hans CM. van Trijp, 'EU Health Claims: A Consumer Perspective' in H Bremmers, K Purnhagen (eds), *Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective*, Economic Analysis of Law in European Legal Scholarship, vol 6 (Springer 2018).
33 Ibid, 98.
34 The wide interpretation of general health claims in Article 10(3) NHCR is very common though, see for instance Leonie Evans, 'Recent Judgments on the Health Claims Regulation' (2014) 9 European Food & Feed Law Review 233.

would have been permitted, among others the statement "Choline contributes to the maintenance of normal liver function". By contrast, the statement "Choline helps maintain memory and brain function" was not authorized.[35] This shows that memory and brain function are specific claims. Zinc has 18 claim clusters registered. Concerning health relationships about cognitive functions, which the general claim primarily targets, the only permissible claim is that "Zinc contributes to normal cognitive function". If this is the only authorized formulation, the claim about other functions such as memory and brain should not be allowed.

In my view the (scientific) quality of information about health claims should have been better safeguarded by the judgment. Authorised health claims not only provide accurate information to consumers, they also contribute to consumer education about scientifically proven effects of nutrients on health, and thereby enable consumers to choose products to target their individual health needs.

2. Upsetting the institutional balance and the validity of sources of law: A teleologic interpretation taken too far?

The most systemically important dimension of the judgment is the treatment of the Commission Implementing Decision by both AG Hogan, and slightly less overtly the CJEU.

In this case, a minor issue concerning the technicalities of designing labels of food products is at stake – but it is an issue that had been relatively clearly addressed in Commission Implementing Decision, which stated that 'accompanying' indeed means 'next to' or 'following'.

Overall, the Implementing Decision by the European Commission has been largely disregarded, which raises serious institutional concerns. In a purposive strive, the CJEU goes as far as creating an entirely new information quality rule, which is that a reference between a general health claim and the supporting specific health claim may be made by means of an asterisk. This contravenes the European Commission Implementing Decision, which states that the general claim should be next to or following the specific claim. AG Hogan more clearly acknowledges the fact that the outcome he proposes (and the CJEU ultimately adopts) contradicts the wording of the Commission Implementing Act. Although the Commission Implementing Act adopted 'Guidelines', from a legal process perspective, these have absolutely distinct legal value from purely administrative guidelines adopted by the Commission services as so-called "soft-law". Implementing Acts are hard law; they are regulated under Article 291 TFEU, and structure executive rule-making power in the EU by means of non-legislative – but legally binding – legal acts.[36]

Implementing acts famously serve executive goals[37] and delegated acts serve 'quasi-legislative' goals. The Implementing Decision only *gave* meaning to Article 10(3) NHCR. The dispute at issue attests to the fact that there was a genuine question of interpretation about the word 'accompany', which the European Commission then resolved in its Implementing Decision. In that sense, it did not amend or contravene the wording of the basic act.[38]

From a formalistic perspective, this approach is surprising – the European Commission had adopted a binding legal act that clarified the implementation of the contested article. From the judgment it is not obvious whether the referring court had been aware of the Implementing Act. At the very least, in order to set aside the Commission's legal act, the CJEU would have needed to delimit the competences of the Commission in adopting implementing acts,[39] and argue where and in how far the Commission overstepped its legal mandate.

From an administrative law point of view, it was assumed that even 'soft-law' guidance by the European Commission would unfold a protective effect, under the administrative law principle that operators are allowed to trust in official documentation issued by administrative entities. It is, therefore, very worrysome that even when traders follow a legally binding guidance this does not provide legal certainty that compliance with the regulatory framework is ensured.

As is, this judgment sits poorly with the legal validity of non-legislative sources of EU law, and very seriously impairs the value of legal acts which under the constitutional order are indicated as binding. This aspect undermines the clear functioning of the devolution of executive powers in the EU, and at a more practical level, raises severe legal uncertainty with business operators.

V. Conclusion

The case concerns a relatively simple issue of how to label references to non-specific health benefits on food products. Clearly, the judgment has specific relevance to the health foodstuff sector: the CJEU ruled that the reference to a non-specific benefit for overall health and its accompanying authorised health claim must have a visual and substantive link. However, the CJEU introduces a caveat to this rule: Spatial separation is possible where there is a clear visual reference between general health benefits and the specific health claims supporting it, such as an asterisk. With this pragmatic solution, the CJEU liberalises labelling of general health claims on the packaging as compared to the requirements laid down in the Commission Implementing Decision; the latter had required the general and specific claims to be 'next to' or 'following' each other. As argued above, the Commission rules seemed more adequate in protecting the quality of information about health claims, and better in preventing a dilution of the quality of health claims. In addition, the judgment should have been more clear in underlining that Article 10(3) NHCR is limited to non-specific benefits referring to *overall good health and well-being* claims.

35 EFSA Panel on Dietetic Products, Nutrition and Allergies (NDA), 'Scientific Opinion on the substantiation of health claims related to choline and contribution to normal lipid metabolism (ID 3186), maintenance of normal liver function (ID 1501), contribution to normal homocysteine metabolism (ID 3090), maintenance of normal neurological function (ID 1502), contribution to normal cognitive function (ID 1502), and brain and neurological development (ID 1503) pursuant to Article 13(1) of Regulation (EC) No 1924/2006' (08 April 2011) <https://efsa.onlinelibrary.wiley.com/doi/abs/10.2903/j.efsa.2011.2056> accessed 15 July 2020.

36 Paul Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011) 36 European Law Review 671–687; the distinction is notoriously difficult to draw, see also Attila Vincze, 'Delegation versus Implementation: A deconstruction of the promise of the Lisbon Treaty' in Eljalill Tauschinsky (ed), *The Legislative Choice Between Delegated and Implementing Acts in EU Law: Walking a Labyrinth* (Edward Elgar 2018) 19-41 Z Xhaferri, 'Delegated acts, implementing acts, and institutional balance implications post-Lisbon' (2013) 20 (4) Maastricht Journal of European and Comparative Law 557-575.

37 Joana Mendes shows that non-legislative acts are conceived from a predominantly interinstitutional perspective, see Joana Mendes, 'The Making of Delegated and Implementing Acts: Legitimacy beyond Institutional Balance' in Carl Fredrik Bergström and Dominique Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 233-256.

38 See Jürgen Bast, 'Is There a Hierarchy of Legislative, Delegated, and Implementing Acts?' in Carl Fredrik Bergström and Dominique Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 157-171.

39 Implementing acts allow the Commission "*to provide further detail in relation to the content of a legislative act, in order to ensure that it was implemented under uniform conditions in all Member States*", see Paul Craig, 'Comitology, Rulemaking, and the Lisbon Settlement: Tensions and Strains' in Carl Fredrik Bergström and Dominique Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 13; referring to Case C-427/12 *Commission v Parliament and Council* EU:C:2014:170, paras 37-39.

The judgment also taints the legal validity of sources of EU law and the institutional balance between non-legislative executive powers and judicial scrutiny. Possibly unintentionally, the institutional dimension was treated in a negligent way and resulted in the unfortunate dismissal of rules set up in a Commission implementing act, thereby raising questions as to the standing of implementing acts in the EU legal order as a whole. This might be due to the fact that the issue was a marginal and technical one, and perhaps because it was framed as a functional question instead of an institutional one. From a business perspective, the ruling is difficult as it undermines trust in the fact that the legally binding guidance issued in the Implementation Decision provides any legal certainty about compliance with the regulatory framework.

In my view, some serious question marks are pending over whether the judgment got it right. However, judgments such as this one demonstrate that there may be merit in the idea of having a possibility to appeal within the EU judicial system for preliminary references in strictly limited cases touching upon fundamental aspects of the 'legal architecture' of EU law. ■

Thomas Zott*

Regulating Airbnb – Economic Methods to Improve the Regulatory Framework for Homesharing Practices?

I. Introduction

The concept of the Sharing Economy is based on the idea that there is idle capacity in almost every private household and that those underutilized assets can be used in a better, i.e. more efficient way.[1] Online-Platforms like Airbnb, Homestay or Wimdu allow private individuals to offer a spare bedroom or their entire apartment to tourists, who are looking for accommodation. The so-called Homesharing business is one of the largest but most controversial sectors of the Sharing Economy.[2] While Homesharing activities offer various benefits, including lower costs for tourists, an individual way of traveling ("live like a local"), a potential source of income for hosts, and a more efficient use of resources, there are also some risks.[3] Many difficult legal questions arise from Homesharing like tax evasion, nuisance for neighbors or regulatory uncertainty in case of accidents. However, the main concern for local regulators is that Homesharing might have negative effects on the rental housing market, when some people take apartments off the long-term rental market and convert them into vacation rentals. A regulatory response seems to be necessary at least from that perspective. Yet, not all forms of short-term rentals have the same negative effects on the long-term housing market. Therefore, the paper will first describe different typical scenarios of Homesharing and their potential adverse impacts on the long-term rental market in cities with housing shortage (II.). Regulators face the challenge to find a balance between enabling Homesharing practices that do make better use of underutilized assets and prohibiting activities that harm the long-term rental market.[4] Many cities enacted day limits for short-term rentals as a compromise. When local regulators decide to limit short-term renting of apartment units to a maximum number of days per year, the subsequent question is how to find the right threshold for short-term rentals.[5] Regarding this problem, the paper wants to draw attention to the more economic approach in the regulatory discussion in the United States (III.). Some regulators in the United States do economic *Break-Even Calculations* to see how many nights per year an apartment unit must be rented out as a short-term rental to create more revenues than renting it out long-term for the whole year. By this means, regulators try to find an economically rational day limit for Homesharing practices in order to protect the housing market. The paper will critically address the question to what extent the use of economic tools generates added value to the legal debate about the regulation of Homesharing and thus should be implemented into other jurisdictions. It will further show limitations of this model and will review the analytical economic findings from a German constitutional perspective. This constitutional review is mandatory when using an interdisciplinary approach because a legislative proposal based on economic tools must not be in contradiction with constitutional provisions that set limits for the legislator to regulate Homesharing. The paper will conclude with an outlook and a proposal how to use the economic method in the regulatory practice (IV.).

II. Different scenarios of homesharing

Online-platforms allow individuals to rent out private apartments (or parts thereof) on a short-term basis. The listing on the platforms are, however, very diverse when considering the concrete offering. Four typical scenarios of short-term rentals through online-platforms shall be addressed in this paper:[6] (1) short-term renting of a *spare room* while the owner is present,

* Dr. Thomas Zott, LL.M. (George Washington Univ.). The author works as a Legal Counsel at a DAX company in Munich. He previously worked as an Academic Assistant at the Chair of Professor Phillip Hellwege at the University of Augsburg (Faculty of Law). The paper highlights some key considerations of his dissertation thesis: Thomas Zott, *Die Regulierung des Homesharing. Eine rechtsvergleichende und rechtsökonomische Untersuchung des Geschäftsmodells der Kurzzeitvermietung privaten Wohnraums über Online-Plattformen* (Duncker & Humblot 2020). The thesis was supervised by Professor Ferdinand Wollenschläger.

1 See the seminal work by Rachel Botsman and Roo Rogers, *What's Mine is Yours. How Collaborative Consumption is Changing the Way we Live* (Harper Collins 2010), 83 ff.

2 For the economic growth of Homesharing in Europe, see e.g. Commission Staff Working Document, 'A European agenda for the collaborative economy – supporting analysis' SWD(2016) 184 final, 8 ff.

3 For potential opportunities created by the Sharing Economy, cf Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European agenda for the collaborative economy' COM (2016) 356 final, 2.

4 Alexander Windoffer, 'Wider die Zweckentfremdung – Ordnungsrechtliche Grenzen der „Sharing Economy" bei kurzfristigen Vermietungen', 2016 Landes- und Kommunalverwaltung 337, 338; Thomas Zott, *Die Regulierung des Homesharing. Eine rechtsvergleichende und rechtsökonomische Untersuchung des Geschäftsmodells der Kurzzeitvermietung privaten Wohnraums über Online-Plattformen* (Duncker & Humblot 2020) 168.

5 Zott (n 4) 168.

6 For similar classifications, see Erez Aloni, 'Capturing Excess in the on-Demand Economy' (2017) 39 University of Hawaii Law Review. 215, 348; Christoph Busch, Vera Demary, Barbara Engels, Justus Haucap Christiane Kehder, Ina Loebert and Christian Rusche, *Sharing Economy in Deutschland* (Nomos 2019) 178 ff; Helge Sodan, *Verfassungs- und andere Rechtsprobleme von Berliner Regelungen über das Verbot der Zweckentfremdung von Wohnraum* (Dunker & Humblot 2015) 80 ff; Zott (n 4) 45 ff.