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R E F L E T S

Legal developments of interest to the European Union

* Citations of the European Convention on Human Rights and Fundamental Liberties, as well as the European Court of Human Rights are as follows: the "ECHR" and the "ECtHR". The Charter of Fundamental Rights of the European Union is cited as follows: the "Charter".

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Preface

In this edition of the bulletin *Reflets no. 2/2014,* three judgments of the ECtHR will be discussed. The first decision concerns the failure of the Italian courts in their obligation to give reasons for their refusal to ask a preliminary question to the Court of Justice (p. 6). The second interpreted decision of the ECtHR concerns the condemnation of the French State on the basis of the violation of Article 8 of the ECHR regarding surrogacy (p. 7). The final decision of the ECtHR refers to the conformity of the French legislation prohibiting an individual to hide his face in public spaces under Articles 8 and 9 of the ECHR (p. 8). Also included is a judgment of the Italian Constitutional Court regarding a question of constitutionality relating to a legislation providing for a ban on medically-assisted reproduction (p. 32). Then, a judgment of the Bundesgerichtshof found that the German regulation laying down the prices of drugs subject to medical prescription is in line with EU law (p. 13). In addition, also provided is a judgment of the French Court of Cassation on the status of aircrew, sales personnel or technical staff of the two airlines Vueling and Easyjet (p.25). Finally, the doctrinal echoes (p. 55) concern the right of action of individuals, as part of the annulment appeal following the entry into force of the Lisbon Treaty, in light of the comments on the Inuit II judgment of the Court of Justice and the Inuit I order of the Court.

Note that the Reflets bulletin has been temporarily available in the "What's New" section of the Court of Justice intranet, as well as, permanently, on the Curia website (www.curia.europa.eu/jcms/jcms/Jo2_7063).

A. Case law

I. European and international jurisdictions

European Court of Human Rights

ECHR - Right to a fair trial - Principle of non-discrimination - Right to respect for privacy and family life - Refusal to ask a preliminary question to the Court of Justice - Obligation to state reasons - Violation of Article 6, paragraph 1, ECHR - Discrimination based on nationality - Violation of Article 14 combined with Article 8 of the ECHR

In a decision dated 8 April 2014, Dhahbi/Italy, the ECtHR unanimously ruled that Italy has violated Article 6, paragraph 1 (right to a fair trial) and Article 14 (prohibition of discrimination) combined with Article 8 of the ECHR (right to respect for privacy and family life), in that the Italian courts failed in their obligation to justify their refusal to ask a preliminary question to the Court of Justice to determine whether the Association Agreement between the EU and Tunisia ("Euro-Mediterranean Agreement") allowed to deprive a Tunisian worker to obtain, from the Italian administration, the payment of a household allowance.

The applicant, Mr Dhahbi, a Tunisian national at the time, having acquired Italian nationality since, visited Italy on the basis of a residence permit and regular work. While employed by a company in Sicily, he brought in 2001, an appeal to obtain the payment of the household allowance provided for by the Italian regulations. According to him, although the law reserves the benefit of the allowance to nationals, the latter still should have been paid under the Euro-Mediterranean agreement, ratified by Italy in 1997. Following the rejection of his application in 2002 by the court of Marsala, Mr. Dhahbi appealed. On this occasion, he requested for a preliminary ruling before the Court of Justice. His appeal was rejected in 2004; he submitted an appeal in cassation and reiterated his request from preliminary ruling. In a judgment of 15 April 2008, the Supreme Court rejected his appeal.

The ECtHR reiterated that, the judgments of the Italian Court of cassation not being subject to any judicial remedy under domestic law in application of the principles in the Vergauwen et al/Belgium case (decision of 10 April 2012, Application No. 4832/04), the latter was obligated to justify its refusal to ask the question with regard to the exceptions under the case law of the Court of Justice, interpreting Article 267, paragraph 3 of the TFEU.

The ECtHR examined the judgment of the Court of Cassation of 15 April 2008 without finding any reference to the preliminary ruling request made by the applicant and the reasons for which it was considered that the issue raised was not worthy of being sent to the Court of Justice. The reasons for the impugned judgment did not therefore help establish if this question had been considered as irrelevant, or as relating to a clear provision or a provision already interpreted by the Court of Justice, or whether it had been simply ignored. In this regard, the ECtHR found that the reasoning of the Italian Court of Cassation did not contain any reference to the case law of the Court of Justice and concluded that there was a violation of Article 6, paragraph 1, of the ECHR.

The ECtHR also held that nationality of Mr Dhahbi was the only criterion according to which he had not received the aforementioned allowance. Since only very strong considerations may justify a difference in treatment substantiated exclusively by

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nationality, and despite budgetary reasons put forward by the Italian government, the restrictions imposed on Mr Dhahbi were disproportionate in light of Article 14 in conjunction with Article 8 of the ECHR.

European Court of Human Rights, judgment of 08.04.14, Dhahbi/Italy (Application No. 17120/09),

www.echr.coe.int

IA/34025-A

[NICOLLO]

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ECHR - Right to respect for privacy and family life - Surrogacy - Violation of Article 8 on "privacy"

In a judgment of 26 June 2014, Mennesson/France, the ECtHR unanimously ruled that France did not violate Article 8 in respect of the applicants' right, a couple of French nationality having used surrogacy in the United States, to respect for their family life and violated Article 8 in respect of the children's right to respect for their privacy, concerning the refusal to recognise in French law legally established parentage in the United States.

Due to infertility of Mrs Mennesson, the applicants used surrogacy in the United States with the implantation of embryos, derived from the gametes of Mr Mennesson and an egg from a donor, in the womb of another woman, giving birth in 2000 in the United States to twin girls, Valentina and Fiorella Mennesson, who are US nationals. A decision of the California Supreme Court of 14 July 2000 specifies that the Mennessons are the parents of the twins. The applicants then requested the French administration for transcription of the US birth certificates in the French civil status records.

Suspecting a case of surrogacy, the French authorities rejected the request. They were finally nonsuited by the French Court of Cassation on 6 April 2011 on the grounds that such transcriptions give effect to a surrogacy agreement, which is null and void according to the French civil code. The Court of Cassation found that there was no infringement of the right to respect of privacy and family life since such annulment did not deprive the children of maternal and paternal parentage under the Californian law nor prevented them from staying in France with the Mennessons.

The ECtHR held that Article 8 applies in terms of its "family life" and "privacy" component. On the one hand, there is no doubt that the Mennessons are looking after their twins as parents since their birth and all four have lived together in a manner that does not differ in any way from "family life" in its usual sense.

On the other hand, the ECtHR noted that the right to identity is integral to the concept of privacy and that there is a direct relation between the privacy of children born of surrogacy and the legal determination of their parentage.

The ECtHR found that the applicants' family life is necessarily affected by the failure of French law to recognise parentage between the twins and the Mennessons. It found, however, that all four family members were able to settle in France shortly after the birth of the twins, that they are able to live together in conditions generally comparable to those in which other families live and that there is no reason to believe that there is a risk that the

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authorities would decide to separate them because of their status under the French law. The ECtHR thus concluded, as regards the right to respect for their family life, that there was no violation of Article 8 of the ECHR.

However, as regards the right of the twins to respect for their privacy, under which each person can establish his or her identity including his or her parentage, the ECtHR considered that they are in a situation of legal uncertainty. Thus, without ignoring that they were identified in the United States as children of the Mennessons, France nevertheless denied them this status in its legal system. The ECtHR held that such a contradiction infringes their identity in French society. Furthermore, although their biological father is French, they face a troubling uncertainty with the possibility of being recognised as French nationals, an uncertainty that is likely to negatively affect the definition of their own identity. The ECtHR noted, moreover, that they can inherit from the Mennessons only as heirs, the inheritance rights thus being calculated in a less favourable for them. Thus, the effects of non-recognition in French law of the parentage between the children conceived abroad through surrogacy and couples who used this method is not limited to the Mennessons' situation: they also cover the children themselves, especially the right to respect for privacy, which is significantly affected. This raises a serious question of compatibility of this situation with the best interests of the children, which must be the guiding factor in all decisions concerning them.

This analysis takes on particular importance when, as in this case, one parent is also the genitor of the child. Given the importance of biological parentage as part of one's identity, one cannot claim that it is in the best interests of the child to deprive him or her of a legal relationship of this nature while the biological reality of this relationship is established and the child and the parent concerned claim full recognition. However, not only was the relationship between the twins and their biological father not accepted at the time of the request for transcription of birth certificates, but its consecration by way of recognition of paternity or an adoption or by the effect of possession of status would conflict with the prohibitive case law established on these issues by the Court of Cassation. Thus, by creating an obstacle for the recognition as well as the establishment of their parentage with regard to their biological father, the French State went beyond its discretionary power. The ECtHR found that the right of children to respect for their privacy was breached, in violation of Article 8.

European Court of Human Rights, ruling dated 26.06.14, Mennesson/France (request no. 19522/09),
www.echr.coe.int.

IA/34031-A

[NICOLLO]

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ECHR - Right to respect for privacy and family life - Right to freedom of thought, conscience and religion - National legislation prohibiting an individual from concealing his face in public spaces - Proportionality of the said national measure - Discretionary power of the Member States

In its Grand Chamber judgment, the ECtHR found that the French law prohibiting an individual from concealing his face in public spaces, does not result in a violation of Article 8 (right to respect for privacy and family life) and Article 9 (right to freedom of thought, conscience and religion).

The case pertains to a French national, originally from Pakistan and a Muslim, who complained of not being able to wear the full

veil in public following the entry into force of the said French law. The applicant declared that she wore the burqa and niqab in order to be consistent with her faith, her culture and her personal convictions and stressed that neither her husband nor any other family member exerted any pressure on her to adopt this dress code.

The French Government argued that the first objective of the law of 11 April 2011 would be to ensure public safety and in that sense, this law would address the need to identify any individual in order to prevent attacks on the safety of persons and property and to fight against identity fraud. The second objective would fall under the protection of the rights and freedoms of others. The third objective pursued by this law would be to ensure equality between men and women.

Concerning the ground for inadmissibility raised by the French Government calling into question the status of victim of the applicant, notably on the ground that no individual measure was taken against her under the law banning the full veil, the ECtHR rejected this preliminary objection, by reiterating that an individual may contend that a law violates his rights if he is forced to change his behaviour under threat of prosecution or if he is part of a class of people at risk of being directly affected by the criticised legislation (see, in particular, Norris/Ireland, judgment of 26 October 1988, application no. 10581/83 and Dudgeon/United Kingdom, judgment of 24 February 1983, Application No. 7525/76).

The ECtHR accepted that the law against concealing one's face in public spaces, has two legitimate objectives set out in Articles 8 and 9 of the ECHR, namely public safety and "protection of the rights and freedoms of others". Concerning public safety, the ECtHR found, however, that the impugned prohibition is not necessary in a democratic society to achieve this objective, insofar as the objective specified by the government would be achieved by a simple obligation to show one's face and provide identification in case of a risk to safety of individuals. Under the "protection of the rights and freedoms of others", the ECtHR admitted that wearing a veil hiding the face in a public space can negatively affect the notion of "living together". In this regard, it indicated taking into account the fact that the French government had argued that the face plays an important role in social interaction. However, it specified that the flexibility of the concept of "living together" requires careful consideration of the necessity of the restriction that it disputes. Regarding the proportionality of the measure adopted by the French Government, the ECtHR noted that with regard to the low number of women affected by the law and considering that this law has a strong negative impact on the situation of women who chose to wear the full veil, a general ban could be disproportionate. However, the ECtHR found that the prohibition does not affect the freedom to wear in public space the clothes or items that do not result in the concealment of the face and that the law is not explicitly substantiated by religious connotation of clothes but by the mere fact they conceal the face. Furthermore, the penalties involved (maximum fine of 150 euros and the possible obligation of completing a community rehabilitation programme in addition or instead) are among the lightest penalties that the legislator could consider. Furthermore, the ECtHR noted that the lack of consensus between the Member States of the Council of Europe on the issue of

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the full veil in public spaces, leaves discretionary power to the Member States (see, X, Y and Z/United Kingdom, judgment of 22 April 2010, application no 21830/93, point 44). The ECtHR thus concluded that the French law prohibiting the concealment of one's face in public spaces does not violate Article 8 or Article 9 of the ECHR.

Note that the two judges expressed dissenting opinions.

European Court of Human Rights, judgment of 01.07.14, SAS/France (application no. 43835/11),
http://www.echr.coe.int

IA/34032-A

[FUCHSMA]

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ECHR - Right to a fair trial - (CE) Regulation No. 44/2001 - Recognition and enforcement of judgments - Enforcement of a judgment delivered in another Member State without summoning the defendant correctly - Violation of Article 6, paragraph 1 - Absence

On 25 February 2014, the ECtHR delivered its judgment in the Avotiņš/Latvia case concerning the enforcement of a judgment of a Cypriot court by which the applicant was ordered to pay contractual debts.

The applicant alleged that by ordering the enforcement of the judgment in Latvia, the Latvian courts with jurisdiction had violated Article 6, paragraph 1 of the ECHR (right to a fair trial), since the Cypriot court had delivered its ruling without the applicant having been properly summoned and without ensuring compliance with his rights of defence.

Firstly, with regard to the admissibility of the request, the ECtHR concluded that it pertained to an important issue, namely compliance with Article 6, paragraph 1, of the ECHR as part of the application of (EC) Regulation no. 44/2001 on legal jurisdiction, recognition and enforcement of civil and commercial judgments ("Brussels I Regulation") by contracting States that members of the European Union.

On the merits, the ECtHR noted that the tasks of interpretation and application of provisions of the Brussels I regulation are incumbent, first, upon the Court of Justice, which should give its ruling as part of a preliminary reference, and second, upon national courts. The ECtHR thus does not have jurisdiction to rule expressly on compliance with EU law.

The ECtHR, first, recalled, based on the Bosphorus ruling (judgement of 30 June 2005, application no. 45036/98), that the protection of fundamental rights granted by the Union was equivalent in principle to that provided by ECHR and that the fulfilment by the State of its legal obligations arising from its membership of the Union is in general interest (see *Reflets No. 2/2005* and *No. 1/2013).*

Secondly, with regard to the application of Article 34, point 2, of the Brussels I Regulation, which allows refusal of recognition of a judgment given in another member State on the grounds that the document instituting the proceedings was not notified to the defendant, the ECtHR found that by dismissing the methods of the applicant by a simple reference to the fact that he had not appealed the judgment of the Cypriot court, the Latvian court has taken sufficient account of the applicant's defence rights under Article 6, paragraph 1. The ECtHR held that the applicant had, on his own, lost the opportunity to plead ignorance of Cypriot law, and that it was up to him to prove the non-existence or the ineffectiveness of the possible remedies.

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It should be noted that this judgment has been passed by four votes against three. The three dissenting judges considered that the response given by the Latvian court to the statements of the applicant, according to which he had not been duly notified of the decision of the Cypriot courts, has not been sufficient to meet the requirements of Article 6, paragraph 1, of the ECHR, especially in light of the applicable Union law. In their view, the EU law does not provide for blind enforcement of judgments, and the ECtHR must not implicitly approve internal practices that could go against it.

European Court of Human Rights, ruling dated 25.02.14, Avotin./Latvia (request no. 17502/07),
www.echr.coe.int

IA/34022-A

[BORKOMA]

**** Briefs (ECHR)***

On 10 May 2001, the ECtHR issued a ruling condemning Turkey for violation of Articles 2, 3 and 5 of the ECHR, because of military operations conducted by Turkey in northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus and the activities of the "Turkish Republic of Northern Cyprus". On the question of fair satisfaction, the ECtHR held that the question of the possible application of Article 41 of the ECHR was not ready for decision and adjourned the review.

Following a request from the government of Cyprus on 25 November 2011 relating to the enforcement proceedings of the judgment of May 10 2001 by the Committee of Ministers of the Council of Europe and requesting the ECtHR to take steps to facilitate the enforcement of that judgment, the Grand Chamber of the ECHR issued a judgment on May 12 2014, finding that Article 41 of the ECHR, concerning fair satisfaction, is applicable to this case for two groups of victims, the 1456 Cypriot citizens who disappeared during the invasion of Cyprus in July and August 1974 by the Turkish army, and the Cypriot Greeks under Turkish military occupation since 1974 in the Karpas peninsula, a region of the area occupied by the Turkish army.

By dismissing the objections of the Turkish government on the inadmissibility of the present action, the Grand Chamber granted an amount of 30 million euros for the extra-pecuniary damage sustained by the survivors of the 1456 missing persons, and 60 million euros for the damage suffered by the residents of the Karpas peninsula. The decision was taken by sixteen votes against one.

European Court of Human Rights, ruling dated 12.05.14, Cyprus/Turkey (request no. 25781/94),
www.echr.coe.int

IA/34023-A

[LOIZOMI]

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In the Aden Ahmed/Malta case, the ECtHR ruled that the applicant, a Somali national held in Malta after having entered illegally by boat in order to seek asylum, had been subjected to inhuman and/or degrading treatment during her stay in a Maltese detention centre in that the authorities denied her access to the internal courtyard and the option of physical exercise for three months.

Asylum seekers arriving by boat in Malta are held in detention centres for the duration of the proceedings. However, the detention may not exceed twelve months. Persons who have not filed an application for asylum or those for whom a refusal decision has been issued can be detained for a maximum period of eighteen months.

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After the ECtHR ruled that the detention conditions applicable in a Maltese detention centre for immigrants in an illegal situation violated Articles 3 and 5 of the ECHR dealing respectively with prohibition of inhuman or degrading treatment and the right to liberty and security, she requested the Maltese government to review the detention conditions and policies in force and to implement other modus operandi for receiving immigrants.

European Court of Human Rights, ruling dated 23.07.13, Aden Ahmed/Malta (request no. 55352/12),
www.echr.coe.int

IA/34021-A

[CBUG]

EFTA Court

European economic area - Reconciliation of laws - Insider dealing and market manipulation – Directive 2003/6/EC - Cooperation between the competent authorities - Content of the request for information - Facts giving rise to suspicions

In its judgment of 9 May 2014, the EFTA Court ruled on the content of a request for information, pursuant to Article 16 of Directive 2003/6/EC on insider dealing and market manipulation.

In this case, the Greek capital markets commission had asked the financial markets authority of Liechtenstein to cooperate, as part of a preliminary investigation, on a case of potential market manipulation. The EFTA Court was hearing a request for an advisory opinion from the administrative court of Liechtenstein, to determine if an authority requesting information from a competent authority of another member State must set out the facts underlying its suspicions with regard to insider dealing or market manipulation.

A preliminary question of admissibility was raised by the Commission and the EFTA Surveillance Authority, which relied in particular on the fact that the referring court was asked to adopt an administrative decision. The EFTA Court, citing the case law of the Court of Justice (Epitropos tou Elegktikou Synedriou ruling, C-363/11, EU:C:2012:584), first recalled that a request for interpretation could be sent to it only if a case was pending before a court of a Member State and that it was led to take a jurisdictional decision. It however stated that this rule should not be strictly interpreted.

In this regard, the EFTA Court held that:
"If, under the legal system of an EEA State, national courts are assigned the task of overseeing [an administrative cooperation between the national authorities of the EEA States], it is imperative in order to ensure the proper functioning of EEA law that the Court should have an opportunity to address the issues of interpretation arising out of such proceedings". Since the decision of the competent authority to reject a request for information was subject to no remedy other than a review of the administrative court, the EFTA Court concluded that this procedure was akin more to a judicial procedure than an administrative procedure.

With regard to the merits, after pointing out that Article 16 of Directive 2003/6/EC

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contained an exhaustive list of situations in which an authority can refuse to respond to a request for information, the EFTA Court held that:
"A national rule that empowers the requested authority to refuse a request on the basis that the requesting authority must specify the facts giving rise to suspicion is not compatible with the Directive."

However, the EFTA Court also stated that:
"In order to ensure the effectiveness of the cooperation procedure in practice and for the requested authority to be able to identify the information required, a request for information under the Directive must include a description of the investigation giving rise to the request."

EFTA Court, Judgment of 09.05.14, in Case E-23/13,
www.eftacourt.int

IA/34019-A

[SIMONFL] [DUBOCPA]

II. National courts

1. Member states

Germany

Free circulation of goods - Quantitative restrictions - Measures having equivalent effect - Price schemes - Price fixing of drugs - Justification - Protection of public health

Hearing an appeal by a German mail order sale company against the judgment by which the court of first instance had accepted an action for injunction brought by a group of pharmacists, the Bundesgerichtshof (hereinafter "BGH") ruled, by taking into account the case law of the Court of Justice, that the German regulations fixing the prices of prescription medicines (Arzneimittel-preisverordnung) conforms to EU law and applies in particular to medicines distributed in Germany by a pharmacy established in the territory of another Member State.

In this case, the defendant had promoted on its website and in its catalogue, drugs marketed by the Dutch pharmacy DocMorris, by attracting the attention of customers on price reductions and incentives offered by it. Noting that these methods of providing incentives for purchase violate the said German regulations and are, therefore, unfair trade practices, the BGH questioned the compatibility of the regulations fixing the drug prices with Article 34 of the TFEU and Directive 89/105/EEC on the transparency of measures regulating the fixing of prices of medicines for humans and their inclusion in the scope of national health insurance systems.

Specifically, the German courts believed that, even assuming that these German regulations constitute a measure having equivalent effect within the meaning of Article 34 of the TFEU, it would be, in any event, justified on grounds of protection of health and the lives of persons within the meaning of Article 36 of the TFEU. In this regard, the BGH relied on the case law of the Court of Justice (particularly the Ascafor and Asidac rulings, C-484/10, EU:C:2012:113, the Elenca ruling, C-385/10, EU:C:2012:634 and the Ker-Optika ruling, C-108/09, EU:C:2010:725) to specify, firstly, that the question of possible justification for overriding reasons relating to general interest was not be addressed when, as in this case, the measure concerned is justified under Article 36 of the TFEU and, secondly, that member States enjoy discretionary power to decide the level to which they wish to ensure protection of public health.

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The BGH pointed out, secondly, that the jurisdiction of Member States in matters of fixing drug prices was not restricted by Directive 89/105/EEC. Furthermore, the fact that a German provision of 2012, stating that the national regulation fixing drug prices applies also to drugs distributed by mail order from another Member State, has not been communicated to the Commission, pursuant to Article 11 paragraph 2 of the Directive, cannot, according to the German courts, affect its validity, since that provision was purely declaratory. The interpretation adopted by the Court of Justice with regard to Directive 83/189/EEC establishing an information procedure in the field of technical standards and regulations (CIA Security International ruling, C-194/94, EU:C:1996:172), according to which the ignorance of the obligation of notification of technical rules leads to their inapplicability, was not transposable to the present case, since such a result would apply only in respect of the rules likely to produce legal effects and hinder trade between member States.

Finally, it should be noted that the BGH applied, under this judgment, an order delivered in a preliminary ruling by the common chamber of the federal high courts of justice (Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes, Order of 22 August 2012, OBG-Gms 1/10), by which it settled an existing interpretation dispute between BGH and the Federal court of social disputes (Bundessozialgericht) regarding the applicability of the regulation fixing drug prices to the products distributed by pharmacies with headquarters in another Member State. This order, on the one hand, led to the introduction of the aforementioned declaratory provision and, on the other hand, has been the basis for four other judgments of the BGH, delivered in cases with similar factual contexts.

Bundesgerichtshof, ruling dated 26.04.14, I ZR 79/10,
www.bundesgerichtshof.de

IA/33293-A

[BBER]

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Reconciliation of laws - Nutrition and health claims relating to foods - Regulation no. 1924/2006 - Concept of "relation" between a component of a food and health - Preliminary expectations and knowledge of the consumer - Expression characterising a brand and not a food component - Lack of concordance with a claim granted to a third party

In a judgment of 26 February 2014, the Bundesgerichtshof (hereinafter "BGH") accepted the request of a manufacturer of baby food by prohibiting a competitor from using certain indications on the labelling of its products. It had distributed baby food indicating, in particular, the terms "Praebiotik (R) + Probiotik (R)" and "Praebiotik (R) zur Unterstützung einer gesunden Darmflora" ("Praebiotik (R) for the support of a healthy intestinal flora").

According to the BGH, the indications that are the subject of the dispute constitute health claims within the meaning of Article 2, paragraph 2, point 5 of (EC) Regulation no. 1924/2006 concerning nutrition and health claims relating to foodstuffs, which applies to any claim that states, suggests or implies that a relation exists between a category of food, a foodstuff or a component thereof and health.

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Referring to the case law of the Court (Green Swan ruling, C-299/12, EU:C:2013:501), the BGH held that the concept of "relation" between food and health should be interpreted broadly. This would imply that a health claim can be characterised as long as the average consumer perceives a relation between a food component and health status, his understanding being, in this regard, influenced by his preliminary expectations and knowledge. The question of knowing whether an indication in itself can objectively recognise this relation or whether it merely describes the ingredients used would therefore not affect its classification as a health claim. In this case, the claim "Praebiotik (R) + Probiotik (R)" would be inspired by the "prebiotic" or "probiotic" properties of a foodstuff, which, according to general experience, would indicate that the foodstuff thus specified has a certain effect on the health of the consumer.

As for the claim "Praebiotik (R) for support of a healthy intestinal flora", the BGH held that it was inconsistent with the claim "Prebiotic fibre supports development of healthy intestinal flora", for which the authorisation for use had been requested, on behalf of its members, by the European association of producers of dietary foodstuffs. In the event that the two claims were consistent, this request was likely to enable the defendant to use the impugned claim, in accordance with the transitional provision of Article 28, paragraph 6 b) of (EC) Regulation no. 1924/2006. The BGH thus took the view that the purpose of (EC) Regulation no. 1924/2006, which is to ensure a high level of consumer protection, and the importance of legal security and the exceptional nature of the said provision derogating from the principle of prior authorisation of a health claim, justified a strict application of this provision. As a result, in this case, the use of an expression characterising a brand cannot, according to the BGH, be equated with the simple description of a component subject to the authorisation request, in order to avoid favourable treatment of those having descriptive brands.

In the absence of reasonable doubts concerning the interpretation of the provisions of (EC) regulation no. 1924/2006, the BGH did not consider it necessary to conduct a preliminary ruling before the Court.

Bundesgerichtshof, ruling dated 26.04.14, I ZR 178/12,
www.bundesgerichtshof.de

IA/33295-A

[BBER] [WENDELU]

**** Briefs (Germany)***

By an order of 20 January 2014, the Bundesverwaltungsgericht (Federal Administrative Court) held that the right to compensation based on a violation of EU law is subject, like a law based on the responsibility of the State under national law, to the national provisions concerning limitations.

In this case, a public firefighter argued a right to compensation against his supervisory authority for violation of Directive 2003/88/EC concerning certain aspects of the organisation of working hours. Referring to the case law of the Court, particularly the Aprile case (C - 228/96 EU:C:1998:544), the Marks & Spencer case (C - 62/00, EU:C:2002:435) and the Bulicke case (C-246/09, EU:C:2010:418) and to its own case law in the matter, the

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Bundesverwaltungsgericht recalled that, in the absence of specific provisions concerning the prescription and in accordance with the principles of effectiveness and equivalence imposed by EU law, any right to compensation, regardless of whether it finds its basis in EU law or in national law, is subject to the national common law system for limitations. Since the impugned right to compensation was, pursuant to the provisions under this system, effectively subject to limitation, the applicant's request was dismissed.

Bundesverwaltungsgericht, order dated 20.01.14, 2 B 3/14 (DE:BVerwG: 2014:200114B2B3.14.0), www.bundesverwaltungsgericht.de

IA/33296-A

[KAUFMSV]

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By a ruling of 27 March 2014, the Bundesverwaltungsgericht (Federal Administrative Court) quashed the ruling of the lower court that had accepted a retroactive regularisation of the local development plan of the city of Esens. This plan, drawn up in conflict with the provisions of Directive 2009/147/EC, referred to as the "Birds" directive, provided for the construction of a road alignment in an area that had not been classified as a special protection area (SPA) by the competent national authorities although it should have been ("factual" SPA). In order to remedy the illegality of the situation, the latter had subsequently established and notified, in accordance with scientifically valid criteria, an SPA that excluded the road alignment in question.

Conceding that the evidence of the existence of a "factual" SPA is subject to the high constraints of evidence since the Member State has completed the notification procedure for SPAs, the Bundesverwaltungsgericht held that a regularisation in this case would be contrary to the penalty recognised by the Court of Justice under the strict protection system for "factual" SPAs, established by Article 4, paragraph 4, first sentence, of the "Birds" Directive (see, in particular, the Commission/France judgment, C-374/98, EU:C:2000: 670). It felt that the member State concerned would thus be able to derive a double benefit from the non-compliance with protection obligations that are incumbent upon it under that directive, i.e. retroactively evade the said strict protection system without however being subject to the SPA protection constraints which, in this case, were not defined at the time of the adoption of the contested local development plan.

Bundesverwaltungsgericht, ruling Dated 27.03.14, 4 CN 3.13 (DE:BVerwG: 2014:270314U4CN3.13.0), www.bundesverwaltungsgericht.de

IA/33297-A

[KAUFMSV]

Austria

Charter - Principle of non-discrimination based on sexual orientation - Rights guaranteed by European citizenship - Request for application in Austria of a marriage between persons of the same sex contracted abroad - Non-recognition under Austrian law

In its judgment of 12 March 2014, the Verfassungsgerichtshof (Constitutional court, hereinafter "VfGH") ruled on the possibility of applying in Austria a marriage between two men contracted in the Netherlands. Both

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applicants are Dutch nationals residing in Austria for the last few years.

As part of an appeal against the decision in the last instance before the VfGH, the applicants, who rent holiday homes in Austria, felt that the rejection of the request for application of their marriage, contracted in the Netherlands, would be contrary to the rights guaranteed by the citizenship of the Union, the prohibition of discrimination based on sexual orientation and the right to marry. The authority issuing the refusal dismissed the request stating that, according to Austrian law, only heterosexual couples can marry; couples of the same sex may enter into a registered partnership. The court of first instance found no discrimination in this case.

The VfGH considered that the refusal of the competent authority and the fact that marriage is reserved for opposite sex individuals cannot be characterised as unlawful discrimination. The VfGH also observed that this finding is consistent with the decision of the ECtHR, Schalk and Kopf/Austria (judgment of 24 June 2010, application no. 30141/04), in which this court held that Member States may have different legal provisions for cohabitation of homo- or heterosexual couples. There VfGH also recalled its own case-law concerning the non-discrimination of heterosexual couples who cannot enter into a registered partnership in Austria, thus noting compliance with the principle of non-discrimination. Furthermore, the VfGH also found that Article 21 of the Charter can be invoked in the procedure for control of standards before it. Regarding the main proceedings, it nevertheless held that the Charter did not apply, since it was not a case requiring the application of EU law in a Member State, within the meaning of the case law of the Court of justice (Åkerberg Fransson ruling, C-617/10, EU:C:2013:105, see Reflets No. 2/2013, p. 9). The law on the matrimonial right does not fall within the application of EU law and there is no provision in the Union law on matrimonial law. Even if the applicants exercise their right to move freely within the Union, it was not a case falling within to the application of EU law, according to the VfGH, which reiterated, in this regard, the case law of the Court concerning the inapplicability of fundamental rights of the Union in relation to national legislation on the grounds that the provisions of the Union in the area in question did not impose any obligations on member States with regard to the situation at issue (Siragusa ruling, C - 206/13, EU:C:2014:126).

In conclusion, the VfGH reiterated the discretionary power vested in the member States to establish their rights concerning civil partnership (aforementioned Schalk and Kopf ruling).

According to it, the application of the said Charter would not change the resolution of the case since the Court of Justice has already ruled that when a court of a member State is required to monitor compliance of a provision or a national measure with fundamental rights, in a situation where the action of the Member States is not entirely determined by Union law, it remains possible for national authorities and courts to apply national standards of protection of fundamental rights, provided that this application does not compromise the level of protection under the Charter (aforementioned Åkerberg Fransson judgment).

Verfassungsgerichtshof, ruling dated 12.03.14, B166/2013-17,
http://www.vfgh.gv.at/cms/vfgh-site/entscheid.html?periode=this

IA/33298-A

[FUCHSMA]

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Belgium

Free movement of persons - Workers - Equal treatment - Income tax - Tax benefit for dependent children - Differences in treatment - Violation of fundamental freedoms guaranteed by Articles 45 and 49 of the TFEU - Violation of the principle of equality and non-discrimination guaranteed by Articles 10 and 11 of the Belgian Constitution

Hearing a preliminary question concerning the compatibility with the principle of equality and non-discrimination as guaranteed by Articles 10 and 11 of the Belgian Constitution, of certain provisions of the income tax code governing the granting of tax benefits to dependent children, the Constitutional Court made a reversal of its case law in the matter in order to ensure that the previous case law complies with the legal analysis developed by the Court of Justice in the Imfeld and Garcet ruling (C - 303/12, EU:C:2013:822).

Regarding the possible violation of Articles 10 and 11 of the Belgian Constitution, the trial court had found that, under the provisions of the income tax code, as applied by the tax administration, the tax benefit granted to dependent children of married couples and legal cohabitants was still charged to the taxpayer with the highest taxable income, while couples living in a common law union, for whom separate taxes are established, could choose the partner to whom it is necessary to charge the additional charge exempted for the dependent child. According to the trial court, this rule could lead to discrimination in situations where one partner would receive foreign income from a State which has concluded a double taxation agreement with Belgium.

When the income of a married taxpayer or a taxpayer who is part of a legal cohabitation, which is higher than that of his partner, is exempt from taxation in Belgium under such agreement, the couple would lose *in concreto* the tax benefit for dependent children, since that benefit is necessarily charged to the spouse with the higher income. However, a couple living in a common-law union, in which the higher foreign income of one of them is exempt from taxation in Belgium, would have the option of making the dependent children the responsibility of the partner with the lower income, thus avoiding the loss of that tax benefit.

After reiterating that it had concluded, in its judgment of 9 July 2013, in response to an identical preliminary question, that there is no difference in treatment, the Constitutional Court automatically stated that, by the aforementioned Imfeld and Garcet judgement, the Court of Justice had ruled that Article 49 TFEU precludes a tax regulation of a member State that deprives a couple residing in that State and receiving income both in that State and in another member State of the effective benefit of a tax benefit, because of its charging procedures, while this couple would enjoy this benefit if the spouse with the higher income did not receive the all of the income in another Member State. The Constitutional Court ruled that, for reasons identical to those of the aforementioned Imfeld and Garcet judgement, which are cited in full, and by taking into account the Libert et al ruling (C-197/11 and C-203/11, EU:C:2013:288), it must be concluded that the provisions of the income tax code implicated in question violate the fundamental freedom corresponding to the free movement of workers guaranteed by Article 45 TFEU, such that these provisions are not compatible with Articles 10 and 11 of the Belgian Constitution.

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Constitutional Court, judgment no. 68/2014 of 24.04.14, www.const-court.be/public/f/2014/2014-068f.pdf

IA/34201-A

[EBN]

Bulgaria

Free movement of capital - Sale of agricultural land to foreigners - Resolution of the Bulgarian parliament extending the moratorium on agricultural land acquisitions in Bulgaria by foreigners and foreign companies - Violation of Article 64 of the TFEU

By its judgment of 28 January 2014, the Bulgarian Constitutional Court cancelled a resolution of the National Assembly prohibiting the sale of agricultural land to foreign legal entities and individuals on the grounds of conflict with the Constitution and Union law.

This judgement finds three unconstitutional elements: first, the moratorium is contrary to the principles of the rule of law, the separation of powers and the treaty of accession of Bulgaria to the Union; secondly, the parliamentary resolution is incoherent and contradictory, completely ignoring one of last amendments to the Constitution that allows foreigners to acquire land in Bulgaria; thirdly, the MPs have introduced a regulation by resolution rather than by law.

It should be noted that foreigners could buy land in Bulgaria through by a registered Bulgarian company. In view of its accession to the European Union in 2007, Bulgaria amended its constitution, by lifting the ban on foreigners buying agricultural land. A moratorium had however been introduced on the sale of land to foreign legal entities and individuals.

In accordance with the accession treaty, this moratorium was to end on 1 January 2014, seven years after the accession of Bulgaria.

The parliamentary resolution on the said moratorium adopted on 22 October intended to renew it until 1 January 2020.

The government had already declared that it does not respect this resolution under the pressure of ultranationalists, judging that it "violated Bulgaria's European commitments".

In its judgment, the Constitutional Court ruled that "the land sales are part of the free movement of capital (Art. 64 of the TFEU), one of the main freedoms" within the European Union.

Конституционен съд, ruling dated 28.01.04 (DV n° 10 of 04.02.14), http://dv.parliament.bg/DVWeb/showMateri alDV.jsp?idMat=82325

Решение на Народното събрание (Resolution of the National Assembly) (DV n° 93 of 25.10.13), http://dv.parliament.bg/DVWeb/showMateri alDV.jsp?idMat=79893

IA/33639-A

[NTOD]

Spain

Area of freedom, security and justice - Asylum policy - Withdrawal of refugee status - Fundamental rights - Freedom of expression - Reasons of national security

In the context of this appeal, the Spanish Supreme Court upheld the withdrawal of the refugee status of a Pakistani national who had announced his intention to burn copies of the Qur'an and publicise a film about the

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real life of Muhammad. The Ministry of Interior had decided to withdraw the refugee status of the applicant for reasons relating to national security, especially in view of the situation of extreme sensitivity surrounding the applicant's conduct, and also drawing on a report of the Foreign Affairs department, which highlighted the tragic events occurring in other countries following similar episodes. The Audiencia Nacional had decided that there were sufficiently justified reasons for considering that the applicant was a danger to national security, the applicant's actions constituting a threat that is incompatible with the confidence and certainty that a democratic State must provide its citizens. The applicant's application against this decision having been rejected by the Audiencia Nacional, the competent authority took an expulsion decision for which suspension was not granted by the Supreme Court.

The Supreme Court ruled that there had been no violation of freedom of expression enshrined in Article 20 of the Constitution and Article 10 of the ECHR. After reviewing the relevant case law of the ECtHR, the court reiterated that the right to freedom of expression is not an unlimited right. Thus, this right may be restricted when there is a danger to national security, in that this right is incompatible with gravely offensive manifestations disregarding religious beliefs, inciting violence or hatred, attacking religious sentiments, and not contributing to public debate in a democratic society and, consequently, falling beyond the area protected by this right fundamental. Since pleas concerning the violation of effective judicial protection and the principle of equality have also been dismissed, the Supreme Court emphasised the fact that the withdrawal of the refugee status does not necessarily mean expulsion from the national territory, to the extent that the competent authorities must ensure that the withdrawal of the refugee status does not involve the surrender of the persons concerned to the authorities of a country where there would be a danger to their life or freedom, or they could be subjected to torture or to inhuman or degrading treatment.

The Supreme Court finally upheld the interpretation of the Audiencia Nacional of Article 44, paragraph 1, of the Asylum Law 12/2009, which provides for the withdrawal of refugee status when the person in question is a danger to national security, in view of a systematic interpretation of the Geneva Convention and Directive 2004/83/EC concerning the minimum standards for conditions that must be met by nationals of other countries or stateless persons to be able to claim the refugee status.

In this regard, an individual opinion, signed by two judges, considers that this case would have led to a preliminary reference to the Court of Justice on the concept of "threat to the security of the Member State" in Article 14, paragraph 4 of Directive 2004/83 and on the compatibility of this provision with the Geneva Convention. As has been shown by the United Nations High Commissioner for Refugees, this provision of the Directive (as well as the provision of the Spanish law on asylum) seems to combine the exclusive grounds of Article 1 F of the Geneva Convention, which may result in the revocation of the status, and the grounds set out in Articles 32 and 33, paragraph 2, of this Convention that, although they outline the exception concerning national security, are limited, respectively, to the expulsion and loss of protection of the non-refoulement principle. In addition, a

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question of interpretation would also have been necessary to determine the compatibility with Directive 2004/83 of the consideration of a conduct as involving a danger to national security if the danger does not emanate from such conduct in itself, but the potential violent reactions in response thereto.

Supreme Court, ruling dated 30.05.14 (appeal no. 3511/2013), www.poderjudicial.es

IA/33923-A

[IGLESSA]

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Citizenship of the Union - Right of entry and residence - Right of residence of nationals of other countries, parents of minor children, citizens of the Union - Renewal of the residence permit denied due to criminal record - Violation of the fundamental right to effective judicial protection

This case concerns the renewal of the residence permit of a citizen of a third country, father of two minor children, one of them being a citizen of the Union. The applicant, who shares custody with the mother of the children and supports them financially, was denied the renewal of his residence permit because of the existence of a criminal conviction for driving while intoxicated. Given this conviction, both the administrative authorities and the judicial authorities rejected the applicant's claims. In these circumstances, the applicant brought an action in defence of the fundamental rights before the Constitutional Court.

In its judgment delivered on 7 April 2014, the Constitutional Court found the existence of a violation of the right to effective judicial protection by means of failure to state reasons, insofar as the courts had not factored in elements such as the child's interest, the right to family privacy, as well as the lightness of the offence committed and the resulting penalties. Although the reasons are usually an ordinary question of legality that do not correspond to the constitutional court, there is an exception regarding the reasons for decisions adopted under a procedure applying penalties. In this case, although it is not strictly a procedure applying penalties, the non-renewal of the residence permit would lead to a modification of the legal position of the applicant, who would no longer be allowed to stay in Spain, and to the loss of his job, which would have consequences on his capacity to meet his parental responsibilities.

The Constitutional Court considers that the administration, by not taking into account either the personal and family circumstances of the applicant, or the degree of seriousness of the offence giving rise to the criminal record, had made an incorrect application of the organic law on rights and freedoms of foreigners in Spain. The wording of the provisions applicable to the case made it possible for a factoring in of elements such as those at issue. Given that the competent courts had not ensured, as part of the review of challenged administrative decisions, such factoring in, even if the right to family privacy (article 18 of the Constitution), among others, was at stake, the Court Constitutional found a violation of the right to effective judicial protection enshrined in article 24 of the Constitution.

Constitutional Court, ruling dated 07.04.14 (appeal no. 46/2014),

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www.boe.es/boe/dias/2014/05/07/pdfs/BOE-A-2014-4816.pdf

IA/33915-A

[IGLESSA]

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Responsibility of the State for violation of EU law - Late and incorrect transposition of Directive 1999/70/EC on the framework ETUC, UNICE and CEEP agreement on fixed-term work - Sufficiently characterised violation - Absence

The case concerns a temporary worker in the public administration who requested the payment of triennial seniority bonuses by first adopting administrative means followed by legal means. By way of a final judgment, the competent administrative jurisdiction had rejected that request.

This judgment was delivered before the Gavieiro Gavieiro judgment of the Court of Justice (C-444/09 and C-456/09, EU: C:2010:819), in which the Court ruled that, with regard to a provision of the framework agreement on fixed-term work having direct effect, the competent authorities of the Member State concerned are required to grant the temporary public service personnel the right to retroactive payment of bonuses in respect of three-yearly increments from the date of expiry of the deadline for Member States to transpose this Directive.

Subsequent to that judgment, the applicant brought an appeal before the Supreme Court for compensation, corresponding to the retroactive payment of seniority bonuses owed to him, because of the damage caused by the Spanish State following the late and incorrect transposition of Directive 1999/70/EC of 28 June 1999 concerning the ETUC, UNICE and CEEP framework agreement on fixed-term work.

Although the Supreme Court had found that Spain had not correctly transposed Directive 1999/70/ EC and had therefore refused to grant triennial seniority bonuses to the temporary public service personnel, it did not recognise the State's responsibility. According to this Court, the violation of EU law would not be "sufficiently serious" due to the fact that the directive appears to provide a discretionary power to the member States regarding the determination of its scope. Secondly, the aforementioned Gavieiro judgment was delivered following the review of the applicant's situation. The law in question was finally amended in accordance with the Court's case law. For this reason, the Supreme Court held that there had been no persistent failure on the part of the legislator following the judgment of the Court of Justice.

Supreme Court, judgment no. 820/2014, of 21.02.14 (appeal no. 724/2012),
www.poderjudicial.es

IA/33920-A

[NUNEZMA]

**** Briefs (Spain)***

In two judgments delivered on 7 April, the Constitutional Court held that there had been a violation of the right to effective judicial protection guaranteed by Article 24 of the Constitution, following two decisions of national competent authorities authorising the surrender of two Italian nationals to Italian authorities to serve criminal convictions pronounced in absentia. In the first case, the Constitutional Court held that the reasons of the Audiencia Nacional in the application of Article 4a of the Framework Decision 2002/584/JHA on the European arrest warrant and procedures of surrender between Member States (subject of the Melloni judgment C-399/11, EU:C:2013:107, which the constitutional

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court refers to), were not sufficient. In the second case, the applicant contested the decision to surrender adopted by the Audiencia National, which had not taken into account the degree of integration in Spanish society. The Constitutional Court based its reasoning in that respect on the Lopes Da Silva Jorge judgment (C - 42/11, EU:C:2012:517), in which the Court held that, provided that a person's degree of integration into the society in a member State is comparable to that of a national citizen, the judicial enforcement authority must be able to assess whether there is a legitimate interest that justifies the sentence imposed in the issuing member State being enforced on the territory of the enforcing member State. The Constitutional Court believes that the decision of the Audiencia Nacional was not sufficiently reasoned, since it had not taken account of the circumstances alleged by the applicant and had not set out the reasons for which it had not applied the Lopes Da Silva Jorge case law.

Constitutional court, ruling nos. 48/2014 and no. 50/2014, of 07.04.14, *www.boe.es/diario_boe/txt.php?id=BOE-A-2014-4818* *www.boe.es/diario_boe/txt.php?id=BOE-A-2014-4820*

IA/33916-A
IA/33917-A

[IGLESSA]

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The question of the right to family reunification of ascendants of Spanish nationals who have recently obtained this nationality often arises before the Spanish courts. The national legislation on this subject had introduced a reverse discrimination element by making reunification of ascendants of Spanish nationals subject to the system followed for nationals in third countries, unlike the reunification of EU citizens. Since this element has been repealed by the Supreme Court by the judgment of 1 June 2010, the reunification of ascendants of Spanish citizens not having exercised the freedom of movement is now subject to the same conditions as the reunification of ascendants of EU citizens. In this context, the concept of "dependent ascendants" is the subject of two judgments delivered by the Supreme Court in April. In the first case, the existence of money transfers performed during the period immediately prior to the request for family reunification visa was rejected by the Supreme Court as sufficient evidence that an ascendant is the responsibility of the Spanish citizen in question. In the second case, the Supreme Court dismissed an appeal against a decision of the Tribunal Superior de Justicia de Madrid (TSJ), which had ruled in the same manner by taking into consideration the Dereci and Others judgement (C - 256/11, EU:C:2011:734) and the case law of the ECtHR concerning the right to family life.

Supreme Court, ruling nos. 1259/2014, dated 03.04.14, and no. 1711/2014, dated 30.04.14, *www.poderjudicial.es*

IA/33919-A
IA/33918-A

[IGLESSA]

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The Constitutional court declared the unconstitutionality of the sovereignty declaration issued by the Parliament of the Autonomous community of Catalonia (Resolución 5/X-23-01-2013). It declared the nullity of the principle, included in the said declaration, according to which "for reasons of democratic legitimacy, the status of the people of Catalonia is that of sovereign political and legal subjects", owing to the

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violation of article 1, paragraph 2, and article 2 of the Spanish Constitution and article 1 and 2, paragraph 4, of the Statute on the autonomy of Catalonia. This status, not granted by the Constitution, involves the granting, to a subject who is part of a group, the power to disrupt, by his will alone, what is established by the Constitution as its essential foundation, "the indissoluble unity of the Spanish nation". The Court recalls that, under the Constitution, an Autonomous community may not convene a self-determination referendum to decide its integration into Spain.

However, the Court held that "the right of decision" of the people of Catalonia, also provided in the same resolution of the Parliament of Catalonia, is not contrary to the Constitution since, without resulting in a right to self-determination that is not recognised by the Constitution, it represents a political aspiration, the fulfilment of which involves a process that is in line with constitutional legality and complies with the principles of democratic legitimacy, pluralism and lawfulness.

Constitutional court, ruling no. 42/2014, dated 25.03.14,
www.tribunalconstitucional.es

IA/33921-A

[NUNEZMA]

*** Brief (Estonia)**

In its judgment of 7 April 2014, the Supreme Court ruled on the recognition and enforcement of decisions relating to maintenance obligations.

The Estonian high court upheld the judgments delivered by the lower courts that recognised and declared enforceability in the territory of the Republic of Estonia of judgments regarding maintenance obligations delivered by the Agency for Social Affairs of Ylä-Savo of the Republic of Finland. In this regard, the Supreme Court held that the lower courts had correctly applied (EC) Regulation no. 4/2009 on the jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in particular, its article 75, paragraph 2, in that the proceedings at issue were initiated before 18 June 2011.

The Supreme Court also stated that, for reasons of legal clarity and under Article 17 of that regulation, the judgments given in a member State bound by the 2007 Hague Convention protocol on the law applicable to maintenance obligations are automatically recognised in the other Member States without the need to resort to a recognition procedure and without it being possible to oppose it, subject only to Article 75, paragraph 2 b).

Finally, it declared that, in the present case, the application for a declaration of enforceability appropriately met the requirements of Articles 28 and 57 of Regulation No. 4/2009, and that there were no grounds for refusal of recognition under Article 24.

Supreme Court, Civil Division, ruling dated 07.04.14, case no. 3-2-1-9-14, www.riigikohus.ee

IA/33924-A

[TOPKIJA]

France

Judicial cooperation in civil matters - Jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility - Regulation no. 2201/2003 - Successive and cross abductions of a child - Jurisdiction of the courts of the State of origin

In a decision dated 5 March 2004, the Supreme Court ruled, in light of Article 10 from of (EC)

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Regulation no. 2201/2003 concerning the jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, on the impact of the incident involving the intra-European double abduction of a child on the jurisdiction of the court in the place of habitual residence of the child. The traditional notions of courts of the State of origin and the State of refuge, under Article 10 of the said regulation, might seem inappropriate for such a situation.

In this case, a father, living in France, had sued the mother of his child in a French court, to be awarded sole parental authority. His demands were met but the child was abducted by its mother and taken to Belgium, where she, in turn, requested the assignment of exclusive exercise of parental authority. The father, who had made a request for the return of the child, took the child away by force and brought it back to France. The mother then appealed the French decision, believing that the rule overriding jurisdiction provided for by Article 10 of (EC) Regulation no. 2201/2003 should be dismissed when the parent invoking it has himself abducted the child in the territory of the Member State tow which he had been take unlawfully by the other parent. However, the appeal court retained its jurisdiction on the basis of this article.

The Supreme Court upheld this decision explicitly referring, for the first time in the matter, to the case law of the Court of Justice. The fact that this position was taken deserves to be emphasised all the more since the three cases cited (Rinau ruling, C-195/08 PPU, EU:C:2008:406, Detiček ruling, C-403/09 PPU, EU:C:2009:810 and Povse ruling, C-211/10 PPU, EU:C:2010:400) relate to situations different from that in this case. It is thus the spirit of the case law of the Court of Justice that the Court of cassation refers to, for the purposes of interpretation of Regulation (EC) no. 2201/2003.

The Court of cassation found that "the unlawful abduction of a child is exclusive, except in case of special circumstances exhaustively listed in Article 10 of the Regulation, of a transfer of jurisdiction of the courts of the Member State in which the child had its habitual residence immediately before its transfer to those of the Member State to which the child has been taken". It follows that "the courts of the Member State of origin keep their jurisdiction when the child, having been unlawfully abducted, has been returned to the territory of that country by the parent in fraud of which the kidnapping took place."

Court of Cassation, Civil Division 1, judgment of 05.03.14, No. 12-24780 *www.legifrance.gouv.fr*

IA/33635-A

[SIMONFL] [DUBOCPA]

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Free movement of persons - Freedom of establishment - Scope - Air transport activity entirely focused on the national territory or carried out in a usual, stable and continuous manner on national territory - Inclusion - Inapplicability of rules relating to the posting of workers within the meaning of Regulation no. 1408/71 - Omission of declaration of employees to national social protection agencies - Undeclared work

By two judgments of 11 March 2014, the Criminal Division of the Court of Cassation ruled on the status of aircrew, sales personnel or technical staff of the two airlines Vueling and Easyjet, by upholding their criminal conviction for undeclared work. The employees of both companies

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were simply presented as posted in France and were therefore not declared to the French social protection agencies.

In this case, the company Vueling Airlines, whose headquarters is located in Barcelona, had employed, between May 2007 and May 2008, in its establishment of the Charles de Gaulle airport in Roissy, dozens of employees under the status of posted workers and holders, as such, of an E 101 certificate (now A1) certifying that these employees were still employed, during the period of posting, under the social security system of their country of origin, namely Spain. The French labour inspectorate argued that the airline could not rely on the provisions applicable to transnational posting, since its activity was focused entirely on the French territory, conducted in premises or with facilities located in France and carried out in a usual, stable and continuous manner.

As regards Easyjet, whose head office is in the United Kingdom, the airline was set up, from 1 August 2004, at counters and offices at Orly airport. The French labour inspectorate criticised the said company for presenting its employees as British posted workers even when they were mostly French, residing in France and permanently assigned to the Orly site.

In both these cases, without it being necessary to pose a preliminary question to the Court of Justice, the Supreme Court upheld the reasoning of the trial court.

Thus, the French high court, firstly, found that in the absence of a posting of employees within the meaning of Regulation no. 1408/71 relating to the application of social security schemes to the employed persons and members of their family that moves to the Community, in force at the time of the dispute, both airlines had developed in the national territory a usual, stable and continuous activity.

It then considered, under the criteria laid down by the case law of the Court of Justice (see Commission/Italy, C-131/01, EU:C:2003:96), that this activity fell within the rules relating to the right of establishment, which are exclusive of provisions applicable to transnational posting, not within the freedom to provide services within the meaning of the Treaty.

Finally, the Court of cassation deduced that the airlines could not rely on posting certificates issued by the competent foreign authorities. Since these companies were not able to declare their employees employed in France to the French social protection agencies, the Supreme Court held that this was a case of undeclared work.

Both the airlines were sentenced to a fine of €100,000 each.

Thus, once the actual centre of the professional activity of the employee is identified as being located in France, the domestic law and, in particular, social law with its protective standards, will apply. The convictions of companies bending the rules concerning the posting of workers, in order to be placed under a less burdensome social and tax regime, have probably just begun.

Court of Cassation, Criminal Division, judgments of 11.03.14, No. 11-88420 and No. 12-81461,
www.legifrance.gouv.fr

IA/33637-A
IA/33638-A

[CZUBIAN]

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**** Briefs (France)***

The Criminal Division of the Court of Cassation ruled on the qualification of several decisions of German and Austrian judicial authorities with regard to the ne bis in idem principles and mutual recognition of decisions.

In this case, a young French woman, Kalinka, was found dead in Germany in the house of her stepfather, a German national.

However, despite the procedures completed in Germany and Austria which did not lead to a conviction, the Supreme Court validated, by a judgment of 2 April 2014, the procedure followed by the French lower courts, this time leading to the conviction of the applicant, the stepfather.

The latter benefited initially from a situation of no further action by the German public prosecutor, confirmed by a German court. In this regard, the Supreme Court considered that the no further action decision could not be characterised as final judgment within the meaning of Articles 113-9 of the Criminal Code and 54 of the Convention implementing the Schengen Agreement, since for a decision taken by a foreign court to be regarded as a final judgment, it is necessary that the action has been initiated on the date on which the decision is made.

The stepfather then benefited from the repeated refusal of Austrian authorities to extradite him and enforce a European arrest warrant. However, the Court of cassation noted, firstly, that the applicant did not have standing to rely on an alleged infringement of the principles of mutual trust and mutual recognition of judicial decisions, resulting from Article 82 of the TFEU and, secondly, that these decisions were not final since they were subject to an appeal by the prosecutor.

Court of Cassation, Criminal Division, judgment of 02.04.14, No. 13-80474, www.legifrance.gouv.fr

IA/33634-A

[DELMANI]

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In a judgment of 11 April 2014, the Council of State ruled that Article 164 C of the General Tax Code is contrary to the principle of the free movement of capital laid down in Article 65 of the TFEU.

This provision of the tax code imposes an income tax on individuals whose tax domicile is not in France but who own residential housing unit in France, when their French source income is below a threshold defined by the said provision. In this case, a German national residing in Monaco was liable to income tax because she is the owner of a residential housing unit in the Alpes-Maritimes.

The Council of State noted that the impugned tax, which is payable only by persons not having their tax domicile in France when their French source income is below the threshold set by the regulations, is likely to discourage non-residents to acquire or hold such property in France, resulting in the observation of a hindrance to the free movement of capital. It then said that to establish a tax on account of the holding of real estate property, the situation of resident and non-resident individuals in France was comparable with regard to this provision and that the difference in treatment is not justified by overriding reasons of general interest.

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Council of State, judgment of 11.04.14, No. 332885

IA/33636-A

[DUBOCPA] [WAGNELO]

Greece

Social policy - Directive 1999/70/EC on the ETUC, UNICE and EEC framework agreement on fixed-term work - National Greek transposition legislation - Transformation of successive fixed-term contracts with the public administration into open-end contracts - Contracts concluded for a term of four years in order to cover needs for an undetermined duration - Admissibility - Conditions

Hearing a dispute within the context of the prevention of misuse arising from the use of labour relations or successive fixed term contracts, the Greek Court of cassation (hereinafter the "Areios Pagos") applied, by judgment of 7 January 2014, the provisions of the Presidential Decree no, 164/2004 which transposed Directive 1999/70/EC concerning the ETUC, UNICE and EEC framework agreement on fixed-term work and that applies to fixed-term contracts in the public sector.

The main proceedings involved a former employee against his employer, a public agency responsible for the execution of official controls on products of animal origin intended for human consumption.

The plaintiff, a chemist by profession, concluded with the said public agency several successive fixed-term contracts starting in September 2000, the last of which expired in April 2005 without being renewed (hereinafter the "contracts at issue").

The applicant claimed that she had provided regular services corresponding to the fixed and permanent requirements of her employer and that for each new contract, she was re-employed at the same job to perform the same functions as those for which the initial contract had been concluded. Therefore, she stated that her employment relations in question should be converted into open-end contracts, pursuant to the relevant provisions of the national regulations.

In its judgment, the Greek Court of cassation first recalled that the valid legal qualification of an employment relationship and the nature of an employment contract - whether fixed or open-end - belongs mainly to the judicial function, regardless of the qualification awarded by the parties.
However, although the national law provides for the possibility of converting successive fixed-term contracts with the public administration into open-end contracts, such a conversion is subject to a series of cumulative conditions. This particularly involves the assessment of the purpose of the contracts at issue, the total duration and specific terms of employment, the tasks performed and the question whether the contracts at issue have covered the fixed and permanent requirements of the employer or whether, on the contrary, the employment of fixed-term staff was dictated by seasonal, urgent, regular or temporary requirements.

Moreover, by comparing the applicable national measures with the minimum standards of protection imperatively demanded by the framework agreement, the Areios Pagos considered that these measures achieve a high level of protection, in that not only do they lay down an obligation to transform the fixed term contracts into open-

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end contracts but also prescribe the conditions required for this transformation. In this way, the national regulation includes effective guarantees of protection of workers against the misuse of contracts or successive fixed term employment relationships.

After an assessment of the circumstances of the case, the Areios Pagos considered that the limited duration of the contracts at issue was neither justified by the nature and the purpose of the services provided by the applicant, nor by any other objective reason. Moreover, the fact that the post filled by the applicant was not held by any public servant and that the employer had made no move for recruiting permanent staff to cover its permanent requirements showed obvious misuse of the said contracts.

In view of the above, the Greek Court of Cassation concluded that a reclassification of the open-end contracts at issue was required and upheld the judgment of the Court of Appeal in the same case, insofar as it ordered the reinstatement in employment of and payment of salary arrears to the applicant.

It should be recalled that this same presidential decree was the subject of several preliminary rulings by the Court of Justice (see, for example, the Adeneler and Others judgment, C -212/04, EU:C:2006:443 and the Berkizi-Nikolakaki order, C-272/10, EU:C: 2011:19).

Areios Pagos (B1Politiko Tmima), ruling dated 07.01.14, no.20/2014,
lawdb.intrasoftnet.com.nomos2.han3.ad.curia.europa.eu/nomos/1_news_fp.php

IA/34018-A

[GANI]

Hungary

EU law - Rights conferred on individuals - Violation by a Member State - Obligation to compensate for the damage caused to individuals - Violation attributable to a supreme court

In a case that focuses on the responsibility of Hungary owing to a violation of the right of the Union by the Supreme Administrative Court, the Supreme Court and the Constitutional Court respectively delivered on 11 December 2013 and 19 May 2014, decisions relating to the application of the principle set out in the Köbler ruling (C-224/01, EU:C:2003:513) of the Court of Justice.

The request for damages before the civil courts is rooted in an administrative dispute. In this context, the Supreme Administrative Court, ruling on an appeal on the legality of a decision of the tax authority, refused the right to deduct the VAT of the applicant.

Following this decision, the applicant applied to the civil courts to obtain damages for the violation of Union law by the Supreme Administrative Court. To this end, he relied not only on the erroneous interpretation of Directive 77/388/EEC but also on the violation of Article 267 of the TFEU.

However, he did not challenge not having raised pleas for the violation of EU law as part of the administrative procedure. However, the applicant noted that the interpretation consistent with the directive of an EU rule with direct effect is automatically incumbent upon the national court.

He also requested the civil courts for a reference for a preliminary ruling concerning the interpretation of the obligation of automatic application of Union rules by national supreme courts.

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The civil courts of first and second instance and the Supreme civil court, ruling on an appeal in cassation, rejected the request for damages. According to those courts, the case raised no question concerning the interpretation of the Union law, resulting their refusal to request a preliminary ruling to the Court of Justice.

The Supreme civil court recalled that during the proceedings before the administrative judge, the applicant did not invoke the erroneous interpretation of the substantial national rule under the Directive 77/388/EC. The same is required for the appeal. Thus, the applicant has at no time based its claims on the grounds of a violation of the rights conferred by EU law.

The Supreme civil court emphasised that the compensation procedure cannot be considered as an additional remedy against the final decision of the administrative high court. The responsibility of the Supreme administrative court must be assessed in the light of the national procedural rules for appeals.

Under these rules, the Supreme administrative court is bound by the pleas raised by the parties. This provision is not contrary to the case law of the Court of Justice. Since the applicant still has the power to raise pleas relating to a violation of EU law in proceedings before the administrative courts, the national rule did not violate either the principle of effectiveness or, indeed, that of equivalence.

According to the Supreme Court, it is true that certain provisions of the Union must be applied automatically; however, this principle was not violated by administrative courts, since the
administrative procedure focused on the interpretation of those rules, and not on their application.

The Supreme Court found, by rallying to the findings of the Regional Court of Appeal ruling on appeal, that the conditions for responsibility of the State were not met. In this case, the supreme administrative court had not violated domestic law or the Union law.

Concerning the constitutional complaint lodged by the applicant against this judgment of the Hungarian Supreme Court, refer to the brief below.

Kúria, ruling dated 11.12.13, no Pfv.III.22.112/2012/13, *www.lb.hu/sites/default/files/hirlevel/hirlevel-1401.pdf*

IA/33930-A

[VARGAZS]

**** Brief (Hungary)***

Following the judgment of 11 December 2013 of the Civil Supreme Court (see above), delivered in the context of a case where this court refused to introduce a preliminary ruling before the Court of Justice, the applicant brought an appeal before the Hungarian Constitutional Court. He claimed a violation of his constitutional rights to fair judicial protection and access to justice. He also based his claim on the obligations on national courts under not only Article 6 of the ECHR but also the Cilfit and Others ruling (283/81, EU:C:1982:335) and the Köbler ruling (C-224/01, EU:C:2003:513) of the Court of Justice.

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By an order of the Constitutional Court delivered on 19 May 2014, the application was dismissed, since the admissibility requirements were not met. On that occasion, the Court observed that the alleged unconstitutionality had not had a decisive influence on the judicial decision made, and that the constitutional question raised was not "fundamental" in nature. In addition, the Constitutional Court added that the requests for preliminary ruling proposed by the applicant did not concern the Union law, but focused on an action against the national legal decision. Finally, it emphasised that the national court has sole jurisdiction to assess the necessity to refer a request for preliminary ruling to the Court of Justice. The exercise of that discretion is not "constitutional" and is, therefore, not within the jurisdiction of the Constitutional Court.

Alkotmánybíróság, decision dated 19.05.14, no 3165/2014 (V. 23.), www.kozlonyok.hu/kozlonyok/Kozlonyok/1/PDF/2014/16.pdf

IA/33931-A

[VARGAZS]

Ireland

Union law - Right of asylum - Rejection of a request for asylum - Appellate action brought after the deadline - Time period shorter than that applicable in matters of land-use planning - Principles of equivalence and effectiveness - Principle of procedural autonomy

On 10 April 2014, the Supreme Court delivered a judgment annulling a decision of the High Court, which had ruled that an Irish law relating to the rights of people who request for asylum was contrary to EU law.

The case concerned the rejection by the Irish authorities of a request for asylum made by a South African family, the applicants in the case. They appealed against a deportation decision taken in their respect. That appeal, however, was brought after the period of 14 days after notification of the decision, set by Article 5, paragraph 2, of the Illegal Immigrants (Trafficking) Act, 2000. Since the applicants did not raise any plea for the delay, the High Court held that, under normal circumstances, it would not be appropriate to grant an extension of time.

However, in the appeal, the applicants raised the plea according to which the Irish law on the granting of refugee status was contrary to Directive 2005/85/EC relating to the minimum standards on procedures for granting and withdrawing refugee status in Member States. The High Court, therefore, pointed out that, in its view, the period in question was contrary to the principles of equivalence and effectiveness of EU law. It found that the period in question is much shorter than the six-month period applicable to appeals against of administrative decisions in matters of land-use planning. The purpose of the periods in the area of asylum and that of land-use planning is legal certainty and the protection of third parties affected by the decisions. The period under the asylum procedure thus violates the principle of equivalence. Furthermore, it stressed that an applicant cannot know in advance whether an extension will be granted by the court or not, thus leading to a lack of predictability and consistency. Therefore, the law also violated the principle of effectiveness.

The Minister of Justice appealed against that judgment. The Supreme Court, hearing the appeal, held that, under Article 19 of the TEU, and Directive 2005/85/EC, the courts of Member States

have an obligation to ensure effective judicial protection of persons claiming a right under European law, including the right to asylum, in accordance with the principle of national procedural autonomy. The exercise of this autonomy is limited by the principles of equivalence and effectiveness.

Considering Article 5 of the Law in the light of these considerations, it emphasised that it applies to requests under both EU law and the national law does not distinguish between them. Therefore, it does not violate the principles in question, and the difference between the period applicable to appeals in matters of land-use planning of the territory and the period in question does not alter this finding. The Supreme Court added that, since the scope of the principles is clear in the case law of the Union, it was not necessary to ask preliminary questions. It therefore annulled the decision of the High Court.

TD, ND (a minor suing by her mother and next friend TD) and AD (a minor suing by his mother and next friend TD) c. Minister for Justice, Equality and Law Reform and Attorney General of Ireland, High Court, 25.01.11, [2011] IEHC 37, www.courts.ie
Supreme Court, 10.04.14, [2014] IESC 29 www.supremecourt.ie

IA/34301-A

[TCR]

Italy

Fundamental rights - Right to have a family - Protection of health - Act providing for a prohibition of heterologous assisted reproduction technology - Balancing of rights and interests of the couple with those of the couple's unborn child - Unreasonableness of the prohibition with regard to the purpose of the law - Declaration of unconstitutionality

The Constitutional court judgment no. 162 of 2014 marked an important step in the evolution of the Italian law on assisted reproductive technology (hereinafter "ART"), a topical and particularly controversial issue, owing mainly to of the existence, in Italy, of divergent schools of thought.

The Constitutional Court received a constitutionality question on the provisions of law no. 40/2004 prohibiting the heterologous ART, namely reproduction for which gametes from a person not part of the couple torque are used. Thus, if the couple is not able to give its gametes because of infertility or absolute sterility, it will not be able to resort to ART.

In its judgment, the Constitutional Court has outlined, first, the context in which this prohibition is stipulated. It stressed that heterologous ART was once authorised in Italy, in private health facilities, and that the introduction of this prohibition does not result from the implementation of international obligations. Moreover, according to the Constitutional Court, removing the prohibition would not be contrary to the 1997 Oviedo Convention on Human Rights and Biomedicine.

The Court considered, then, the various rights and interests involved to see whether the legislator, by providing for a ban on heterologous ART, struck a reasonable balance.

It found, first, that the prohibition violates several rights enshrined in the Constitution and in particular the right to have children and have a family (Article 31) and the right to health (article 32). In this regard, it noted that the latter includes not only

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physical health but also mental health. It added that the legislator cannot, at its discretion, intervene in therapeutic choice, but must take into account the guidelines based on scientific knowledge, the basic rule in this area being that of autonomy and responsibility of the physician.

Second, the Court analysed the other interests at stake, such as that of the third party donor and the unborn child. On the one hand, it noted that the heterologous ART procedure has no health risks for the gamete donors. On the other hand, it found that the provisions for protection of the unborn child exist in the domestic legal system. Law No. 40/2004 regulates the parental relationships of the child born in violation of this prohibition. Under Article 9, the spouse or cohabitant that has consented to the heterologous ART cannot contest the paternity of the child. Furthermore, no parental relationship is recognised between the gamete donor and the child. According to the Court, Article 8 of the law concerning, in general, the legal status of the child born through ART techniques also applies to the child born from heterologous ART.

Once the rights and interests involved were determined, the Court evaluated the proportionality and the adequacy of the provisions for the ban to see whether they are necessary and appropriate in pursuit of the legitimate objectives of protecting the unborn child. In its review, the Court found the unreasonableness of that prohibition in view of the purpose of law no. 40/2004, which is to "favour the solution of any reproduction problems arising from sterility and infertility" (Article 1). Owing to the prohibition, the aforementioned constitutional rights are denied to couples affected by the most serious disorders (infertility and absolute sterility).

Finally, the Court focused on another aspect of the unreasonable prohibition of heterologous ART: the difference in treatment of couples based on their economic situation. The possibility of using this technique outside Italy implies that only couples with sufficient economic means to travel abroad can exercise their fundamental right to have a family with children. For these reasons, the Constitutional Court declared the unconstitutionality of the provisions of law no. 40/2004 prohibiting heterologous ART.

Corte Costituzionale, ruling dated 10.06.14, No. 162,
www.cortecostituzionale.it

IA/34030-A

[BITTOGI]

**** Briefs (Italy)***

By its judgment of 4 February 2014, the Court of cassation ruled on the grounds that legitimise the introduction of an appeal relating to a judgement of the Council of State. According to Article 111, paragraph 8, of the Constitution, this appeal is admissible only for reasons of lack of jurisdiction.

In this regard, the Court emphasised that the violation of EU law by the incorrect interpretation or application of its provisions by a judicial body of final instance, as the Council of State, does not constitute grounds justifying the introduction of an appeal.

In particular, the rejection by the Council of State, of an action based on alleged improper interpretation of the Directive 1999/70/EEC concerning the ETUC, UNICE and CEEP framework agreement on fixed-term work, of Article 11 of Law No. 11 of 15 June 1988, of the Regione Siciliana, cannot be considered a valid reason for the

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introduction of an appeal in cassation. In this case, there is no violation of the external limits of the jurisdiction.

While, on the one hand, this rejection constitutes a violation of judicial protection, on the other hand, it cannot characterise an abuse of power that can be tried by the Court of Cassation, since this violation does not transform into a misuse of authority simply because the EU law is affected. Therefore, this violation may only be considered as an error in judicando.

Corte di Cassazione, Sezioni unite civili, ruling dated 04.02.14, n. 2403,
www.cortedicassazione.it/Notizie/GiurisprudenzaCivile/SezioniUnite/SchedaNews.asp?ID=3345

IA/34020-A

[CAGNOFR] [GLA]

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In this judgment, the Court of Cassation ruled, ultimately, on a matter relating to law no. 157/99, which excludes the liability of administrators of political parties for obligations incurred in connection with activities of the party.

The secretaries of political parties had signed with the Banca di Roma current account credit facility contracts, without however, fulfilling the pecuniary obligations there under. In order to obtain payment for these obligations, the Banca di Roma submitted an action against the party secretaries to the judicial bodies. It had won the case at first instance, but had lost before the Court of Appeal, which had retained a broader interpretation of law no. 157/1999. The Banca di Roma had then lodged an appeal with a request for a preliminary ruling before the Court of Justice for a ruling on the compatibility of this law with the Union law in matters of State aid.

After reiterating the extent and limits of the obligation of preliminary ruling before the Court of Justice, the Court of cassation held that in the present case, it was not required to refer to the Court, the question raised by the applicant being unfounded in its opinion.

Turning to the concept of undertaking in Article 107 of the TFEU, the Court of cassation considers two aspects. First, it recalls that the concept of undertaking within the meaning of EU law is interpreted broadly. Secondly, however, it considers that a political party cannot correspond to this notion.

Court of Cassation, ruling dated 01.04.14, n° 17812/2010,
www.cortedicassazione.it

IA/34029-A

[BITTOGI]

Latvia

Economic and monetary policy - Monetary policy - Accession of Latvia to the Euro zone - Amendment of the Latvian constitution providing for the lats as the official currency of the country - Rejection by the Central Election Commission of a draft law that was not fully developed - Action brought against this rejection

In a judgment delivered on 28 March 2014, the Augstākās tiesas Administratīvo lietu departaments (Administrative Section of the Supreme Court) dismissed the request of the society "Par latu, prêt eiro" (for the lats, against the euro) against the Centrālā vēlēšanu komisija (Central Election Commission, hereinafter the "Commission").

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The applicant sought the annulment of a decision of the Commission by which a draft law "Amendments to the Constitution", which envisaged to include in the Constitution the following phrase: "The lats is the official currency of Latvia", had been refused. More specifically, the Commission had refused to register the draft law on the grounds that it had not been fully developed.

The applicant contested the arguments raised by the defendant, including the argument that the project was contrary to the international obligations of Latvia, in particular, the Treaty of Accession of Latvia to the European Union which provided for the introduction of the Euro. According to the applicant, the government and the Latvian parliament had the right to initiate the necessary amendments to the treaties to comply with the will of the people.

The administrative section of the Supreme Court considered that the Commission's decision was based on the fact that the draft law did not meet the requirements of the Constitution, namely, that the draft law (including the draft amendments to the Constitution itself) should be fully developed with respect to the form and content.

It concluded that the draft law cannot be considered as fully developed since the adoption of this law would create contradictions between the Latvian legal system and its international obligations. However, the Treaty of Accession of Latvia to the European Union provides for an obligation to be part of the Economic and Monetary Union once the convergence criteria are met, which includes the introduction of the euro as the official currency.

In this regard, the national court concluded that Latvia had fulfilled the convergence criteria at the beginning of 2013 and, therefore, the country should introduce the euro as the official currency of Latvia.

Augstākās tiesas Administratīvo lietu departaments, ruling dated 28.03.14, SA-3/2014,
www.at.gov.lv

IA/33922-A

[BORKOMA]

**** Briefs (Lithuania)***

In its judgment of 18 March 2014, the Constitutional Court ruled on the conformity with the Constitution of Article 99 of the Criminal Code covering the concept of genocide. Under this provision, a crime is qualified as genocide if it has been committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious, social or political group.

Firstly, the Lithuanian high court declared that the international law, which must be complied with under Article 135 of the Constitution, does not include social and political groups in the concept of "genocide."

The Constitutional Court concluded that the States, taking account of their historical, political, social and cultural context, have certain discretionary power allowing them to incorporate in their respective national law a broader definition of the concept of genocide than that provided by the rules of international law.

Subsequently, the Lithuanian high court described the former totalitarian communist regime as being part of the specific historical and legal context of the Lithuanian State. It considered that the primary means used under this regime to destroy the foundation of the Lithuanian nation was the repression against the civil population, especially the more active social and political groups.

Thus, it held that the notion of social and

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political group could legitimately be included in the concept of genocide.

Lietuvos Respublikos Konstitucinis Teismas, ruling dated 18.03.14, no. KT11-N4/2014, www.lrkt.lt

IA/33913-A

[URMONIR]

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The Supreme Administrative Court of Lithuania, in its judgment of 24 April 2014, issued a decision regarding the conditions required under national law for a person to be a candidate in the elections to the European Parliament.

The main proceedings concerned the refusal of the election commission to register the applicant as a candidate in the elections to the European Parliament on the grounds that he had not submitted the 10000 signatures supporting a candidate list, provided for by national law.

The applicant argued that the principle of universal and equal suffrage under the Union law, especially Articles 20 and 22 of the TFEU and decision 76/787/ECSC, EEC, Euratom, had not been respected.
It considered that the right to stand for election was much more limited for Lithuanian citizens and citizens of other member States for which such a requirement of signatures did not exist.

The Lithuanian high court first observed that the EU law provides only the provisions and fundamental principles governing elections to the European Parliament. It then stressed that the determination of the persons entitled to vote and stand in elections to the European Parliament fell within the jurisdiction of each Member State (see Spain/United Kingdom, C-145/04, EU:C:2006:543).

According to the Supreme Administrative Court, the special conditions required by the Member States for the registration of candidates running in the elections could not be automatically interpreted as a violation of universal and equal suffrage. Therefore, it concluded that the requirement of signatures could be considered justified because of the need to ensure good practices in electoral matters.

Lietuvos Vyriausiasis Administracinis Teismas, ruling dated 24.04.14, n° R-143-13/2014, www.lvat.lt

IA/33914-A

[URMONIR]

Netherlands

Reconciliation of laws - Copyright and related rights - Directive 2001/29/EC - Harmonisation of certain aspects of copyright and related rights in the information society - Reproduction right - Private copying exception - Fair compensation - Exclusion of certain media for reproduction of works protected from the private copying levy - Incompatibility - Absence of coherent system of compensation

In its judgment of 7 March 2014, the Dutch Supreme Court ruled that the exclusion by the Dutch government of MP3 players and digital video recorders, from the fee charged to manufacturers or importers of materials intended for reproduction of literary, scientific or artistic works carried out for private use (hereinafter the 'private copying levy') was contrary to Directive 2001/29/EC on the harmonisation of certain aspects of the copyright and related rights in the information society.

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The Netherlands availed itself of the option, given by Article 5, paragraph 2 b) of the aforementioned Directive to provide for an exception to the exclusive reproduction right of the author to his work when it involves reproductions on any medium by an individual for private use and for purposes that are neither directly nor indirectly commercial. However, it was decided to exclude certain media intended for the reproduction of works protected from the private copying levy, given that these media were already subject to other charges.

In first instance, the court of 's-Gravenhage dismissed the request of the organisation for collective management of copyrights in question to note that the aforementioned exclusion was an illegality committed by the Dutch government constituting a fault likely to engage the responsibility of the said government. However, on appeal, it was granted the above request, which was confirmed subsequently by the Supreme Court.

Referring to the Stichting de Thuiskopie judgement (C-462/09, EU:C:2011:397), Padawan judgement (C-467/08, EU:C:2010:620) and Amazon judgement (C-521/11, EU C: 2013: 515), the Supreme Court held that a Member State is, insofar as it admits the reproduction for private use under Article 5, paragraph 2 b) of Directive 2001/29/EC, obligated to ensure that the holders of the rights receive a fair compensation and that its recognised right to determine the form, terms of funding and receipt, and the level of that fair compensation is not unlimited.

The Supreme Court rejected the plea of the Dutch government according to which the exclusion of MP3 readers and digital video r ecorders from the private copying levy is justified because these media are already subject to other charges. However, the Supreme Court upheld the judgment of the Court of Appeal according to which a Member State is obligated to develop a coherent system of fair compensation, which was not the case here.

Hoge Raad, ruling dated 07.03.14, 12/03239, www.rechtspraak.nl, ECLI:NL:HR:2014:523

IA/33721-A

[SJN] [FEENSMA]

Poland

Reconciliation of laws - Telecommunications sector - Networks and electronic communications services - Authorisation - Directive 2002/20/EC - Monitoring of electronic communications services - Financial penalty - Preliminary ruling request - Refusal - Need for the appellate court to present arguments concerning the interpretation of provisions of the directive in other Member States - Absence

In February 2009, the Prezes Urzędu Komunikacji Elektronicznej, the national regulatory authority within the meaning of Directive 2002/20/EC on the authorisation of electronic communications networks and services ("authorisation" directive), imposed a financial penalty on a telecommunications company for violation of the conditions for access to networks. These conditions were set by the contract stipulating the connection of that company's network with the network of another operator, as amended by the decisions of that authority.

Following the appeal of the company, the decision was overruled by the Regional Court whose judgment was subsequently upheld by the Court of Appeal.

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Both these courts held that the national regulatory authority concluded to the existence of these violations following an inspection. Therefore, after this inspection and before imposing the penalty, under the national law transposing the "authorization" directive, the authority should have delivered a judgement to inform the company of any breaches determined during the inspection and setting for it a deadline to present its explanations or to remedy these irregularities.

To the extent that the national regulatory authority did not issue such a judgement that would give the company an option of presenting its explanations, the imposition of the penalty in question was premature. In this regard, the courts relied, inter alia, on the judgments of the Supreme Court of 21 September 2010 (III SK 8/10) and 7 July 2011 (III SK 52/10).

However, in this case, the regulatory authority requested the Regional Court and then the Court of Appeal to address a request for preliminary ruling to the Court of Justice concerning the interpretation of Article 10, paragraphs 2 and 3 of the "authorization" directive. It argued that the violation of the contract terms had been detected before the inspection and that it was carried out only remotely and only to verify the existence of the violation and punish it. In addition, before the inspection, the authority informed the company of the initiation of the procedure concerning the violation. Therefore, according to the authority, following this inspection, it was not forced to deliver an order informing the company of the breaches and determining the time for explanations or to remedy these breaches.

In its appeal against the judgment of the Court of Appeal, the national regulatory authority argued that the latter court had rejected the preliminary ruling request by relying on the interpretation of the provisions of the directive by the Supreme Court without having assessed if they were interpreted in a uniform manner in other Member States and without having analysed the case law of the Court of Justice.

In response to this argument, the Supreme Court held that it is up to the party challenging the refusal of preliminary rulings by the trial court to present any arguments concerning the interpretation of the provisions of the Directive in other Member States. If this party not present such arguments, the appellate court is not obligated to examine the interpretation of the Directive in other Member States to judge whether the lower court rightly refused the request for preliminary ruling.

In addition, the Supreme Court, by relying on its judgment of 14 February 2012 (III SK 24/11), explained that article 10 of the "authorization" directive, in its original version applicable in this case (before the amendment by the Directive 2009/140/EC) did not provide for the option of imposing, under paragraph 3, a penalty for violations mentioned in paragraph 2, without first following the procedure laid down in that paragraph, namely, without informing the company of the violations noted and giving it a reasonable opportunity to express its views or remedy these violations in an adequate time period. The Supreme Court thus dismissed the appeal.

Sąd Najwyższy, order of 05.02.14, II SK 39/13, www.sn.pl/Sites/orzecznictwo/Orzeczenia2/II%20SK%2039-13.pdf

IA/33929-A

[BOZEKKA]

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Portugal

Adoption by couples comprising same-sex partners - Referendum proposal - Criteria provided for in the Portuguese Constitution for the execution of a referendum - Violation

In its judgment no. 176/2014 of 19 February 2014, the Constitutional Court had to rule on the constitutionality and legality of the referendum proposal approved by resolution no. 6-A/2014 of the Parliament, of 20 January 2014, on adoption by couples comprising same-sex partners.

This resolution of the Parliament proposed the execution of a referendum in which citizens who are registered voters in the country were asked to vote on the following issues:
"1 - Do you agree that the same-sex spouse or partner can adopt the child of his spouse or partner?
2 - Do you agree with the adoption by married couples or unmarried partners of the same sex?"

Hearing an appeal relating to the constitutionality and legality of the said proposal, by the President of the Republic, the Constitutional court, sitting in plenary session, ruled that while the proposal in question was timely and has a large national interest, it did not meet the requirements of thematic homogeneity of the matter that is the subject of a referendum and did not allow the participation of voter citizens residing abroad, in accordance with the criteria laid down in the Constitution. On the basis of these considerations, it declared the resolution as unconstitutional.

Reiterating that, according to Article 115, paragraph 6, of the Portuguese Constitution, every referendum must involve a single thematic object, the Constitutional Court ruled that the two questions were conceptually distinct, in that they required the voter to decide on two different situations, namely the individual adoption by a spouse (or partner) of the child of his spouse (or partner) of the same sex and the joint adoption of a child by unmarried spouses or partners of the same sex. Therefore, in the first case, there is already a parental relationship between the child and one of the parents, while in the second, it involves the creation of a family ex novo.

In the context of this overall assessment of the two questions, the voter may, however, not realise that each of the adoption situations weighs different values and interests. In the first case, it is necessary to determine whether the best interests of the child are duly protected as part of a blended family where the child has a relationship with a member of the family but where the effectiveness of interpersonal relationships must be assessed to confirm whether the adoption is the best way to protect the best interests of the child. In the case of joint adoption, however, the balancing of the interests involved is different, since the child has no emotional relationship with the spouse or partner and other interests must be taken into account, such as the interests of the same-sex couples of being able to adopt and, in relation to the child, the interest of being adopted by a family that provides him healthy development. However, given the fact that the adoption institute intends to "give a family to a child and not a child to a family" (ECtHR, Fretté / France judgment of 26 February 2002, Application No. 36515/97), the Constitutional Court ruled that the ambiguity generated by the formulation of the two conceptually different questions was likely to cause confusion in the minds of citizens and that, consequently, they may not realise the different interests to be balanced.

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Moreover, in case the voter would respond negatively to the first question and in the affirmative to the other, the legislator could be in a situation where it would be forced to allow adoption to only some same-sex couples.

As regards the argument that the Parliament's resolution did not allow the participation of citizen voters living abroad, the Constitutional Court reiterated that it is up to the court to determine, case by case, to what extent the thematic subject of a referendum specifically concerns the Portuguese citizens living abroad who maintain a real connection with the national community. It held that the disputed referendum concerned Portuguese living abroad, particularly assuming that they might be interested in adopting children residing in Portugal.

Constitutional Court, ruling dated 19.02.14, n° 176/2014 available on: www.tribunalconstitucional.pt/tc/acordaos/20140176.html

IA/33932-A

[MHC]

Czech Republic

Consumer protection - Unfair terms in consumer contracts - Directive 93/13/EEC - Transposition into national law - Stricter national provisions, ensuring a higher level of protection for consumers - Unfair clause within the meaning of Article 3 of the directive - Clause conferring territorial jurisdiction - Assessment of unfairness by the court - Criteria - Respect of the adversarial principle

The divergences between the Czech lower courts concerning the application and interpretation of the Civil Code provisions on the protection of consumers against unfair terms led the collegial system of civil and commercial law (občanskoprávní a obchodní kolegium) of the Nejvyšší soud (Supreme Court) to deliver on 9 October 2013, an opinion on this subject, pertaining to the clauses conferring territorial jurisdiction. It should be noted that the collegial systems of the Nejvyšší soud are responsible for ensuring the legality and consistency of case law and that they issue, as such, opinions intended to remove inconsistencies occurring in the case law of the lower courts on specific points of law.

In the above opinion, the Nejvyšší soud assessed the transposition of Directive 93/13/EEC on unfair terms in contracts concluded with consumers in the Czech legal system and clarified the procedure to be followed by judges when they believe that a clause conferring territorial jurisdiction must be invalidated because of its unfair nature.

The Nejvyšší soud, first, found that the provisions of the Civil Code, by which the Directive 93/13/EEC was transposed into domestic law, do not use the same terms as the Czech version of the directive and do not include certain examples of unfair terms contained in the annex to the directive, such as, in this case, the terms removing or hindering the exercise of legal actions or remedies by the consumer. However, the wording of the national provisions suggests that the Czech legislator opted for greater consumer protection than that referred to by the directive, by considering as unfair all clauses establishing a significant imbalance between the consumer and a professional in breach of the principle of good faith, without any need to consider whether these clauses have been the subject of an individual negotiation or not.

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The Nejvyšší soud then reiterated that Directive 93/13/EEC cannot be applied directly in disputes between individuals, but it is nevertheless incumbent on judges to interpret national law in light of the wording and the purpose of the directive and the relevant case law of the Court. Consequently, although the provisions of the Civil Code do not cite clauses impeding the exercise of legal actions in the indicative list of unfair terms, a clause conferring jurisdiction on a court located far from the consumer's domicile, provided that it has not been the subject of individual negotiation between the latter and the professional and that it creates to the detriment of the consumer a significant imbalance between the rights and obligations of the parties under the contract, despite the requirement of good faith, is still likely to be regarded as unfair.

Finally, it is apparent from the opinion that, if the court considers that it does not have jurisdiction to rule on the appeal that has been referred to it because of the unfair nature of the clause conferring the territorial jurisdiction, it is required to inform the parties thereof during the proceedings and request them to submit their comments. It is only when, at the expiry of the time period given to the parties, the absence of a significant imbalance between the rights and obligations of the parties has not been established (for example, where the parties do not present comments), that the court hearing the matter may note the invalidity of the clause as well as its own lack of jurisdiction and refer the case to the court having territorial jurisdiction. However, in cases where the consumer expressly denies that the clause plays against him, the latter continues to bind the parties and cannot be declared unfair by the court.

Nejvyšší soud, opinion dated 09.10.13, no. Cpjn 200/2011,
www.nsoud.cz

IA/33925-A

[KUSTEDI]

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Social security for migrant workers - Unemployment - Worker other than a wholly unemployed frontier worker having resided, during his previous employment, in the territory of a Member State other than the State of employment - Right to choose between the member State of residence and that of employment to receive benefits - Application for benefits in the member State of residence - Calculation of benefits from the previous salary - Taking into account the salary actually received - Absence - Calculation based on the normal wage or salary corresponding, in the place of residence of the unemployed person, to a job equivalent or similar to the last one pursued

The Nejvyšší správní soud (Supreme Administrative Court), in its judgment of 22 April 2014, dismissed as unfounded the appeal in cassation introduced by an applicant for unemployment allowance for residents of Czech Republic. The applicant had challenged before the administrative courts the calculation of the amount of unemployment allowance which had been granted to him by the competent national authority, by estimating that it should have calculated the amount of benefit on the basis of the net salary that he received in Austria, the State of his last employment.

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The Nejvyšší správní soud, first, found that the (EC) Regulation no. 1408/71 on the application of social security schemes to salaried and non-salaried workers and their families that move within the Community, directly applicable in the present case, distinguishes between four categories of individuals in matters of unemployment allowance: frontier workers, atypical frontier workers, migrant workers and unemployed persons going to a Member State to collect allowances. According to the Nejvyšší správní soud, the applicant fell within the category of atypical frontier workers, given that he had remained in Austria for the entire duration of his employment without making weekly visits to Czech Republic and while specifying his address in that State as his residential address. As an atypical frontier worker, he had, after the termination of his employment and pursuant to Article 71 paragraph 1 b) ii) of the aforementioned regulation, requested for unemployment allowances to the competent Czech authority and had opted for the enforcement of the regulations of that State. However, the expression contained in that provision according to which a worker "shall receive benefits in accordance with the laws of that State, if he was employed there previously" does not require the competent institutions to calculate benefits by taking into account the net wage actually received by the applicant in the member State of employment. The Supreme Administrative Court held that the competent authority had rightly applied Article 68, paragraph 1, second sentence, of that regulation, and determined the amount of the allowance based on the average net salary corresponding, in the applicant's area of residence in the Czech Republic, to a job equivalent to the one he had held in Austria.

Nejvyšší správní soud, ruling dated 22.04.14,
6 Ads 86/2013-23,

www.nssoud.cz

IA/33926-A

[KUSTEDI]

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International agreements - Agreements of the Union - Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) - Effects - Interpretation of national law in the light of the Convention - Persons entitled to appeal to the courts to challenge the legality of an urban development plan - Sole individuals who are holders of rights to property in the area affected by such a plan - Violation of the right of associations to a fair trial

In its judgment of 30 May 2014, the Ústavní soud (Constitutional Court) annulled a judgment of the Nejvyšší správní soud (Supreme Administrative Court) on public participation in decision-making in matters of environment and urban planning.

In the judgment, the Nejvyšší správní soud rejected the appeal in cassation lodged by an association of citizens from communes located in the territory of a nature park against an urban development plan adopted by one of those communes on the grounds that the associations are not entitled, under Czech law, to the right to bring an action for annulment against such plans. Given the particular legal form of these plans, falling under special administrative acts, referred to as general measures (opatření obecné povahy) and not administrative decisions, the Nejvyšší správní soud held that only individuals, as holders of material

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rights may take legal action against an urban development plan, provided they justify that violates their rights to property in the area covered by the plan or in the vicinity of such an area. According to the administrative court, the Czech law limits the participation of associations working for the protection of the environment, like the applicant, to administrative procedures and legal procedures for annulment of administrative decisions.
Furthermore, the right of these associations to take legal action against urban development plans would result neither from Union law (particularly directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment or directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment) nor from the Aarhus Convention.

The Ústavní soud, hearing the matter submitted by the association, noted, in turn, that the national provisions must be interpreted, to the extent possible, in the light of the Aarhus Convention, which is also part of Union law, even if the provisions thereof (in particular Article 9, paragraph 2) do not have direct effect. The Constitutional Court noted that the law allows any person alleging violation of his rights by a general measure to challenge such a measure before the courts. However, in the light of this principle, the strict interpretation adopted by the administrative court, categorically denying associations the right to challenge the legality of urban development plans, cannot be permitted. Contrary to what had been ruled by the Nejvyšší správní soud, the status of a legal person or the purpose of the activity of the association does not affect the right to exercise an appeal. Moreover, it would be unusual to accept that individuals may allege a violation of their rights, while associations comprising these same persons and collectively defending the same rights, would not have this option.

The Constitutional Court has, in this regard, added that the right of associations to institute proceedings must be assessed by taking into account the relation of the association concerned with the area covered by the plan.

The Ústavní soud finally noted that the associations are an important democratic element in a civic society and that they must benefit, as such, from effective judicial protection. This is also the extent to which Article 9, paragraph 2, of the Aarhus Convention must be interpreted in the Czech legal system.
In view of the above, the Ústavní soud concluded that the assessment made by the Nejvyšší správní soud in the judgment had violated the fundamental right of the applicant to a fair trial.

Ústavní soud, ruling dated 30.05.14, I.ÚS 59/14 http://nalus.usoud.cz

IA/33927-A

[KUSTEDI]

United Kingdom

Criminal law - Conviction to a term of discretionary life imprisonment without possibility of parole ("whole life order") - Article 3 of the ECHR - Prohibition of torture - Application of the Vinter case of the ECtHR

In a case concerning the compatibility, with regard to Article 3, of the criminal justice system governing the determination of a sentence of discretionary life imprisonment without possibility of parole, also referred to as whole life order, the Court of Appeal ruled, in contrast to the ECtHR, that such sentences are allowed.

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In the Vinter/United Kingdom case (judgment of 9 July 2013, application nos. 66069/09, 130/10 and 3896/10), the Grand Chamber of the ECtHR distinguished sentencing a whole life order from reviewing such a sentence at a later stage in order to ensure that it remains justified by legitimate penological reasons of order. As regards the review mechanism that must be effective from the sentencing of whole life order, the said Court ruled that the law of England and Wales governing the options of release for prisoners is unclear and does not constitute an appropriate and adequate legal path. It concluded that the sentences referred to as "whole life orders" could not be described as compressible and were, therefore, contrary to Article 3 of the ECHR, which provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment.

In the present case, the Court of Appeal held that the ECtHR erred is assessing the review mechanism on the basis of an exhaustive list of conditions imposed by an order of the prison administration; these were conditions that the ECtHR found to be extremely restrictive. Contrary to that court, the Court of Appeal held that the wording of the legislation governing the review mechanism, including the term "exceptional circumstances" is sufficiently clear to give the prisoner a small possibility of release. Furthermore, the Court of Appeal also specified that the conditions imposed by the order of the prison administration cannot interfere with the discretionary power of the Minister in matters of release of prisoners and that the said power must be exercised in a manner consistent with the ECHR, as required by the law of the United Kingdom under the law on human rights.

In conclusion, the Court of Appeal held that the Vinter judgment does not prohibit the sentencing of a "whole life order" and that the lower court had misinterpreted the decision of the ECtHR in the Vinter case as prohibiting such sentencing. The Court of Appeal therefore revoked the conviction of an accused to life imprisonment with a minimum term of 40 years and ordered a "whole life order". Although this sentence is executed only in the case of heinous crimes, the Court of Appeal held that this case fulfilled such conditions as it was a second conviction for homicide and that there were aggravating circumstances.

Court of Appeal, ruling dated 18.02.14, R. v McLoughlin, [2014] EWCA Crim 188, www.bailii.org

IA/33723-A

[HANLEVI]

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Free movement of persons - Right of free movement and residence of the spouse having the nationality of a third State - Right dependent on proof of a conjugal relationship with an EU citizen working in a Member State other than that of his nationality - Law applicable to the determination of such a relationship - Insufficient evidence - Refusal of residence permit

In a case concerning the marriage by proxy of a Dutch national and a Nigerian national residing in the United Kingdom, the Upper Tribunal held that the latter cannot benefit from the right to free movement and a right of residence under Union law. While observing than many previous decisions of the courts of England and Wales have held that a host Member State may refer to its own legal system to recognize a marriage, the Upper Tribunal held that there is no legal basis in EU law to support such decisions.

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Unlike previous decisions, the Upper Tribunal held that, in a situation where the conjugal relationship is disputed, the existence of such a relationship must be examined in the light of the right of the Member State of nationality of the EU citizen from which the spouse derives his/her right, in this case the Netherlands. In support of its decision, the Upper Tribunal invoked the principle which emerges from the Jia judgment, (C-1/05, EU:C:2007:1), which prohibits a Member State from referring to its own legal system to determine whether a person has the status of family member. Moreover, the Upper Tribunal highlights the fact that there is no official definition of the concept of "spouse", which is common to all Member States and that in the event that the host Member State determines if a marriage was entered into or not, it might be easier for an EU citizen move to a Member State rather than any other citizen in accordance with its propensity to recognise the marriage.

As for the evidence required to establish a conjugal relationship, the Upper Tribunal held that in the absence of independent and reliable evidence concerning the recognition of the marriage under the law of the State where the marriage took place, it would be hard to rule that such evidence has been provided. Moreover, the mere production of legislative texts of the State in question is not sufficient as evidence, since they do not determine how the law is interpreted or applied in these countries.

Although the Upper Tribunal found that the evidence provided in this case as regards the Dutch law does not help definitely establish the status of a marriage by proxy in the Netherlands, it carried out an in-depth inspection of all documents submitted.

In conclusion, the case was decided on the basis that the marriage in this case would be recognised neither under Dutch law, in the absence of recognition under Nigerian law, nor, for all purposes, under law of the United Kingdom.

Upper Tribunal (Immigration and Asylum Chamber), ruling dated 16.01.14, Kareem v Secretary of State for the Home Department, [2014] UKUT 00024 (IAC), *https://tribunalsdecisions.service.gov.uk/utiac*

IA/ 33724-A

[HANLEVI]

**** Brief (United Kingdom)***

Public international law - Determination of the legal system applicable to damage resulting from a traffic accident - Application of the law of another Member State

In a case concerning an action for damages following the death of a national of the United Kingdom in a road accident that took place in Germany through the fault of a German driver living in Germany, the Supreme Court held that, in this case, it had to apply the rules of the German legal system concerning the calculation of damages.

Under (EC) Regulation no. 44/2001 relating to the jurisdiction, recognition and enforcement of judgments in civil and commercial matters, the widow of the deceased had the option of lodging a complaint against the German insurer before the courts of England, her country of residence. The amount of damages due under the German regulations proved significantly higher than those granted under the regulations for fatal accidents in the United Kingdom.

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(EC) Regulation No. 864/2007 on the law applicable to the non-contractual obligations (hereinafter the "Rome II Regulation") provides that the widow receives the amount that she would have received before a German court. However, given that the accident took place before the entry into force of the Rome II Regulation, the Supreme Court had to conduct a thorough review of the rules of the international private law applicable in the United Kingdom.

These rules distinguish between procedural issues, such as recoverability, which are subject to the law of the forum (UK law) and material issues, such as assessment, which are governed by *lex causea* (German law). The case was decided on the basis that the widow was entitled to damages under a German substantive law, and thus, the Supreme Court held that such a classification of the laws of the United Kingdom had, in the present case, no impact.

Supreme Court, ruling dated 02.04.14, Cox v Ergo Versicherung AG (formerly known as Victoria), [2014] UKSC 22, www.supremecourt.gov.uk

IA/ 33725-A

[HANLEVI]

Slovakia

Reconciliation of laws - Retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks - Directive 2006/24/EC - Obligation for providers to retain certain data for the purpose of any communication to the national authorities - Case concerning compliance from certain national provisions transposing the Directive with the Constitution - Decision of a national court provisionally suspending the effects of these provisions

Following the judgment of the Court of Justice of 8 April 2014, Digital Rights Ireland (C-293/12 and C-594/12, EU:C:2014:238), declaring invalid the Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of electronic communications services available to the public or of public communications networks, the Constitutional Court suspended, by order, the effects of Article 58, paragraphs 5-7, and Article 63, paragraph 6 of law no. 351/2011 on electronic communications, by which the Directive had been transposed into national law.

In particular, this involves provisions for an obligation for providers of electronic communications services or a public communications network to retain data generated or processed by them for a specific period. Similarly, the provisions governing the transmission of data to the competent bodies to rule on criminal cases as well as to authorities operating in the field of State security are also included.

This preliminary decision was adopted as part of an ongoing procedure where the Constitutional Court was called to assess the conformity of the aforementioned provisions, as well as that of other national measures stipulating the provision of such data to competent bodies, with the Constitution, the ECHR and the Charter.

The procedure was initiated by a group of parliamentarians, who argued that the provisions in question are probably contrary to the freedom of expression and the rights to privacy, respect for family life, secrecy of correspondence and communications, and the protection of personal data.

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Being provisional in nature, the suspension will be valid until the decision on the merits is delivered. As regards the legal consequences, although still formally in force, the provisions concerned are without effect, which means that they cannot be applied.

In the event that the Constitutional Court would declare as non-compliant, by a judgment on the merits, the provisions concerned with regard to the Constitution, the ECHR or the Charter, these provisions shall cease to have effect and the body that applied them will be required to remedy the lack of conformity within six months from the date of delivery of the judgement. Otherwise, the provisions become invalid *ex constitutione* at the end of the specified period.

Ústavný súd, order of 23.04.14, PL. ÚS 10/2014, www://portal.concourt.sk/plugins/servlet/get/attachment/main/ts_data/Tl_info_30_14_dan_el_kom.pdf

IA/33933-A

[MAGDOVA]

Slovenia

Border, asylum and immigration controls - Asylum policy - Obligation for national courts to take account of a judgment of the Court of Justice - Absence - Violation of the requirement of adequate reasons

In a decision of 23 January 2014, the Constitutional Court cited Article 22 of the Constitution (requirement of adequate reasons) to cancel a decision of the Supreme Court concerning the application of the Elgafaji judgement (C-465/07, EU:C:2009:94).

The Constitutional Court overturned the judgment of the Supreme Court as it upheld, on the basis of a report of the Danish immigration department, the repatriation of the applicant on the ground that Kabul was one of the few cities in Afghanistan where the situation was relatively stable despite the incidents that were taking place there every day.

In addition, the Supreme Court had noted that "the applicant did not prove that the threats concern him individually, indicating that, by the repatriation, he would not be subject to an indiscriminate violation". According to the Constitutional Court, this was a case of incorrect application of the Elgafaji ruling.

In that judgment, the Court of Justice interpreted the concept of "serious damage" contained in Article 15, c) of Directive 2004/83/EC, concerning the minimum standards for conditions that must be met by nationals of third countries or stateless persons to be able to claim the status of refugees or by the persons who, for other reasons, require international protection.

It held that the existence of serious and individual threats against the life or person of the applicant requesting subsidiary protection is not subject to the condition that he prove that he is specifically targeted for reasons specific to his personal circumstances. The existence of such threats can exceptionally be considered to be established when the degree of indiscriminate violence characterising the ongoing armed conflict, assessed by the competent national authorities accepting a request for subsidiary protection or by the courts of a Member State to which a decision of rejection of such a request is referred, reaches a level so high that there are substantial and proven grounds for believing that a civilian who has returned to the country concerned or, where appropriate, to the region concerned, would run, solely

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because of his presence in the territory of the latter, a real risk of being subject to the said threats. The Constitutional Court highlights that it is clear from that judgment that, in this case, the Supreme Court should have examined whether the situation in Kabul characterising the ongoing armed conflict constitutes "indiscriminate violence" reaching such a high level that there would be substantial grounds for believing that the repatriation of the applicant to Kabul would present a real risk of "serious and individual threat". In this respect, having failed to check whether the threats involved the applicant individually and if the existence of "indiscriminate violation" was to such a degree that the applicant by his mere presence in Kabul could suffer "serious damage", the Supreme Court committed a violation of Article 22 of the Constitution.

According to the Constitutional Court, in accordance with Article 22 of the Constitution, the judicial decisions must be appropriately substantiated so that it can monitor compliance with the Constitution. As part of that monitoring, it is for the Constitutional Court to assess, among other things, whether the national court has taken into account the relevant decisions of the Court of Justice. When the Constitutional Court considers that there are no strong reasons or the reasons are inadequate, it must find a violation of that article and annul the decision concerned.

However, in the present case, it is clear from the judgment of the Supreme Court that the applicant's allegations that his repatriation to Kabul was not safe enough because of the attacks that occur regularly in this city and causing a high number of civilian casualties have not been the subject of a review in the light of the Elgafaji ruling.

Under these conditions, by considering that the Supreme Court infringed the Elgafaji judgment, the Constitutional Court annulled the impugned judgement and referred the case to the Supreme Court for reconsideration.

Ustavno sodišče Republike Slovenije, decision of 23.01.14, Up 150/13-21, www.us-rs.si/

IA/33928-A

[SAS]

2. Third country

United States

Supreme Court of the United States - Principle of equality - Admission to State universities - Prohibition of preferences based on race - Violation - Absence

In its decision of 22 April 2014, the Supreme Court of United States evaluated proposal No. 2, now Article I of paragraph 26 of the Constitution of the State of Michigan, which prohibited the use of preferences based on race in the admission process for State universities in the light of the principle of equality contained in the Fourteenth Amendment of the US Constitution.

This proposal was adopted after the Supreme Court had decided in the Gratz / Bollinger case (539 US 244 (2003)) that the use of preferences based on race in the admissions programme at the undergraduate level, by the University of Michigan, violated the principle of equality. However, there was no violation in the case of limited use of an admission plan for the law school (Grutter / Bollinger case, 539 US 306 (2003)).

The majority of the judges of the Supreme Court held that the present case does not pertain to the question of how to treat or

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prevent damage caused by race but rather the question of whether voters can determine if a policy of preference based on race must continue or not.

According to the majority, there is no basis in the United States Constitution or in the case law to dismiss proposal No. 2. Although the Constitution protects individual freedom that includes the right of an individual not to suffer damage due to the illegal exercise of government power, it also includes the right of citizens to act through a legitimate electoral process, which the voters of Michigan did.

In their dissenting opinion, Ginsburg and Sotomayor the judges defended the principle that the majority cannot remove the right of the minority to participate on an equal footing in the political process. Under this principle, the government action deprives the minority groups of protection when it "(1) has a racial focus, targeting a policy or a programme that 'is primarily intended for the benefit of the minority' [and] (2) changes the political process such that the pressures weigh uniquely on the capacity of racial minorities to achieve their goals through this process". According to the judges, a faithful application of the aforementioned principle required to rule in favour of cancellation of the proposal in question.

U.S. Supreme Court, Schuette, Attorney General of Michigan v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (BAMN) et al., *Opinion of the Court of 22.04 14, 572 U.S.,* www.supremecourt.gov/

IA/34026-A

[GRGICAN]

**** Briefs (United States)***

In its decision of 4 March 2014, Lawson et al. v. FMR LLC et al, the Supreme Court of the United States considered that the provision of the Sarbanes-Oxley Act of 2002 (18 U.S.C. §1514A (a)), which provides that no public company or any contractor or subcontractor of a company may dismiss, demote, suspend, threaten, harass or discriminate against an employee because of the whistleblowing measures adopted by him against illegal activities, is applicable to the employees of private companies working with public companies and their subcontractors.

This law was passed to restore and preserve investor confidence and financial markets following the collapse of Enron.

In this case, the applicants were former employees of FMR, a private company that advises or manages mutual funds which are public companies without any employee. The applicants claimed to have disclosed the fraud concerning mutual funds and have experienced reprisals from FMR. However, FMR argued that the Act protects only employees of public companies and not employees of private companies that work with public companies.

According to the Court, FMR's interpretation would restrict the protection of employees against reprisals of contractors to the point of depriving the Sarbanes-Oxley Act of its effectiveness. The Court held that its interpretation of that law corresponds to the objective of preventing another debacle like that of Enron. The fear of reprisals was the first reason why the employees of the co-contractors of Enron were discouraged from disclosing the difficulties of Enron. Given that the particular feature of almost all mutual funds is not to have employees

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and be managed by independent investment advisers, the interpretation proposed by FMR leads to exclude all companies managing mutual funds from the scope of the provision § 1514A (a)) of the Sarbanes-Oxley Act.

U.S. Supreme Court, Lawson et al. v. FMR LLC et al.*, Opinion of the Court of 04.03.14, 571 U.S.,*

www.supremecourt.gov/

IA/34028-A

[GRGICAN]

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In its decision of 5 May 2014, Town of Greece, New York v. Galloway et al., the Supreme Court of the United States assessed the practice by which, since 1999, the town of Greece (New York) during monthly meetings of the municipal administration council, begins by way of a roll call, the recitation of the oath of allegiance and a prayer by a local clergyman. Although the prayer programme is open to all faiths, most of the local congregation is Christian.

The defendants, citizens who attended the meetings in question to discuss local issues, alleged that the local government had violated the clause of the First Amendment to the United States Constitution (known as the establishment clause), which prohibits the establishment of a national religion by Congress. According to the defendants, the violation had been committed in that the practice at issue would favour Christians over other faiths and would result in a sponsorship of sectarian prayers. These citizens argued that the local government should limit the programme to "inclusive and ecumenical" prayers referring only to a "generic God".
The Supreme Court upheld the practice of the town, indicating that this type of prayer at meetings of the municipal assemblies of a religious nature, has long been understood as consistent with the establishment clause. Moreover, most States have, in this regard, a practice similar to this one because it is a historical tradition of opening the meetings of municipal assemblies with a prayer.

According to the Court, the defendants' insistence on a non-sectarian prayer is not compatible with this tradition. By having to stand by a principle according to which the prayers must be non-sectarian, the bodies that organise these prayers and the courts that decide on these issues would be forced to act as censors of the religious discourse. Furthermore, it is inevitably questionable that a consensus can be reached as to the qualification of a prayer as generic or sectarian.

Although the Court recognised that there are constraints to be respected regarding the content of such prayers, it said that as long as the city maintained a policy of non-discrimination, the Constitution was not violated.

U.S. Supreme Court, Town of Greece, New York v. Galloway et al.*, Opinion of the Court of 05.05.14, 572 U.S., www.supremecourt.gov/,*

IA/34027-A

[GRGICAN]

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B. Practice of international organisations

United Nations Organisation

Environment - Preservation of whales - International convention for the regulation of whaling - Japanese hunting programme - Jurisdiction of the International Court of Justice - Declarations under article 36, paragraph 2, of the Statute of the Court - Interpretation - Article VIII of the Convention - Hunting for scientific research - Concept

On 31 March 2014, the International Court of Justice delivered a judgment in the Australia / Japan case regarding the legality of whaling in Antarctica carried out by Japan. Japan having pursued a hunting programme as part of the second phase of the Japanese programme for scientific research on whales in Antarctica under a special permit (hereinafter "JARPA II"), Australia introduced an application claiming that the programme violated the International convention for the regulation of whaling. New Zealand intervened in support of this application.

First, the Court noted its jurisdiction to hear the dispute. Australia indicated that the parties had recognised its mandatory jurisdiction by declarations under Article 36, paragraph 2, of the statute of the Court. Japan, however, invoked a reservation in the Australian declaration, according to which the disputes arising from the use of maritime zones that are the subject of disputes regarding their boundaries are not within this jurisdiction. It noted that, while Australia believed that the maritime zones in question are part of its area exclusive economic zone, it considered them as part of the high seas. According to Japan, the dispute, therefore fell within the scope of this reservation.

The Court reiterated that, by interpreting a declaration of acceptance of its mandatory jurisdiction, it must consider the intention of the State who filed it. According to it, the intention of Australia, by drafting this reservation, was that one had to, on a preliminary basis, note the existence of a dispute concerning the maritime delimitation between the States at issue to trigger it. The fact that Japan challenges the Australian claims in respect of certain maritime areas, without itself raising claims to them, does not give rise to a dispute over its boundary. The exception of lack of jurisdiction was, therefore, rejected.

On the merits of the dispute, Japan argued that the permits issued under the JARPA II, under which it authorised the killing, capture and processing of whales, were "for purposes of scientific research", in accordance with the exception to the prohibition of whaling under the terms of Article VIII of the Convention. The Court noted that this exception must be interpreted in the light of the objectives of the Convention and that its applicability does not just depend on the interpretation of the State concerned. While it did not consider it necessary to establish a general definition of the concept of "scientific research", the Court stated that the activities in question must be conducted "in view" of this research, and that the design and implementation of the programme must be reasonable with regard to the research objectives declared. The existence of reasons beyond the research does not prohibit from concluding that the programme has a scientific purpose, provided that the announced research objectives in themselves are sufficient to justify it.

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Applying these considerations to the JARPA II, the Court concluded that, although lethal research methods were not, as such, unreasonable, the sample sizes provided were, however, excessive with regard to the research objectives. The permits, therefore, were not issued "in view of scientific research" under the Convention and the Court thus ordered Japan to suspend them and to refrain from granting any new similar permit.

International Court of Justice, Whaling in the Antarctic (Australia / Japan; New Zealand intervening), 31.03.14, www.icj-cij.org

IA/34024-A

[TCR]

C. National legislations

1. Member states

**** Brief (Belgium)***

The law of 8 May 2014, which modifies the rules of transmission of the name to the child or the adopted child, came into force on 1 June this year. Generally, the parents can now give their children the father's name, the mother's name or a combination of both names in the order they want. The same choice is available to adopters in respect of the adopted child.

These rules are in principle applicable only to couples whose children were born or adopted after 1 June 2014. However, in the case of minor children born or adopted before that date, it will be possible to request a Belgian regional administration for renaming children so that the change is made in accordance with the new law.

This law is in line with the case law of the Court (see Garcia Avello ruling, C-148/02, EU:C:2003:539).

Law of 08.05.14 amending the Civil Code to establish equality between men and women in the mode of transmission of the name to the child and the adopted child, MB, 26.05.14, www.ejustice.just.fgov.be/loi/loi.htm

[NICOLLO]

**** Brief (Greece)***

With the objective of supporting banks facing financial crisis and reduction in speculative risks by increasing surveillance, law no. 4261 of 5 May 2014 transposed into Greek law the Directive 2013/36/EU relating to access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

The said directive, read in conjunction with (EU) enforcement regulation no. 575/2013, represents a new set of reform measures that constitute the broadest European regulation so far in the banking sector and that implements, at the European level, prudential rules referred to as "Basel III" rules, developed by the Basel Committee on banking supervision, a global forum on banking regulation and supervision created in 1974 by the ten major industrialised countries.

In order to address the acute problems of the said sector, exposed by the financial crisis, the aforementioned national legislation regulated, among others, the strengthening of rules on governance and supervision of banks, the quantitative and qualitative consolidation of bank capital, the cash requirements associated with the management of liquidity risk in both the short and long term and the forecasting of standards to prevent the distribution of

dividends and bonuses from undermining prudence and solidarity. Moreover, monetary penalties and other administrative measures are provided to prevent offences committed by the institutions, by those who effectively control their activities and the members of their management body, under the obligations described in the present law.

Law no. 4261 of 05/05/14 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (implementing Directive 2013/36/EU), on the repeal of law no. 3601/2007 and other provisions (Official Gazette A '107 of 05/05/14), *www.et.gr/index.php/2013-01-28-14-06-23/2013-01-29-08-13-13*

[GANI]

United Kingdom

Reform of the English legal system

On 25 April 2013, an omnibus bill aimed at simplifying and modernising the English justice system had received Royal Assent.

Among the numerous changes introduced, it is worth mentioning those relating to the procedure for appointing judges, the court structure, the criminal justice system and the broadcasting of the debates.

With regard to the procedure for appointment of judges, a series of changes are planned in order to encourage diversity of representation of different social groups representing in the judiciary and, in particular, to increase the representation of women and ethnic minorities. In this respect, the law changes the composition of the judge selection boards and expands the possibility of working part time, while also providing greater flexibility of working time.
Then, as regards the court structure, all the "county courts", civil courts of first instance, of which there are currently 170, will be merged to form a single "county court". The court will have a unique identity and its own seal. Henceforth, recourses will be processed electronically centralised administrative centres and then allocated to the courts. In the same spirit, the old system of courts responsible for Family Affairs at three levels is replaced by a single "family court". Each region has a designated family center, where the competent court for the region is located. These centers are responsible for administrative processing of cases and their allocation, if necessary, to the regional centers where hearings will be held. Then, in criminal matters, a new agency to fight against crime is established. There "National Crime Agency" assumes the functions of the former Serious Organised Crime Agency, thus becoming the competent authority for monitoring the compliance of European arrest warrants issued by the other member States.

In this regard, on the surrender procedure in itself, a new ground for refusal of enforcement of an arrest warrant is also introduced by Article 50 of the Law. This provision provides a "forum bar" under which, in the case of a person sought for an offence committed in whole or in part on national territory, a court may refuse to enforce the arrest warrant if it considers that the interests of justice require that the case be heard by a court in the UK. This ground for refusal also applies to extradition requests from third countries.

Finally, Article 32 of the law allows, under certain conditions, broadcasting of debates before the courts.

Crime and Courts Act 2013, *www.legislation.gov.uk*

[PE]

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Creation of two new courts in Scotland

As part of the line of approach taken by the London Parliament in 2007 (see *Reflets No. 2/2008*, p. 33-34), the Scottish Parliament voted on 11 March 2014 for a legislation to create two courts of first and second tier in civil matters to which the functions and powers of various specialised courts will be transferred. Referred to as the "First-tier Tribunal for Scotland" and "Upper Tribunal for Scotland", the new courts begin their work at a date to be set by the Scottish Parliament.

Tribunals (Scotland) Act 2014, www.legislation.gov.uk

[PE]

Law governing the implementation of EU law by Jersey

The bailiwick of Jersey, a non-member territory of the European Union but enjoying special status under the UK's Treaty of Accession to the European Communities, voted, on 13 May 2014, for a new law on the procedure for transposition of provisions of the Union law binding on Jersey into national law.

The new law, which repeals and replaces a 1996 law, intends to implement the recommendations of the International Monetary Fund in a 2009 report on the regulation of financial services in Jersey. This report had particularly called for the strengthening of the effectiveness of national measures for implementation of UN Security Council sanctions, in particular to ensure that they extend to all regulated financial services in Jersey.

In this regard, the new law empowers the Minister of External Affairs of Jersey to adopt measures to implement not only the obligations of EU law that apply to Jersey, but also the provisions of Title V of the Treaty on European Union, and Articles 75 and 215 of the Treaty on the functioning of the European Union.

European Union Legislation (Implementation) (Jersey) Law 201-, www.jerseylaw.je

[PE]

2. Other countries

Switzerland

Popular federal Swiss initiative of 9 February 2014 ("Against mass immigration")

By a vote dated 9 February 2014, the popular federal initiative titled "Against mass immigration" received the majority of votes in favour of an constitutional amendment to the introduction of quotas to limit immigration in Switzerland. This calls into question the principle of the free movement of people between the EU and Switzerland.

The adopted text includes an amendment of the Federal Constitution of the Swiss Confederation in the sense that "the number of authorisations issued for the stay of foreigners in Switzerland is limited by ceilings and annual quotas", which are to be fixed, for gainfully employed foreigners, including border workers, according to the overall economic interests of Switzerland and in accordance with the principle of national preference. Furthermore, the international treaties contrary to this provision must be renegotiated and adapted within three years from the acceptance of the text of the initiative.

...

This last passage focuses especially on the bilateral agreements concluded with the EU, particularly the agreement on free movement of persons (hereinafter the "ALCP"), negotiated as part of the Bilateral Agreements I (seven sectoral bilateral agreements signed on 21 June 1999 and entered into force on 1 June 2002). Although the constitutional amendment involves only a renegotiation of the ALCP, it is worth mentioning that, through a clause called "guillotine", this agreement provides for the possibility of its termination by the contracting parties, resulting in the non-application of all seven agreements negotiated as part of this package. The Swiss Office for Migration is responsible for submitting a proposal for implementation of the new provisions. Pending the entry into force of a new Swiss regulation and the renegotiation of the ALCP, the residence and work permits issued to EU nationals remain valid, similar to those issued by Member States to Swiss nationals. However, the popular initiative has already resulted in a number of consequences for relations between the EU and Switzerland.

Switzerland cannot make international-level commitments that are incompatible with the constitutional amendment, which prevents it from signing the Protocol III on the extension of the ALCP to Croatia, which joined the EU on 1 July 2013. This protocol included, in its initial version, gradually increasing quotas during a transitional period of ten years, after which the free movement of persons would apply fully and comprehensively.

Since the EU places essential importance on the signing of that Protocol, the association of Switzerland, in the same way as the member States, to a number of cooperation programmes, including the research programme Horizon 2020, the university exchange programme Erasmus+ and the support programme for films MEDIA was suspended, Switzerland now being considered a third State.

Furthermore, the negotiations of new agreements, particularly with regard to the transmission of electricity were also suspended.

In order to restart talks with the EU on its participation in European programmes, Switzerland decided to grant specific quotas for Croatian nationals, corresponding to those which would have been granted for the period between the signing of the protocol and its implementation. Switzerland will also pay its enlargement contribution in favour of Croatia and recognise the professional Croatian degrees that fall within the area of competence of the Confederation.

Popular federal Swiss initiative of 09.02.14 ("Against mass immigration"), www.admin.ch/ch/f/pore/vi/vis413.html

[KAUFMSV]

D. Doctrinal echoes

Right of action of individuals as part of an annulment appeal following the entry into force of the Lisbon Treaty - Comments on the judgment of the Court of 3 October 2013 in Case C-583/11 P - Inuit Tapiriit Kanatami et al/Parliament and Council and the order of the Court of 6 September 2011 in Case T-18/10, Inuit Tapiriit Kanatami et al/Parliament and Council

Following the entry into force of the Lisbon Treaty, the Court had the opportunity to rule on the interpretation of the new "third branch" of Article 263, fourth paragraph, of the TFEU, which introduces the possibility for any individual or company to appeal

against "regulatory acts are of direct concern to it/him and does not entail implementing measures".

There doctrine strongly reacted to both the order of the Court of 6 September 2011 (T-18/10, Inuit Tapiriit Kanatami et al / Parliament and Council, EU:T:2010:172, hereinafter "Inuit I") and the judgment of the Court of 3 October 2013 (C-583/11 P, Inuit Tapiriit Kanatami et al / Parliament and Council EU:C:2013:625, hereinafter, "Inuit II"), in constant dialogue with the debate around the conclusions of the Advocate General Jacobs in the C-50/00 P case, Unión de Pequeños Agricultores / Council, EU:C:2002:462 and the Court's judgment in the T-177/01 case, Jégo-Quéré, EU:T:2002:112.

Concept of regulatory act within the meaning of Article 263, fourth paragraph of the TFEU

The interpretation of the concept of regulatory acts adopted by the Tribunal and the Court (focusing on "any act of general application except legislative acts") is at the center of discussions concerning the question of what acts are included therein. For Kornezov, "[t]his definition contains a substantive and a procedural criterion. According to the substantive criterion, only acts of 'general application' are regulatory acts. (...) While in most cases it will be obvious from the outset whether an act is of general or of individual application, this might sometimes be subject to controversy. Indeed, some EU acts have a dual nature [e.g. Council regulations imposing anti-dumping duties; Commission decisions concerning a State aid schemes (…)]. Critically, this could lead to overlaps between the question of whether an act is of individual application - and therefore 'non-regulatory'- and whether it is of individual concern to the applicant. (…) According to the procedural criterion, only non-legislative acts can be 'regulatory'. (…) Thus, all acts of general application that are not adopted by legislative procedure are 'regulatory'. Regulatory acts are therefore to be defined by default. In practical terms, this means, admittedly, that delegated and implementing acts adopted under, respectively, arts 290 and 291 TFEU, acts adopted in a sui generis procedure (…) or on the basis of secondary legislation, as well as Commission decisions in some State aid cases fulfil the procedural criterion. Soft law acts, if they are intended to produce legal effects, might also come under the umbrella of 'regulatory acts'"[1].

Some authors have raised the formal nature of the distinction between legislative and non-legislative acts. Thus, referring to the Tribunal's order in Inuit I, Wathelet and Wildemeersch find that "the criterion used by the Tribunal to determine whether the act in question is a legislative act or not is purely procedural. [A]rticle 289, § 3, of the TFEU leaves no choice in this respect, since it defines legislative acts as those adopted by a legislative procedure (ordinary or special). (...) [T]his new rule breaks away from the well-established case law that, to determine the general or individual character, and whether an act is normative or not, wanted the focus to be on the 'substance' and not the 'form' or 'title' of an act"[2]. In this sense, Jones argued that "[t]here is a strong argument that the distinction between legislative acts and non-legislative acts is excessively formalist. […] Arguably, the CJEU should be looking at the substance and nature of a measure in question, and not the harm chosen, to

[1] KORNEZOV, A., "Shaping the New Architecture of the EU System of Judicial Remedies: Comment on Inuit", *European Law Review* 39, 2014, pp. 251-263, aux pp. 256-257.

[2] WATHELET, M., and WILDEMEERSCH, J., "Recours en annulation: une première interprétation restrictive du droit d'action élargi des particuliers? (Action for annulment: a first restrictive interpretation of the broader right of action of individuals?), *Journal de droit européen: droit européen* 187, 2012, pp. 75-79, p. 78.

determine its impact and thus whether it is "regulatory". […] Moreover, this formalistic approach ignores the fact that the impact or effect of an act does not correspond directly to whether or not it is legislative or non-legislative"[3]. For Arnull, the interpretation adopted by the Court is paradoxical: "[t]he choice of the TFEU authors to avoid the term 'non-legislative acts' could therefore indicate, if they thought about it, that they did not envisage a purely formal concept defined by the procedure under which the contested act was adopted"[4].

Several authors have expressed reservations about the condition relating to the general character of the act. Thus, in relation to the Inuit I order, Gormley notes that "the need for the act to be of general application appears to be unreasoned to say the least. […] In fact, a good reason to confine regulatory acts to acts of general application is wholly absent, so it is not surprising that the General Court did not seek to justify itself […]"[5]. Similarly, Gänser and Stanescu specify that "(...) the Court appears to have introduced a sub-category in addition to that of the regulatory acts, namely the acts of individual application. This distinction is likely to raise a structural nature problem. (...) [I]t follows from protocol nos. 1 and 2 annexed to the EU and FUE treaties that the legislative acts enjoy greater legitimacy as compared to non-legislative acts, which explains why only the latter are affected by easing of terms of admissibility. However, the exemption of acts of individual application - which are not legislative - from this flexibility does not follow this logic"[6].

In addition, questions remain unanswered about the concept of "implementing measures" in the sense of the new branch of Article 263, fourth paragraph, of the TFEU: "does the term only refer to a regulatory act that does not require the adoption of any subsequent act or does it also encompass a regulatory act that requires a the intervention of a registration act or an act of pure execution from a national authority reduced to the rank of copyist monks? [...] The smallest national measure must be a pretext for a referral of the individual subject to trial before the national courts"[7].

The interpretation method: resorting to the genesis of the provisions of Union law

To interpret the relevant provisions of the Lisbon Treaty, the Tribunal considered that it should undertake a "literal, historical and teleological" interpretation[8]. Thus, with regard to the judgment of the Inuit II Court, Turmo differs in opinion by noting that "(...) the need to retain a historic interpretation (...) hardly seems convincing[9]". He states that historical interpretation does not usually have significance in European Union law, and it is difficult to see why it should be any different here.

[3] JONES, J. "Standing Space Only in the CJEU: Comment on Inuit Tapiriit Kanatami v European Parliament and Council", *Judicial Review* 19, 2014, pp. 65-72, p. 70.

[4] ARNULL, A., "Arrêt 'Inuit': la recevabilité des recours en annulation introduits par des particuliers contre des actes réglementaires" (Inuit' ruling: the admissibility of the action for annulment brought by individuals against regulatory acts), *Journal de droit européen* 205, 2014, pp. 14-16, p. 15.

[5] GORMLEY, L., "Judicial Review- Reflections on the New Dawn after the First Judgments of the General Court", *Europarättslig tidskrift* 2, 2012, pp. 310-324, p. 319.

[6] GÄNSER, C. G. and STANESCU, R., "La protection juridictionnelle des particuliers au sein de l'Union européenne: Les apports de l'arrêt 'Inuit'" (The judicial protection of individuals in the European Union: Contributions of the Inuit judgment), *Revue du droit de l'Union Européenne* 4, 2013, pp. 747-760, aux pp. 755-756.

[7] COUTRON, L., "L'héritage de l'arrêt UPA" (The legacy of the UA ruling), *Actualité juridique du droit administratif* 10, 2014, pp. 548-556.

[8] Paragraph 40 of the order in the T-18/10 case.

[9] TURMO, A., "Nouveau refus d'élargir l'accès des particuliers au recours en annulation contre les actes de l'Union européenne" (New refusal to expand access for individuals to actions for annulment against acts of the European Union), *Revue des affaires européennes* 4, 2014, pp. 825-835, p. 827.

The decision of the Court to invoke the preparatory work of Article III-365, paragraph 4, of the draft treaty establishing a Constitution for Europe, the content of which was repeated in identical terms in Article 263, fourth paragraph, of the TFEU was the subject of criticism. Arnull argued that "[T]he Court does not establish a direct link between the preparatory work and the Lisbon Treaty: Advocate General Kokott even found that certain linguistic versions did not use the same terms (...) in the draft treaty establishing a Constitution for Europe and the Lisbon Treaty"[10]. In the same vein and in light of the political and legal complexity of the constitutional process that resulted in the approval of the Lisbon Treaty, Thalman highlights the difficulty of finding definitive evidence of intent of the Praesidium of the Convention and the 2007 Conference: "[f]raglich - und letztlich ausschlaggebend – ist jedoch, ob die Intentionen des Konventionspräsidiums auch von den 'Herren der Verträge', also von den in der Regierungskonferenz 2007 versammelten Mitgliedstaaten, gebilligt und damit formal dem gegenwärtigen Begriffsgehalt zurechenbar wurden"[11] In this regard, Bast specifies in his comment on the Inuit I order that "[w]hile the officially stated intentions of the [European Convention's Praesidium] do constitute valuable material for interpretation, the complete picture composed of materials from different stages and sources would be more diverse.The deliberate use of a new and undefined term absent consensus in terms of substance bears all signs of a 'dilatory formulaic compromise' that leaves broad margins of discretion to the Court of Justice to later construe its meaning. Revealingly, all attempts during the ensuing [Inter-Governmental Conference ("IGC")] to technically 'clarify' the issue failed on account of a lack of clarity. Replacing 'a regulatory act' with 'a regulation or decision having no addressees', as suggested by the Council Legal Service, was not accepted by the IGC's legal experts, which proves that at least one or perhaps more Member States found that the suggestion went beyond a purely legal clarification"[12].

Coutron, who examined the use by the Court of said preparatory work in another context, argues that "[f]ar from confining itself to an adventitious role, this preparatory work plays a decisive role in this case"[13]. Kornezov goes further by advancing the idea that "[the drafting history] was critical in Inuit, since it is admittedly the only clear indication that the new third limb of this provision was not intended to cover legislative acts. (…) [It] is the strongest argument in support of the Court's conclusion. It also marks a new addition to the Court's methods of interpretation, given that the Court has only recently started to take account of the drafting history of the Treaties"[14].

Moving on to a closer and perhaps less discussed genesis, as regards a literal interpretation of the wording of Article 263, fourth paragraph of the TFEU, which suggests that the drafters of the treaty did not intend to make a distinction between legislative and non-legislative acts, Peers and Costa have asked, with respect to Inuit I, the following question: "[i]f [the treaty drafters]

[10] ARNULL, A., cit supra, note 4, p. 16.
[11] THALMANN, P., "Zur Auslegung von Art. 263 Abs. 4 AEUV durch Rechtsprechung und Lehre - Zugleich ein Beitrag zur begrenzten Reichweite von Art. 47 Abs. 1 GRC wie auch zur Rolle der historischen Interpretation primären Unionsrechts", *Europarecht* 4, 2012, pp. 452-468, p. 461.
[12] BAST, J., "New Categories of Acts after the Lisbon Reform: dynamics of Parliamentarization in EU Law", *Common market law review* 49, 2012, pp. 885-928, p. 905.
[13] COUTRON, L., cit. supra, note 7.
[14] KORNEZOV, A., cit. supra, note 1, p. 257.

had intended such a distinction, why not use more express and unambiguous wording? After all, they chose to make a clear distinction between legislative acts and non-legislative acts in several other provisions of the treaties. Most significantly, since the treaty drafters inserted an express reference to 'legislative acts' in Article 263(1), but not in the third limb of Article 263(4), this obviously suggests that they intended a different scope of the relevant provisions. […] [T]he Court's limitation of the second limb of Article 263(4) TFEU to acts of general application is highly questionable"[15]. Everling also considered surprising that the Court does not give any value to the text of the Treaty.

This point, he finds that "[n]och erstaunlicher ist aber, dass das EuG den Wortlaut der Vorschrift überhaupt nicht würdigt"[16].

Direct assignment: the application of the Plaumann case law

As for the assessment of the criterion for direct assignment in relation to the acts of general application which do not constitute "regulatory acts", several authors deliberated on the the implications from the Plaumann case law[17].

Thus, Krämer, in his commentary on the Inuit I order wonders "[w]hether [the Plaumann doctrine] is still the most appropriate formula to decide on the admissibility of actions against EU provisions by private persons (…)"[18]. In this regard, Coutron acknowledges that "[o]ne cannot criticise the Court for applying the treaty faithfully and in the spirit that drives the components. The initial error is older: it lies in the unnecessary sacralisation of the Plaumann case law presented in 2002"[19]. However, Kornezov demonstrates that "[a]lbeit restrictively worded, the Plaumann formula should not necessarily be an unsurmountable obstacle for private parties. Considered in abstracto, its wording does not strike as unusually conservative. It is rather the way in which it is applied in practice that shapes the intensity of the condition of individual concern. (…) Thus, without necessarily reconsidering the wording of the Plaumann formula as such, a shift in the way in which that formula is applied in practice could breathe new life into the test of individual concern. In Inuit, the appellants did not, however, argue any of the above but rather sought to overturn the Plaumann rule and replace it with a criterion of 'substantial adverse effect'. This prevented the Court from exploring in more detail whether the specific position of the Inuit community, as laid down in the Regulation, could mean that at least some of the appellants were individually concerned thereby: after all, in appeal proceedings, the Court's competence is strictly circumscribed by the parties' claims and arguments"[20].

The arguments related to the separation of powers and the constitutional role of the Court

The interpretation of the Court of the concept of "regulatory acts" is often considered by the doctrine together with the arguments related to the imperatives resulting from the principle of separation of powers.

[15] PEERS, S. and COSTA, M., "Court of Justice of the European Union (General Chamber), Judicial review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission", *European Constitutional Law Review* 8, 2012, pp. 82-104, p. 92.

[16] EVERLING, U., "Klagerecht Privater gegen Rechtsakte der EU mit allgemeiner Geltung", *Europäische Zeitschrift für Wirtschaftsrecht* 23, 2012, pp. 376-380, p. 378

[17] Court's Plaumann/Commission ruling, 25/62, ECLI:EU:C:1963:17.

[18] KRÄMER, L., "Seal Killing, the Inuit and European Union Law", *Review of European Community & International Environmental Law* 21, 2012, pp. 291-296, p. 296.

[19] COUTRON, L. cit. supra note 7.

[20] KORNEZOV, cit. supra note 1, p. 259.

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Thus, Alonso de León found, in relation to the Inuit I order, that the approach of the Tribunal "(…) responde también a la idea de que los procedimientos legislativos obedecen a una cierta lógica de control democrático, cuando menos por la intervención del Parlamento Europeo, mientras que las disposiciones no legislativas carecen de esa legitimidad, lo que justifica un control judicial más accesible para los ciudadanos"[21]. Similarly, Petzhold observed that the interpretation of the Court follows the existing trend in the member States in relation to the legislative acts: "[d]as EuG folgt mit seiner Auslegung der Mehrheitsmeinung im Konvent und der 'konservativen' Sicht, dass nämlich Individualklagen gegen Gesetze eine Ausnahme sein sollen. Dies entspricht auch dem Standard über alle Mitgliedstaaten hinweg, die diese Möglichkeit teils gar nicht, sonst aber regelmäßig nur mit erheblichen Einschränkungen vorsehen"[22]. Thus, Kornezov argues that "(…) standing requirements should be placed in the larger context of the theory of separation of powers. Unrestricted access to the courts could give rise to a critique of the judiciary for intruding in the political process. (…) The restrictions placed on the standing of private parties for challenging EU legislative acts could be justified along the same lines. After all, EU legislative acts also enjoy a certain degree of democratic legitimacy, especially now that the input of the European Parliament in the legislative process has been considerably enhanced by the Lisbon Treaty. (…) Moreover, in Union law, the risk of actio popularis is further aggravated by the fact that annulment applies erga omnes and is in principle retroactive. From a comparative perspective, therefore, EU rules on standing appear grosso modo consistent with national practices"[23].

In this regard, Bast rightly points out: "[w]hat better choice could there be than to pick the Inuit case to clarify the extent to which the Lisbon reform has opened up the direct route of judicial review? Hardly any other act in this legislative term would deserve more to be called a 'brainchild' of the European Parliament than the Regulation on seal products. If there are any good reasons to translate the degree of parliamentary involvement into the rules of locus standi, then we can expect to find them in the Inuit case"[24].

Some authors have also highlighted the fact that the Inuit case has strengthened the position of the Court as the Constitutional Court, since it would be the only entity to examine the legality of legislative acts: "[d]ie vorangehend skizzierte Vorgehensweise könnte insgesamt den Eindruck erwecken, als sei es dem Gerichtshof in der hier in Rede stehenden Rechtsmittelentscheidung hauptsächlich darum gegangen, seine Position als EU- Verfassungsgericht abzusichern, indem er mit seiner Auslegung des Art. 263 Abs. 4 AEUV dafür sorgt, dass nur er und nicht auch das vornehmlich die Funktion eines Verwaltungsgerichts ausübende Gericht EU- Rechtsakte mit Gesetzgebungscharakter für nichtig erklären kann (…)"[25].

[21] ALONSO DE LÉON, S., "Tribunal de Justicia de la Unión Europea - TJUE - Tribunal General - Auto de 6.9.2011, Inuit Tapiriit Kanatami y otros c. Parlamento y Consejo, T-18/10; Sentencia de 25.10.2011, Microban c. Comisión, T-262/10 - 'Recurso de anulación - Concepto de acto reglamentario - Ausencia de afectación directa o individual' - Por fin una definición judicial de los 'actos reglamentarios' del artículo 263, 4 TFUE", *Revista de Derecho Comunitario Europeo* 44, 2013, pp. 345- 361, p. 358.

[22] PETZOLD, H.A., "Was sind 'Rechtsakte mit Verordnungscharakter' (Art. 263 Abs. 4 AEUV)? - Zur Entscheidung des EuG in der Rechtssache Inuit", *Europarecht* 4, 2012, pp. 443-451, aux pp. 448-449.

[23] KORNEZOV, A., cit. supra note 1, p. 258.

[24] BAST, J., cit supra note 12, p. 901.

[25] NOWAK, C. and BEHREND, K., "Kein zentraler Individuelrechtsschutz gegen Gestezbungsakte der Europäischen Union?", *Europarecht* 1, 2014, pp. 86-99, p. 99.

In addition, Kingreen noted that the Court is gradually getting closer to a "Europäische Verfassungsbeschwerde"[26].

There distribution of jurisdictions to ensure the right to effective judicial protection: the role of national judicial systems

The doctrine also focused on the role given by the Court to the national courts for ensure effective judicial protection in relation to the legality of the acts of the Union. This, Arnull argued that "(...) two responsibilities are incumbent on the national courts. The first is adherence to the principle of compliant interpretation established in the Unión de Pequeños Agricultores case and then developed in the Unibet case. (...) The second is the responsibility, underlined in the Inuit case, of creating new legal remedies where none exists 'to, even indirectly, ensure adherence to the rights that individuals derive from the [Union] law[27].

Regarding the obligation of member States to establish a redress system to ensure respect of the right to effective judicial protectio, several critical comments were made. Turmo believes that "[t]he reasons for this judgement seem insufficient in view of the actual place of national courts in the judicial system of the Union and the nature of their relations with the Court of Justice"[28]. In this regard, Streinz questions the possibility of creating remedies in all member States: " [es] ist fraglich, ob und wie in allen Mitgliedstaaten diejedenfalls zur Vermeidung der unzumutbaren Konstellation einer vorhergehenden Rechtsverletzung erforderlichen Rechtbehelfe geschaffen werden können"[29]. Moreover, Arnull considers it paradoxical that "(...) the Court imposes on the national courts requirements that it is not ready to assume itself. The Court refuses to interpret Article 263, fourth paragraph, of the TFEU in the light of the principle of effective judicial protection or create new legal remedies in case this proves to be impossible"[30]. Furthermore, the decision of the Court leaves some open questions: "[c]an we therefore infer that a State fails to fulfill its obligations under Article 19 of the TEU when it does not, in a given situation, provide for a remedy to challenge the validity of EU law?"[31]. With respect to this question, some authors note that it is not entirely clear whether there is an obligation for member States to adopt implementing measures to allow an appeal to individuals, insofar as there is a danger that the national implementing measures are adopted through a law and that there is no recourse in the relevant national system against legislative acts: "[n]icht entschieden ist damit auch ob die Vorschrift ein unionsrechtliches Gebot an die Mitgliedstaaten enthält, Durchführungs-maßnahmen nur in einer solchen Form zu erlassen, dass sie auch nach dem jeweiligen nationalen Recht ohne Weiteres anfechtbar wären. Insbesondere besteht die Gefahr, dass ein Mitgliedstaat eine notwendige Durchführungsmaßnahme als Gesetz erlässt, seine Rechtsordnung aber keinen

[26] KINGREEN, T., "Heranrobben an Europäische Verfassungsbeschwerde", *Neue Zeitschriftfür Verwaltungsrecht* 23, 2013, p. iii.
[27] ARNULL, cit. supra note 4, p. 15. TURMO, A., cit. supra note 9, p. 834.
[28] STREINZ, R., "Individualrechtsschutz im Kooperationsverhältnis", *Europäische Zeitschrift für Wirtschaftsrecht* 1, 2014, pp. 17-21, p. 21. 30 ARNULL, cit. supra note 4, p. 15.
[29] STREINZ, R., "Individualrechtsschutz im Kooperationsverhältnis", *Europäische Zeitschrift für Wirtschaftsrecht* 1, 2014, pp. 17-21, p. 21. 30 ARNULL, cit. supra note 4, p. 15.
[30] ARNULL, cit. supra note 4, p. 15.
[31] GÄNSER, C. G. and STANESCU, R., cit. supra note 6, p. 758.

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Rechtsschutz gegen Legislativakte kennt"[32]. In such cases, a violation, particularly of Article 19 of the TEU and Article 47 of the Charter, could be envisaged: "[h]ierin wäre wohl ein Verstoß gegen die mitgliedstaatlichen Pflichten aus Art. 4 Abs. 3, 19 Abs. 1 UA 2 EUV n. F. und Art. 47 GRCh zu sehen"[33].

Even so, many authors have expressed reservations about the preliminary reference system as a mechanism that complements the system of remedies of the Union. So, for Jones, "[t]he assumption that the possibility for an individual applicant to trigger a reference for a preliminary ruling provides full and effective judicial protection against general measures is open to serious objections"[34]. These reservations arise, in part, from limitations of powers of national courts: "[a]s it is not clear that although it would be the legitimacy of a national court to settle, primarily, the question of the validity of a legislative act of the Union, all the reasoning concerning the effective judicial protection leaves the reader unsatisfied"[35]. "(…) even where there are implementing measures at EU level, art. 277 TFEU does not always - and certainly not as a matter of principle - ensure effective judicial protection"[36]. Therefore, "[h]aving to challenge the implementing EU measure in order indirectly to plead the illegality of the underlying legislative act implies that an applicant has to wait for the competent institution to adopt the relevant implementing measure in order to have access to the EU Courts"[37]. In addition, "[w]ith regard to the possibility of triggering a preliminary reference on the invalidity of an EU act, it must be acknowledged that this mechanism should be able to function relatively well in situations where there are national implementing measures. If, however, an EU legislative act is self- executing, i.e. does not require implementing measures, and if the individual cannot prove that the act is of direct and individual concern to him, there is a palpable concern of lack of an available remedy"[38]. Furthermore, "[i]t is also arguable that legal certainty necessitates allowing a general measure to be reviewed as soon as possible and not conditional on when implementing measures have been adopted"[39].

Therefore, some authors propose interpretations to overcome, to some extent, the difficulties faced in the context of the preliminary procedure. On the one hand, Turmo believes, in his comment on the Inuit I order, that "(...) [i]n the meantime, it should be ensured that the procedure for preliminary rulings on validity of Community acts allows greater access to the Court in the spirit of the Foto-Frost case law. (...) Furthermore, from the point of view of the procedure, it would be necessary to change the rules of procedure with regard to the preliminary ruling by bringing it closer to the regular system of appeals, with the intervention of the institution responsible for the contested act"[40]. On the other hand, Peers and Costa argue that "[i]nterpreting Article 19(1) TEU in light of Article 47 of the Charter, the first objection to the effectiveness of Article 267 could be addressed by extending the CILFIT test fully to all challenges to the validity of EU measures brought via national courts. This would mean that any national court would have to refer any challenge to the validity of an EU act to the Court of Justice not just where it had serious doubts about the validity of that act, but in all cases where the validity of an EU act is challenged, (…).

[32] PETZOLD, H.A., cit. supra note 22, p. 450.
[33] Ibid.
[34] JONES cit. supra note 3, p. 71.
[35] TURMO, cit. supra note 9, p. 831.
[36] KORNEZOV, cit. supra note 1, p. 260.
[37] Ibid.
[38] Ibid
[39] JONES cit. supra note 3, p. 71.
[40] CREUS, A., "Commentaire des décisions du Tribunal dans les affaires T-18/10-Inuit et T-262/10- Microban", *Cahiers de droit européen* 3, 2011, pp. 659-678.

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Such a change would entail Köbler liability if national courts failed to comply with their obligations; and arguably, given the obligation on all national courts to refer questions, in this context Köbler liability should apply no matter which level of court failed to refer"[41].

Therefore, a part of the doctrine is in favour of the central role of the Court: "[f]urther centralization of the control of the validity of EU acts would clearly 'be better achieved at Union level,' since it would establish a more effective system of judicial review than member states could achieve acting separately. In any event, since national courts already lack the key power to declare Union acts invalid, this train has already left the station"[42]. In this regard, Arnull maintains that "[t]he deficiencies in the judicial protection guaranteed [by Article 263 TFUE] after the Inuit ruling cannot be overcome by the national courts, which only offer means of appeal that are less direct, less efficient, and slower. Such a result cannot be justified by using either the preparatory work of the Convention on the future of Europe or the explanations relating to the Charter of Fundamental Rights"[43].

The interaction with the TWD Textilwerke Deggendorf case law

Still on the subject of the relation between Articles 263 and 267 TFEU, Gundel questioned, in the light of the Inuit I order, whether and to what extent the TWD Deggendorf[44] case law is now applicable: "[s]oweit Art. 263 Abs. 4 AEUV in seiner neuen Variante nun tatsächlich die prinzipale Normenkontrolle ermöglicht, stellt sich allerdings als Folgeproblem die Frage, ob insoweit nun auch die Deggendorf- Präklusion eingreift (…)"[45]. In this regard, Gänser and Stanescu propose that: "(...) with the easing of the conditions of admissibility of the action for annulment against regulatory acts [resulting from the declaration of the Court in Inuit II], the [Deggendorf] case law may apply more often on the grounds that the number of acts against which a direct action of an individual could be admissible has considerably increased"[46]. They believe that "[g]iven that an individual directly concerned by a regulatory act may not necessarily be aware of this act and its effects within the limitation period provided for in Article 263, paragraph 6, TFEU, it is possible that he does not use his right to commence an action for annulment. Thus, the question arises whether the application of the TWD case law in such circumstances would not be contrary to the right to challenge the legality of acts of Union law. (...) In its Pringle judgment, the Court seems to exclude the consideration of any condition other than that of 'the standing to act within the meaning of Article 263, fourth paragraph TFEU'. Will it change its mind on this point after the Inuit judgement despite the weight it gave to its Pringle judgement?"[47].

[41] PEERS, S. and COSTA, M., cit. supra note 15, p. 101.
[42] Ibid. p. 95.
[43] ARNULL, cit. supra note 4, p. 16.
[44] Judgement of the Court on TWD Textilwerke Deggendorf, C−188/92, EU:C:1994:90.
[45] GUNDEL, J., "Die neue Gestalt der Nichtigkeitsklage nach dem Vertrag von Lissabon : Die Weichenstellungen der ersten Urteile zu Direktklagen Einzelner gegen normative EU- Rechtsakte", *Europäisches Wirtschafts- und Steuerrecht* 3, 2012, pp. 65-72, p. 70.
[46] GÄNSER and STANESCU, cit. supra note 6, p. 760.
[47] Ibid.

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As for the effect of the Inuit II judgment on the practice of competition law, Nihoul stresses that "(…) regulations issued in [the area of European competition law] are not - in the European sense - legislative. Under the TFEU, that qualification is reserved to acts adopted by the Parliament with the Council, or the converse (Council with Parliament). That condition is not satisfied for regulations in the field of competition where they are adopted, as the case may be, by the Council, or by the Commission"[48]. He continues, by warning that: "[p]ractitioners always had the possibility to seek the annulment or inapplicability of general acts adopted in the field of European competition law. But the procedure to do so has now changed. These general acts must now be challenged in direct actions before the Tribunal. The challenges cannot be made any more in preliminary references or as part of an exception of illegality. Beware! There is a price to pay by those who would forget the lesson. Their demand would be deemed inadmissible …"[49].

The Lisbon Treaty and a possible opening of the conditions of legitimacy for individuals?

Some authors believe that the status quo that existed before the Lisbon Treaty will be maintained. Arnull observes that "[t]he judgment of the Court is in the same direction as its previous case law, marked by a strict attitude towards the right of individuals to take action for annulment (...)"[50]. According to Wathelet and Wildemeersch, "[t]he order of the Court, despite the theoretical opening of Article 263 TFEU, will therefore require the applicant to demonstrate that he is directly and individually concerned as soon as he wants to challenge a legislative act, while the new paragraph 4 of Article 263 TFEU was supposed to facilitate his access to the European court."[51] So even in terms of delivery of the Inuit II judgment, some authors talk of a missed opportunity. Jones, for example, believes that "[i]n giving a narrow interpretation to the provision for natural and legal persons to institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures, the CJEU has arguably dashed any hopes that the gap in the Treaty system of judicial protection identified in [Unión de Pequeños Agricultores/Conseil] would be closed"[52].

Others have hope for the future. Thus, according to Arnull, "we need to take a more demanding approach in respect of the Union [than the one followed in the Inuit II judgement] to ensure full respect of the values and principles on which it is based, not only those of the rule of law and respect for human rights but also those of attribution and democracy. Only then the action for annulment could restore some lost luster to the tarnished legitimacy of the Union"[53]. Buchanan remains optimistic when he notes that "[t]he introduction of the category of 'regulatory act' and the separate standing rules applicable thereto should go some way to improving effective judicial protection with the EU legal system, even if not quite as wished for by AG Jacobs"[54] . However, Turmo believes that "[the issue of the existing rule] can be solved only by a wider reflection on the compatibility of the judicial system of the Union with the principle of effective judicial protection"[55].

[48] NIHOUL, P., "A New Era for Litigators: Change in the Admissibility of Applications Against Regulations Adopted in the Field of Competition", *Journal of European Competition Law & Practice* 5, 2014, vol. 5, nº 2, pp. 63-64, p. 63.
[49] Ibid. p. 64.
[50] ARNULL, A., cit. supra note 4, p. 15
[51] WATHELET, M., and WILDEMEERSCH. cit. supra note 2, p. 78.
[52] JONES, cit. supra note 3, p. 72.
[53] ARNULL, cit. supra note 4, p. 16.
[54] BUCHANAN, C., "Long Awaited Guidance on the Meaning of 'Regulatory Act' for Locus Standi Under the Lisbon Treaty", *European Journal of Risk Regulation* 3, 2012 pp. 115-122, p. 122.
[55] TURMO, A., cit. supra note 9, p. 830.

For others, while they refute the existence of an opening, they find, however, some progress in the right direction. Referring to the Inuit I order, Alonso de León highlights the practical implications in the context of matters where the regulations of the Commissions are tools often used, "[a]unque esta jurisprudencia confirme que no habrá una gran apertura en las condiciones de legitimación para los particulares, las nuevas condiciones de admisibilidad sí tendrán consecuencias prácticas relevantes en los ámbitos en que los reglamentos de la Comisión son habituales, como la autorización de productos alimenticios, productos con incidencia en el medio ambiente, productos peligrosos, etc. en estos sectores habrá una mejora sensible en las condiciones de acceso a la jurisdicción de la Unión para los ciudadanos"[56].Donnat observes, in an article written after the Tribunal's order but before the judgment of the Court, that "[w]hile it is too early to take stock of the implementation of the provisions of Article 263, fourth paragraph, TFEU, it seems already possible to say that the easing introduced by the Lisbon Treaty in the conditions of admissibility of actions for annulment brought by natural or legal persons against acts that do not concern them is real and should apply to many of the general acts adopted by the institutions of the Union, including the Commission or by its agencies"[57].

In addition, Gundel highlights that the reference to the possibility of indirect control through national courts shows that the inclusion of the new branch was not necessary to overcome the actual shortcomings in the judicial protection system, because if these shortcomings did exist, the restriction of the third "branch" of Article 263, fourth paragraph, TFEU, to non-legislative acts would be difficult to justify: "[d]ie regelmäßigen Hinweise der Rechtsprechung auf die Möglichkeit des inzident-indirekten Rechtsschutzes gegen EU-Recht auf dem Weg über die nationalen Gerichte verdeutlichen auch, dass die Aufnahme der neuen Alternative nicht zur Schließung echter Rechtsschutzlücken erforderlich war; wenn solche Lücken tatsächlich bestünden, wäre die Beschränkung der dritten Alternative auf Nicht-Gesetzgebungsakte tatsächlich schwer zu rechtfertigen"[58].

Finally, by referring to possible external control of the Court, Turmo asks: "(...) will the new control to be exercised by the European Court of Human Rights on the Union law help make the advances that ultimately did not allow the last revision of the treaties, by forcing the Court of justice to recognise that the appeals system is not as 'complete' as it claims"?[59].

[56] ALONSO DE LÉON, S., cit. supra note 21, p. 359.

[57] DONNAT, F., "Contentieux de l'annulation devant le juge de l'Union: la chasse aux phoques et le dégel des conditions de recevabilité des recours des particuliers", *L'Observateur de Bruxelles* 87, 2012, pp. 30-33, p. 32.

[58] GUNDEL, J., "Die Rechtsprechung zur Individualklagebefugnis des Art. 263 Abs. 4 AEUV nach dem Vertrag von Lissabon – Eine Bestandsaufnahme zu den Folgen der Neuregelung", *Europäisches Wirtschafts- & Steuerrecht* 1, 2014, pp. 22-27, p. 27.

[59] TURMO, A., cit. supra note 9, p. 835.

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Information

The texts and documents that the following information refers to are extracted from publications available at the Court library.

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