Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 2 May 2019 [1]

Case C-28/18

Verein für Konsumenteninformation
v
Deutsche Bahn AG

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Request for a preliminary ruling — Regulation (EU) No 260/2012 — Article 9(2) — Technical and commercial requirements for credit transfers and direct debits in euro — Accessibility of payments — Payment by SEPA (single euro payments area) direct debit — General conditions requiring the payer to have a residence in the same Member State as the payee)

Introduction

1. It is a truth universally acknowledged that the fundamental freedoms which make up the internal market are allergic to residence requirements. Under the fundamental freedoms, removing barriers based on residence requirements has, as it were, been in the spotlight of the activity of both the EU legislature [2] and the Court. In this connection, the Court has consistently held that national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners. [3] Given that the fundamental freedoms are primarily addressed at Member States, cases dealt with by the Court mainly concern State measures imposing (national) residence requirements.

2. Far less is known about situations in which a private party requires another private party to have its residence at a specified location. In terms of EU law, obscurity prevails. Is it lawful that, in many instances, it is virtually impossible for a customer who does not reside in the same Member State as that in which the bank is established to obtain a mortgage from that bank? Can an insurer refuse to provide coverage for a potential customer located in another Member State? To a layman, at the very least, such situations are difficult to reconcile with the objective of an internal market. While for some such practices are incompatible with the rationale of an internal market 'in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties', [4] others would point to a supposedly fundamental difference between the activity of public and private entities and the fact that in terms of underlying logic, at least initially, public activity was to be governed by the fundamental freedoms and private activity by the provisions of competition law. The rest was left to 'the market' itself.

1 Original language: English.

2 See, by way of example, Articles 20 and 21 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

3 See, by way of example, judgment of 7 May 1998, *Clean Car Autoservice* (C-350/96, EU:C:1998:205, paragraph 29 and the case-law cited).

4 See Article 26(2) TFEU.

3. It is not for this Opinion to provide an answer to this fundamental dispute.[5] Suffice it to say that, clearly, in a number of instances, 'the market' has failed in 'horizontal' situations between two private parties, which is why the EU legislature has begun to take action and has curtailed private autonomy.[6] A prime example in this area is the regulation of roaming charges in the EU.[7] Here, indeed, the EU legislature intervened in the relationship between individuals – who find themselves in an asymmetric relationship: phone companies on the one hand, consumers on the other – and directly applied classical internal market instruments such as the principle of non-discrimination to horizontal situations.[8]

4. Another example of EU legislative intervention is that of the present case: cross-border payments in the European Union. To that end, on the eve of euro notes and coins becoming legal tender,[9] on 29 December 2001, the Council adopted a regulation on cross-border payments: Regulation (EC) No 2560/2001,[10] which was repealed by Regulation (EC) No 924/2009.[11] Subsequently, the EU legislature adopted Regulation (EU) No 260/2012 establishing technical and business requirements for credit transfers and direct debits in euro.[12] It is the interpretation of the latter regulation which is at issue in the present proceedings.

5. The Oberster Gerichtshof (Supreme Court, Austria) would like to know whether the German railway operator Deutsche Bahn Aktiengesellschaft ('Deutsche Bahn') can require customers wishing to pay by way of direct debit to have their residence in Germany.

6. In this Opinion I shall argue that the answer should be 'no'. My principal argument can be summarised as follows: a company is not required to offer its customers payment by way of direct debit. However, once that possibility has been provided for, it must be offered in a non-discriminatory manner.

Legal framework

7. Article 1 of Regulation No 260/2012, headed 'Subject matter and scope', reads as follows:

'1. This Regulation lays down rules for credit transfer and direct debit transactions denominated in euro within the Union where both the payer's payment service provider and the payee's payment service provider are located in the Union, or where the sole payment service provider (PSP) involved in the payment transaction is located in the Union.

5 The truth certainly being somewhere in the middle.

6 On private autonomy and EU law, see Leczykiewicz, D., Weatherill, St., 'Private Law Relationships in EU Law', in D. Leczykiewicz, St. Weatherill (eds.), *The Involvement of EU Law in Private Law Relationships*, Hart Publishing, Oxford and Portland, Oregon, 2013, pp. 1-8, at pp. 3-5.

7 See Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ 2012 L 172, p. 10).

8 Obviously, the EU has also legislated by way of harmonisation in the field of a number of aspects of private law, that is to say horizontal situations by definition (e.g. commercial agents, product liability, insurance and, more generally, consumer protection). However, while the ultimate purpose may, here too, be the establishment of an internal market (see in detail Müller-Graff, P.-Chr., 'Allgemeines Gemeinschaftsprivatrecht', in M. Gebauer, Chr. Teichmann (eds.), *Europäisches Privat- und Unternehmensrecht (Enzyklopädie Europarecht, Band 6)*, Nomos, Baden-Baden, 2014, pp. 69-151, at point 43 et seq.), the instruments used are not the same. In these instances, the legislature does more than simply transpose the same concepts normally used under the fundamental freedoms.

9 1 January 2002.

10 Regulation of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro (OJ 2001 L 344, p. 13).

11 Regulation of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 (OJ 2009 L 266, p. 11).

12 Regulation of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 (OJ 2012 L 94, p. 22), as amended by Regulation (EU) No 248/2014 of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 84, p. 1) ('Regulation No 260/2012').

2. This Regulation does not apply to the following:

(a) payment transactions carried out between and within PSPs, including their agents or branches, for their own account;

(b) payment transactions processed and settled through large-value payment systems, excluding direct debit payment transactions which the payer has not explicitly requested be routed via a large-value payment system;

(c) payment transactions through a payment card or similar device, including cash withdrawals, unless the payment card or similar device is used only to generate the information required to directly make a credit transfer or direct debit to and from a payment account identified by BBAN or IBAN;

(d) payment transactions by means of any telecommunication, digital or IT device, if such payment transactions do not result in a credit transfer or direct debit to and from a payment account identified by BBAN or IBAN;

(e) transactions of money remittance as defined in point (13) of Article 4 of Directive 2007/64/EC;[13]

(f) payment transactions transferring electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions,[14] unless such transactions result in a credit transfer or direct debit to and from a payment account identified by BBAN or IBAN.

3. Where payment schemes are based on payment transactions by credit transfers or direct debits but have additional optional features or services, this Regulation applies only to the underlying credit transfers or direct debits.'

8. Article 2 of Regulation No 260/2012, bearing the title 'Definitions' provides that:

'For the purposes of this Regulation, the following definitions apply:

(1) "credit transfer" means a national or cross-border payment service for crediting a payee's payment account with a payment transaction or a series of payment transactions from a payer's payment account by the PSP which holds the payer's payment account, based on an instruction given by the payer;

(2) "direct debit" means a national or cross-border payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's consent;

(3) "payer" means a natural or legal person who holds a payment account and allows a payment order from that payment account or, where there is no payer's payment account, a natural or legal person who makes a payment order to a payee's payment account;

(4) "payee" means a natural or legal person who holds a payment account and who is the intended recipient of funds which have been the subject of a payment transaction;

13 Directive of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1).

14 OJ 2009 L 267, p. 7.

(5) "payment account" means an account held in the name of one or more payment service users which is used for the execution of payment transactions;

...

(21) "mandate" means the expression of consent and authorisation given by the payer to the payee and (directly or indirectly via the payee) to the payer's PSP to allow the payee to initiate a collection for debiting the payer's specified payment account and to allow the payer's PSP to comply with such instructions;

...

(26) "cross-border payment transaction" means a payment transaction initiated by a payer or by a payee where the payer's PSP and the payee's PSP are located in different Member States;

(27) "national payment transaction" means a payment transaction initiated by a payer or by a payee, where the payer's PSP and the payee's PSP are located in the same Member State;

...'

9. Pursuant to Article 3 of Regulation No 260/2012, headed 'Reachability':

'1. A payee's PSP which is reachable for a national credit transfer under a payment scheme shall be reachable, in accordance with the rules of a Union-wide payment scheme, for credit transfers initiated by a payer through a PSP located in any Member State.

2. A payer's PSP which is reachable for a national direct debit under a payment scheme shall be reachable, in accordance with the rules of a Union-wide payment scheme, for direct debits initiated by a payee through a PSP located in any Member State.

3. Paragraph 2 shall apply only to direct debits which are available to consumers as payers under the payment scheme.'

10. Article 9 of Regulation No 260/2012, entitled 'Payment accessibility', states:

'1. A payer making a credit transfer to a payee holding a payment account located within the Union shall not specify the Member State in which that payment account is to be located, provided that the payment account is reachable in accordance with Article 3.

2. A payee accepting a credit transfer or using a direct debit to collect funds from a payer holding a payment account located within the Union shall not specify the Member State in which that payment account is to be located, provided that the payment account is reachable in accordance with Article 3.'

11. Article 77 of Directive (EU) 2015/2366,[15] entitled 'Requests for refunds for payment transactions initiated by or through a payee', provides, in paragraph 1:

'Member States shall ensure that the payer can request the refund referred to in Article 76 of an authorised payment transaction initiated by or through a payee for a period of 8 weeks from the date on which the funds were debited.'

15 Directive of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35).

12. Regulation (EU) 2018/302,[16] which is applicable since 3 December 2018, provides in its Article 5, headed 'Non-discrimination for reasons related to payment', as follows:

'1. A trader shall not, within the range of means of payment accepted by the trader, apply, for reasons related to a customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union, different conditions for a payment transaction, where:

(a) the payment transaction is made through an electronic transaction by credit transfer, direct debit or a card-based payment instrument within the same payment brand and category;

(b) authentication requirements are fulfilled pursuant to Directive (EU) 2015/2366; and

(c) the payment transactions are in a currency that the trader accepts.

2. Where justified by objective reasons, the prohibition set out in paragraph 1 shall not prevent the trader from withholding the delivery of the goods or the provision of the service, until the trader has received confirmation that the payment transaction has been properly initiated.

3. The prohibition set out in paragraph 1 shall not prevent the trader from requesting charges for the use of a card-based payment instrument for which interchange fees are not regulated under Chapter II of Regulation (EU) 2015/751 [17] and for those payment services to which Regulation (EU) No 260/2012 does not apply, unless the prohibition or limitation of the right to request charges for the use of payment instruments, in accordance with Article 62(5) of Directive (EU) 2015/2366, has been introduced in the law of the Member State to which the trader's operation is subject. Those charges shall not exceed the direct costs borne by the trader for the use of the payment instrument.'

Facts, procedure and the question referred

13. The applicant in the main proceedings, Verein für Konsumenteninformation, is entitled to bring action for the protection of consumers, in accordance with Austrian law.

14. The defendant in the main proceedings, Deutsche Bahn, is a railway company with its registered office in Germany, which, among other things, offers Austrian customers the opportunity to book train journeys on the internet. For that purpose, it concludes contracts with consumers based on its conditions of carriage. These conditions contain a clause to the effect that tickets reserved via the internet site can be paid, in particular, by credit card, instant bank transfer or under the single euro payments area (SEPA) direct debit scheme, the latter being limited to those customers with a residence in Germany. Moreover, in order to activate the SEPA direct debit scheme, consent to a credit check must be given during the registration process.

15. Verein für Konsumenteninformation brought an action for a prohibitory order before the Handelsgericht Wien (Commercial Court, Vienna, Austria) by which it requested that court to order Deutsche Bahn to refrain from using this clause in consumer contracts on the ground that it is contrary to Article 9(2) of Regulation No 260/2012, since a consumer generally has a payment account with a bank established in the Member State of his own residence.

16 Regulation of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ 2018 L 601, p. 1).

17 Regulation of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ 2015 L 123, p. 1).

16. By judgment of 13 July 2016, the Handelsgericht Wien (Commercial Court, Vienna) upheld Verein für Konsumenteninformation's action in respect of consumers resident in Austria on the ground that the disputed clause is contrary to Article 9(2) of Regulation No 260/2012.

17. On appeal, by a judgment delivered on 14 March 2017, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) overturned that judgment and dismissed Verein für Konsumenteninformation's action on the ground that, while Article 9(2) of Regulation No 260/2012 requires that payers and payees must have only one payment account in order to be able to make national and cross-border payments by SEPA direct debit, that regulation does not oblige payees to accept, in all cases, specific SEPA payment instruments in commercial transactions with consumers.

18. In an appeal on a point of law brought by Verein für Konsumenteninformation against that judgment, the Oberster Gerichtshof (Supreme Court) has expressed the view that Article 9(2) of Regulation No 260/2012, by prohibiting payers and payees from specifying the Member State in which the other party's account is to be located, does not apply to payment service providers, but applies to the relationship between payees and payers and thus protects them. Whilst it is true that on a literal interpretation, this provision would only prohibit taking the location of the payer's payment account as a criterion, nevertheless the requirement that the payer of a direct debit must be resident in the same Member State as the payee could affect that provision, since a payer's account is, as a general rule, located in the State in which the payer is resident.

19. In those circumstances, the Oberster Gerichtshof (Supreme Court) decided, by order of 20 December 2017, received at the Court on 17 January 2018, to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 9(2) of Regulation No 260/2012 be interpreted to mean that the payee is prohibited from making payment under the SEPA direct debit scheme dependent on the payer's place of residence being in the Member State in which the payee also has his establishment (residence), if payment in a different way, for example with a credit card, is also allowed?'

20. Written observations were lodged by the parties in the main proceedings and the European Commission, all of which presented oral argument at the hearing held on 30 January 2019.

Assessment

21. The referring court wishes to know whether, on a proper construction of Article 9(2) of Regulation No 260/2012, a payee is prohibited from making payment under the SEPA direct debit scheme dependent on the payer's place of residence being in the Member State in which the payee also has his establishment (residence).

22. Verein für Konsumenteninformation considers that Article 9(2) of Regulation No 260/2012 prohibits the payee from making the acceptance of payments made by means of a SEPA direct debit subject to the condition that the payer be resident in the Member State in which the payee also has its registered office or residence, even when other methods of payment, for example by credit card, are also accepted. The Commission shares this view.

23. Deutsche Bahn does not take that view. It submits that while Article 9(2) of that regulation governs the relationship between the payer and the payee, it does not provide either that the payee be required to offer a direct debit or that it be prohibited from requiring the payer to satisfy other conditions in order to be able to use a direct debit. In particular, that provision does not provide that a payee wishing to offer direct debit payment would be required either to offer it to all its customers or not to

offer it at all. Indeed, it is clear from this provision that the use of the direct debit scheme requires an agreement between the parties to the contract to that effect. Only in that case would a payee be prohibited from requiring the payment account used for the direct debit to be located in a certain Member State.

Article 9(2) of Regulation No 260/2012 – Obligations of the payee

24. Pursuant to Article 9(2) of Regulation No 260/2012, 'a payee accepting a credit transfer or using a direct debit to collect funds from a payer holding a payment account located within the Union is not to specify the Member State in which that payment account is to be located, provided that the payment account is reachable in accordance with Article 3 [of that regulation]'.

25. The key terms of this provision are legally defined in Article 2 of the same regulation. Thus, a credit transfer is a payment service for crediting a payee's payment account with a payment transaction from a payer's payment account by the payment service provider which holds the payer's payment account, based on an instruction given by the payer.[18] Direct debit, in turn, means a payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's consent.

26. It could be argued that, solely based on the wording of Article 9(2) of Regulation No 260/2012, Deutsche Bahn has not acted unlawfully. In fact, Deutsche Bahn does not require those customers wishing to use the direct debit scheme to have their payment account in any particular Member State.

27. The matter is not, however, as straightforward. As I shall argue, there are compelling reasons of context and objectives of the regulation at issue[19] which would point to a different interpretation of Article 9(2) of Regulation No 260/2012.

28. Regulation No 260/2012 was adopted as part of the project to create a single european payment area (SEPA) to establish common payment services throughout the European Union to replace the current national payment services for payments denominated in euro. To ensure a complete migration to EU-wide credit transfers and direct debits in euro, that regulation establishes technical and commercial requirements with the aim of establishing an integrated market for electronic payments 'with no distinction between national and cross border payments'.[20] These requirements should apply to SEPA payments, both cross-border and domestic, under the same basic conditions and in accordance with the same rights and obligations, 'regardless of location within the Union'.[21]

29. Although the main purpose of Regulation No 260/2012 is to establish technical and commercial requirements for credit transfers and direct debits in order to establish common payment services in the European Union, which means it primarily concerns payees, that regulation also takes into account payers and, more specifically, to a certain degree, the relationship between payees and payers. In that respect, Article 9(2) of Regulation No 260/2012, which constitutes somewhat of an *aliud* in the system of that regulation, applies specifically to this relationship between payees and payers.[22] In this connection, the importance of a high level of protection to payers, particularly for direct debit transactions, is highlighted in the preamble to that regulation.[23]

18 See Article 2(1) of Regulation No 260/2016.

19 In accordance with the settled case-law of the Court, in interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part, and in particular the origin of that legislation: see, by way of example, judgment of 17 April 2018, Egenberger (C-414/16, EU:C:2018:257, paragraph 44 and the case-law cited).

20 See recital 1 of Regulation No 260/2012.

21 See recital 1 of Regulation No 260/2012.

22 A German higher regional court has even characterised this provision as one which protects consumers. See Oberlandesgericht Karlsruhe, 20 April 2018, 4 U 120/17, paragraph 10 et seq., *MultiMedia und Recht (MMR)*, 2018, p. 611.

23 See recital 32 of Regulation No 260/2012, which also refers to 'a high level of consumer protection'.

30. It is a fact of life that in the vast majority of cases in the European Union a person's residence corresponds with his or her payment account. This appears to be so axiomatic that it needs no further proof or evidence. Requiring a payer to be resident in a certain Member State is therefore tantamount to specifying in which Member State a payment account must be located. Besides, as is rightly stressed by Verein für Konsumenteninformation, requiring the consumer, as a condition for payment by direct debit, to establish a residence in Germany leads to an even more serious restriction than the (mere) opening of a payment account in Germany.

31. It would therefore appear that the practice of Deutsche Bahn is contrary to Article 9(2) of Regulation No 260/2012.

32. Nevertheless, Deutsche Bahn invokes two arguments in order to justify its practice. First, that company claims that the provisions and spirit of Regulation 2018/302 should be taken into account. Secondly, Deutsche Bahn considers its practice justified because of the alleged need for it to carry out credit checks. I shall address these two arguments in turn.

Regulation 2018/302

33. Deutsche Bahn is fully aware that Regulation 2018/302 is not applicable to the present case.

34. That regulation applies from 3 December 2018[24] and is therefore not applicable to the present proceedings *ratione temporis*. Nor does it apply *ratione materiae* given that, as a result of Article 1(3) of that regulation read in conjunction with Article 2(2)(d) of Directive 2006/123, it does not cover transport services. Moreover, recital 9 of Regulation 2018/302 acknowledges that discrimination can also occur in relation to services in the field of transport, in particular with respect to the sale of tickets for the transport of passengers. That recital points in this respect to four regulations dealing with the transport sector, three of which contain provisions specifically ruling out discrimination based on nationality or on place of residence when it comes to access to transport: Regulation (EC) No 1008/2008,[25] Regulation (EU) No 1177/2010[26] and Regulation (EU) No 181/2011.[27] As regards the fourth regulation, Regulation (EC) No 1371/2007,[28] which deals with rail passengers' rights and obligations in the railway sector, here recital 9 of Regulation 2018/302 states that 'it is intended that Regulation No 1371/2007 ... will be amended to that effect in the near future'.

35. However, Deutsche Bahn believes that Regulation 2018/302 must nevertheless be taken into account in the interpretation of Article 9(2) of Regulation No 260/2012, so as to avoid any contradictions and inconsistencies in the application of secondary EU law.

24 See Article 11(1) of Regulation 2018/302.

25 Regulation of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3). See Article 23(2): 'Without prejudice to Article 16(1), access to air fares and air rates for air services from an airport located in the territory of a Member State to which the Treaty applies, available to the general public shall be granted without any discrimination based on the nationality *or the place of residence* of the customer or on the place of establishment of the air carrier's agent or other ticket seller within the Community.' My emphasis.

26 Regulation of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ 2010 L 334, p. 1). See Article 4(2): 'Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers or ticket vendors shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of carriers or ticket vendors within the Union.'

27 Regulation of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ 2011 L 55, p. 1). See Article 4(2): 'Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of the carriers, or ticket vendors within the Union.'

28 Regulation of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14).

36. In that regard, Deutsche Bahn claims that Article 5 of Regulation 2018/302 contains detailed prescriptions on whether and when discrimination based on residence is allowed. Pursuant to Article 5(1) of that regulation, a trader is not, within the range of means of payment accepted by the trader, to apply, inter alia,[29] for reasons related to a customer's place of residence, different conditions for a payment transaction, where the payment transaction is made through an electronic transaction by credit transfer, direct debit or a card-based payment instrument within the same payment brand and category[30] and authentication requirements are fulfilled pursuant to Directive 2015/2366.[31] Deutsche Bahn claims that it is precisely these authentication requirements[32] which are not fulfilled in the present case, meaning that discrimination based on residence would be possible.

37. In Deutsche Bahn's view, since in the present case – if it fictitiously fell within the scope of Regulation 2018/302 – discrimination based on residence would be possible under Article 5 of that regulation, such discrimination should also be possible under Article 9(2) of Regulation No 260/2012. The Court should therefore interpret Article 9(2) of Regulation No 260/2012 in such a way as to allow discrimination based on residence.

38. I am not convinced by the reference to – and possible negative analogies to be drawn from – Regulation 2018/302 for the purposes of the present case.[33]

39. Regulation 2018/302 is an example of where the EU legislature has been more specific as to the criteria for determining the conditions under which unequal treatment based on the residence of a payer is prohibited (or, put differently, when such unequal treatment is allowed). Such a standard applies within the scope of Regulation 2018/302, and within the scope of that regulation only. It is linked to the specificities of geo-blocking, which are wholly different from those of direct debit payment. If the EU legislature wished to establish the same standards when it comes to SEPA direct debit payments within the scope of Regulation No 260/2012, it would be free to do so. However, in the absence of a clear cross-reference in that regulation to other texts such as Regulation 2018/302, I find it difficult to 'cross-fertilise' concepts – and this even more so since we are in the presence of a horizontal relationship between two private individuals. In such a situation, the assumption that the EU legislature has already taken into account and calibrated all interests is even stronger, and there is no reason to question it.

40. In conclusion, therefore, Regulation 2018/302 should not, as claimed by Deutsche Bahn, be taken into account in the interpretation of Article 9(2) of Regulation No 260/2012. The references to and supposed analogies to Regulation 2018/302 confuse far more than they convince.

Exceptions to the payee's obligations

41. Finally, I would like to address the question, whether the restriction to the freedom of payment precluded by Article 9(2) of Regulation No 260/2012 could potentially be justified, in other words, whether it is possible for an undertaking to deviate from the requirements of Article 9(2) of Regulation No 260/2012.

29 As well as for reasons related to a customer's nationality, place of establishment, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union.

30 Subparagraph (a).

31 Subparagraph (b). And where the payment transactions are in a currency that the trader accepts (subparagraph (c)).

32 See Article 97 of Directive 2015/2366.

33 It should be stressed that, further to Deutsche Bahn's written submissions, the Court, on the basis of Article 61(1) of its Rules of Procedure, invited the participants at the hearing to dwell on the possible relevance of Regulation 2018/302. I, for one, was enlightened in that I left the hearing with the conviction that resort should not be had to that regulation in the present case.

42. Deutsche Bahn points to the risk of abuse and non-payment in connection with direct debit payment. Such a risk is claimed to be high when, as in the main proceedings, the SEPA mandate is issued directly by the customer to the payee, without the intervention of the customer's or the payee's payment service providers. Indeed, in the case of other payment methods, the payment service provider would only accept the customer's payment in the event of a positive payment forecast. By contrast, in the case of payment by direct debit, the payee itself must assess the risk of non-payment by the customer. It is the payee who first discharges its obligations by issuing the ticket. Accordingly, the payee bears the risk of the payer not paying.

43. Deutsche Bahn therefore considers it necessary to be able to carry out credit checks. Firms offering such services tend to do so on a national basis. Deutsche Bahn stresses that it is simply not possible to carry out an appropriate credit check under the same conditions in all the countries within the SEPA. A credit check for customers whose place of residence is in Austria is around 15 times more expensive than for customers whose place of residence is in Germany. The payee would incur significant financial expense if it had to adapt its own clearing systems and interfaces to the extent that it could make provision for credit checks throughout the SEPA. Given those costs, the direct debit scheme would frequently simply not be economically viable and could no longer be offered. That could not have been the intention of the EU legislature.

44. Deutsche Bahn further submits that the integration of creditworthiness into a payment method organised by the operator itself would not be feasible for some payees throughout the SEPA and would not be possible in many Member States on commercially acceptable terms. No operator would provide creditworthiness information at SEPA level. For some SEPA Member States, it would not be possible to access any information or only partial information on customer creditworthiness. The payee could therefore not adequately reduce the risk of default in SEPA direct debits for these customers and, if it were required to offer payment by direct debit to customers established in these countries, the payee would knowingly bear an incalculable risk. In addition, due to differences in payment habits and/or customer expectations in the different SEPA countries, there would be significant differences in the cost of obtaining customer credit information, so that it may not be cost-effective in one Member State to prefer direct debits to other less expensive payment methods.

45. While I see the commercial arguments advanced by Deutsche Bahn, I cannot, from a legal point of view, agree with its line of argumentation.

46. Neither Article 9(2) of Regulation No 260/2012 nor any other provision of that regulation provides for a justification. Reading possible justifications into the text of that regulation (presumably against the supposed intention of the EU legislature, which would otherwise have dealt with this matter) is not a path I would encourage the Court to take.

47. Again, I understand the various interests at stake between payers and payees to have been addressed by Article 9(2) of Regulation No 260/2012 when it comes to payment by way of direct debit. Whichever way one looks at it: that provision does not provide for exceptions. The EU legislature has done its job – and is free to change any provisions, should it decide to do so because, for instance, provisions are not workable.

48. The reason that there is, in commercial practice, no internal market for records of debtors and assessing creditworthiness cannot in itself justify the residence requirement at issue. Besides, such a line of reasoning is dangerously close to that of a pure economic argument in the context of the four freedoms. That argument cannot be sustained. As is well known, purely economic arguments cannot be invoked by Member States as overriding reasons relating to the public interest. Arguably, in the case of horizontal situations, *public* interests are not at stake – while *private* interests tend to be of an economic nature. Still, the mere assertion of the absence of an internal market for records of debtors is not sufficient.

49. It is true that there may be companies *qua* payees who prefer, for commercial or other reasons, not to offer payers the possibility of paying by direct debit. This is perfectly legitimate under Article 9(2) of Regulation No 260/2012. Indeed, the provision only applies once the choice has been made to accept direct debit. In such a situation, there can be no discrimination. If the result is that, instead of offering discriminatory forms of payment, a payee decides not to offer a specific form of payment at all, that is an economic reality which one would have to accept.

Conclusion

50. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

On a proper construction of Article 9(2) of Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009, as amended by Regulation (EU) No 248/2014 of the European Parliament and of the Council of 26 February 2014, a payee is prohibited from making payment under the single euro payments area (SEPA) direct debit scheme dependent on the payer's place of residence being in the Member State in which the payee also has his establishment (residence).