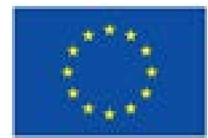

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**No. 2/2015**

# *R E F L E T S*

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*The European Convention for the protection of human rights and fundamental freedoms (hereinafter, the “ECHR”); the European Court of Human Rights (hereinafter, the “ECtHR”); the Charter of Fundamental Rights of the European Union (hereinafter, the “Charter”).

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# Preface

In this edition of the bulletin *Reflets no. 2/2015,* two judgments of the ECtHR will be discussed. The first decision concerns the compliance, under Article 2 of the ECHR (right to life), of a court decision to stop administering food and fluid intake to a quadriplegic person (p.6-7). The second decision concerns the liability of a commercial operator of a web-based news portal with regard to insulting comments left by Internet users on this portal under Article 10 of the ECHR (right to freedom of expression) (p.7-9). Another issue is the recent ruling of the US Supreme Court recognising the legality of civil marriage between persons of the same sex at the federal level (p. 56-57), similar to the Irish referendum on the same issue (p. 62). The edition also includes favourable rulings of the German (p. 15-16) and Belgian (p.22-23) constitutional courts, delivered on the issue of freedom of worship in schools. In addition, the edition also covers two decisions of the two highest French courts concerning the right of airline passengers and, in particular, compensation for the passengers in case of cancellation or denied boarding (p. 31-32). Finally, the Doctrinal Echoes (p. 65-74) pertain to the comments on the judgment of the Court of Justice in the Dano case (C-333/13, EU:C:2014:2358), which discussed the possibility of the host State excluding EU nationals from social benefits.

We should point out 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).

The bulletin is also available in English on the ACA website (http://www.aca-europe.eu/index.php/en/).

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## A. Case law

## I. European and international jurisdictions

### European Court of Human Rights

***ECHR - Right to life - Decision to stop administering food and fluid intake to a quadriplegic person - No violation of Article 2 of the ECHR***

On 5 June 2015, the Grand Chamber of the ECHR delivered a judgment in a case where it was decided to stop the administration of artificial fluid and food intake to a patient in a vegetative state, finding no violation of Article 2 of the ECHR.

In 2008, a person suffering from a serious head injury following a traffic accident became quadriplegic and completely dependent. Believing that they had seen signs of refusal to accept treatment that was provided to him, the caregivers decided to initiate the procedure set up by the French law of 2005 on patients' rights to end their life, referred to as the "Leonetti law", in order to stop administering artificial food and fluid intake to him, with the consent of his wife, but without consulting the rest of his family. However, said law provides that in the absence of advance directives or a person designated as "trusted" by the patient, the family must be associated with the procedure.

After several procedures, the Council of State, after ordering a medical examination and consulting several authorities in the field of medical practice and ethics, considered that the decision of the medical team was not flawed. To ensure that the conditions laid down by the law were met, the Council of State checked the irreversibility of the injuries and the existence of evidence from some relatives attesting that, before the accident, the patient had expressed the wish to not be artificially kept alive.

The applicants, i.e. the patient's relatives, who were opposed the decision to stop the administration of food and fluid intake, referred the matter to the ECHR, arguing that the decision of the Council of State was in violation of Article 2 of the ECHR, which protects the right to life, constituted ill treatment amounting to torture under Article 3 and was a violation of physical integrity, as defined in Article 8.

Pending the judgment of the ECtHR on the merits, the procedure of Article 39 of the rules of the Court was provisionally applied, resulting in the suspension of the execution of the judgment of the Council of State.

First, as regards the admissibility, the ECtHR found that the applicants did not have the authority to act in the name and on behalf of the patient. In this regard, the Court reiterated its case law concerning vulnerable individuals, according to which it is necessary to establish the existence of a risk that the rights of the direct victim are not effectively protected and the lack of conflict of interests between the victim and the applicant. On the first criterion, the ECtHR noted the absence of such a risk, since the applicants, in their capacity as relatives of the victim, could claim in their own name the right to life protected by Article 2. On the second criterion, the Court found that the convergence of interests between what the patient would have wanted and what the applicants expressed was not established.

Consequently, the Court reviewed only the complaints raised by the applicants in their own name, alleging the violation of Articles 2, 6, paragraph 1, and 8 of the ECHR.

Second, on the merits, the Court held that the case at issue did not concern the negative obligations of the State with regard to the right to life, since it did not involve the deliberate causing of death, but a decision to stop treatment that keeps the patient alive artificially.

As regards the positive obligations of States, the ECHR reiterated the three elements to be taken into account with regard to the administration or withdrawal of medical treatment: the existence in domestic law and practice of a legal framework consistent with the requirements of Article 2, the taking into account of wishes previously expressed by the patient and the possibility of a judicial remedy in case of any doubt about the best decision to be made in his interests. Furthermore, noting the lack of consensus between Member States of the Council of Europe on stopping treatment artificially maintaining life, it found that the States have, in this respect, discretionary power.

Regarding the first element, the Court held that the "Leonetti law" constituted a sufficiently clear legislative framework to regulate the physician's decision accurately and that the organisation of the decision-making process was within the discretionary power of the States. It observed that in this case, the procedure had been conducted "for a long time and meticulously, going beyond the requirements of the law". As regards the second element, the Court noted that the patient's consent, even if he is unable to express his will, must remain at the core of the decision-making process. In this case, it validated the approach of the Council of State considering that the evidence regarding the patient's past comments, corroborated by his personality, his history and his opinions, was accurate enough to establish an intention to refuse treatment. As to the third element, the Court held that "the [case] had been thoroughly reviewed, during which all viewpoints had been expressed and all aspects were carefully considered, in view of both a detailed medical assessment and the general observations of the highest medical and ethical bodies".

Reiterating the deep complexity of the medical, legal and ethical issues involved, the Court concluded that the domestic authorities have complied with their positive obligations under Article 2 of the ECHR, given the discretionary power at their disposal, and found that the complaints made under Article 8 are replaced by those raised under Article 2, as well as those invoked under Article 6, paragraph 1, since these complaints were manifestly unfounded.

Five judges expressed a dissenting opinion.

*European Court of Human Rights, ruling dated 05.06.15, Lambert e.a. / France (request no. 46043/14), www.echr.coe.int*

IA/34069-A

[WAGNELO] [GERBADE]

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***ECHR - The right to freedom of expression - Insulting comments left by users on a web-based news portal - Liability of the commercial operator of this portal - No violation of Article 10 of the ECHR***

In a Grand Chamber ruling, the ECtHR ruled, by a majority, that Estonia did not violate Article 10 of the ECHR, in that the Estonian courts found a commercial operator of a web-based news portal liable for insulting comments left by users on said portal.

The applicant, Delfi AS, is a company incorporated in Estonia, and has one of the largest web-based news portals in the country. In January 2006, it published on its news portal an article about a shipping company, in which it referred to the decision taken by the company to change the route taken by its ferries to reach certain islands. The passage of ferries by this new route had caused the breaking of the ice in places where proper roads could have been built later, thus delaying for several weeks the opening of these roads, which constituted a cheaper and faster way than the ferries to reach the islands. Under the article, there were comments left by the readers, which were accessible to all site visitors. A number of these comments contained extremely abusive language against the shipping company and its owner. At the request of the latter's lawyers, Delfi withdrew the abusive comments a few weeks after publication.

In June 2008, following legal action brought by said owner against Delfi, the national court in charge of the case, ruling that the disputed comments were defamatory and that Delfi was responsible for them, sentenced it to pay the applicant 5,000 Estonian kroons (i.e. about 320 euros) in damages. Delfi brought the case before the Supreme Court of Estonia, which dismissed its appeal in June 2009. Holding that Delfi controlled the publication of comments that appear on its website, the Supreme Court rejected the argument that the company derived from directive 2000/31/EC on electronic commerce and which indicated that it had played, in this case, a purely technical, automatic and passive role of providing information and storage services. The Supreme Court therefore considered that Delfi was liable under the relevant domestic law, including the Constitution, the law on general principles of the civil code and the law on obligations, as it had failed not only to prevent the publication of comments that are insulting to human dignity and contain threats and are, therefore, clearly illegal, but also remove the comments from the portal on its own.

Citing Article 10 of the ECHR (freedom of expression) in its request brought before the ECtHR on 4 December 2009, Delfi complained that the Estonian courts had deemed it liable for comments written by readers in violation of this provision.

Following the chamber ruling of 10 October 2013, in which the ECtHR had found that the conviction of Delfi did not violate Article 10 of the ECHR, and the referral of the case in the Grand Chamber under Article 43 of the ECHR, the issue that the ECtHR was asked to resolve in this case was not whether there had been infringement of the freedom of expression of those who had left the comment, but whether fact that Delfi was held liable for the comments made by third parties had infringed the freedom of the applicant to provide information.

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The Grand Chamber found that the decision of the Estonian courts to hold Delfi liable was justified and did not constitute a disproportionate restriction on the right of the applicant to freedom of expression under Article 10 of the ECHR. The Grand Chamber of the ECtHR took into account the extreme nature of the comments in question, the fact that they had been left in response to an article published by Delfi on a news portal that it operated professionally as part of a commercial activity, the insufficient measures taken by Delfi to promptly withdraw those comments after they were published as well as the moderate nature of the sum (320 euros) that Delfi had been ordered to pay.

*European Court of Human Rights, ruling dated 16.06.15, Delfi AS / Estonia (request no. 64569/09), www.echr.coe.int*

IA/34084-A

[NICOLLO]

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***ECHR - Right to freedom of expression - Comments of a lawyer recounted to the press, alleging failure of the judicial system - Failure observed as part of an inquiry procedure involving significant media coverage - Criminal conviction of the lawyer for public defamation of the investigating judges in question - Violation of Article 10 of the ECHR***

In its Grand Chamber ruling delivered on 23 April 2015, the ECtHR issued a clarification on the scope of the right to freedom of expression guaranteed in Article 10 of the ECHR and granted to a lawyer in the context of pending judicial inquiry procedure.

The Court was, in particular, asked to rule on the compliance with the ECHR of the criminal conviction for public defamation of the lawyer Olivier Morice, who had strongly criticised the investigating judges on the conduct of two judicial inquiry procedures. The lawyer in question, appointed to represent the widow of the late French judge Borrel, as part of two judicial inquiry procedures initiated with regard to the death of the said judge, had leaked to the press a letter written by him and by one of his colleagues and addressed to the garde des Sceaux (Keeper of the Seals) to denounce the "conduct that was entirely contrary to the principles of impartiality and fairness" of the French judges to whom these procedures had been initially assigned. The cases investigated by the judges were characterised, in particular, by the significant media coverage they received and the public attention given to the circumstances of the disappearance of Judge Borrel, found dead in October 1995, near the city of Djibouti.

As the judges, to whom the judicial inquiry procedures in question were initially referred, were removed from the case, the lawyer Morice had alleged numerous failures in said procedure as well as complicity with the prosecutor of Djibouti. Specifically, one of the investigating judges concerned failed to send a pleading to his successor during the withdrawal of the case. Mr. Morice had been convicted, according to the complaints made by the two judges in question, of complicity in defaming a public official, a conviction that is the subject of the case before the ECtHR. Hearing an appeal from the lawyer, the Court of Cassation had upheld the assessment that the impugned remarks were particularly slanderous accusations and had found that the permissible limits of freedom of expression in the criticism of the actions of judges were exceeded.

Hearing the case, the ECtHR unanimously found a violation of Article 10 of the ECHR, arguing that the conviction of Mr. Morice constituted interference in the exercise of his right to freedom of expression. In this regard, the judges of the ECtHR noted, in particular, that the impugned statements certainly were value judgments, given the general tone of the remarks, but that these remarks were based on an adequate and factual basis. The alleged non-transmission of a video cassette could be established and the expressions used by the lawyer had a sufficiently close connection with the facts of the case.

Furthermore, the ECtHR took into account the specific history of the case and, in particular, its highly publicised nature. Given this context, the ECtHR found that the statements of the lawyer were designed to draw public attention to the possible judicial failures, which relates to a general subject of interest and therefore leaves little room for restrictions on freedom of expression.

In addition, the ECtHR held that the limits of acceptable criticism are greater for judges than for private individuals as the judicial authority can benefit from constructive criticism. In this regard, the impugned statements were not, in the opinion of the judges of the ECtHR, likely to disturb the proper conduct of court proceedings, since the investigating judges referred to by the critics had previously been removed from the case.

Given all this, the ECtHR established that the interference with the right to freedom of expression was disproportionate, which was not "necessary in a democratic society", within the meaning of Article 10 paragraph 2 of the ECHR.

*European Court of Human Rights, ruling dated 23.04.15, Morice / France (request no. 29369/10,http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-154264#{"itemid":["001-154264"]}*

IA/34075-A

[GANI]

*** Briefs (ECHR)***

In its judgment of 2 December 2014, the ECtHR (second section) unanimously concluded that there was a violation of Article 2 of Protocol 4 to the ECHR (freedom of movement) by Italy, following the refusal to issue a passport to the applicant and the cancellation of his identity card for foreign travel by the domestic courts. This refusal was motivated by the non-payment of alimony to his family. The purpose of this measure was to "ensure that the parent meets his obligations towards his children". The domestic courts had stressed that the applicant had not paid the alimony that he was required to pay to his children and that there was a risk that he will stop paying it if he moved abroad.

The ECtHR noted that there are ways likely to achieve recovery of credit beyond national borders, in particular regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations, the Hague Convention on the international recovery of child support and other forms of family maintenance and the New York convention on the recovery abroad of maintenance.

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The ECtHR noted that these instruments have not been taken into account by the national authorities at the time of application of the contested measure. They simply pointed out that the applicant could have gone abroad with his passport and thus avoided fulfilling his obligation.

In addition, the ECtHR noted that, in the present case, the restriction imposed on the applicant had not guaranteed the payment of alimony.

Accordingly, it held that the applicant had been subject to an automatic measure, without any limitation with regard to its scope or its duration. Moreover, the domestic courts had not carried out since 2008 in any review of the justification and proportionality of the measure in view of the circumstances in this case. The ECtHR thus held that the automatic imposition of such a measure for an indefinite period, without taking into account the circumstances of the person concerned, cannot be described as necessary in a democratic society.

*European Court of Human Rights, ruling dated 02.12.14, Battista / Italy (request no. 43978/09) www.echr.coe.int*

IA/34085-A

[NICOLLO]

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By its decision of 3 February 2015, the fourth section of the ECtHR held that the sentence of life imprisonment without parole, subject to a review of UK law, is compatible with the ECHR.

Previously, in the Vinter/United Kingdom case, the Grand Chamber of the ECtHR had found that the United Kingdom had violated Article 3 of the ECHR concerning the prohibition of inhuman or degrading treatment, stating that the provisions of UK law governing the authority of the Minister of Justice to release prisoners who were sentenced to life imprisonment were not clear (see judgment of 9 July 2013, request nos. 66069/09, 130/10 and 3896/10, *Reflets No.3/2013*, p. 6-7). The Grand Chamber had concluded, in particular, that for a real life sentence without parole to remain compatible with Article 3, there must be a possibility of review.

On 18 February 2014, the Court of Appeal provided clarifications as to the possibility of release for prisoners sentenced to life imprisonment without parole. It confirmed that, under national law, the Minister of Justice is required to order the release of prisoners in case of establishment of "exceptional circumstances" justifying a release, the exercise of that authority being subject to the review of national courts (see judgment of 18 February 2014, McLoughlin, [2014] EWCA Crim 188, *Reflets No. 2/2014*, p. 43-44).

Taking into account these clarifications, the fourth section of the ECtHR ruled that the sentence to such punishment is consistent with Article 3 of the ECHR. The decision of the Chamber was referred to the Grand Chamber by decision of 1 June 2015.

*European Court of Human Rights, ruling dated 03.02.15, Hutchinson / United Kingdom (request no. 57592/08), www.echr.coe.int*

IA/34313-A

[HANLEVI]

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By judgment of 27 January 2015, the second chamber of the ECtHR held, by a majority, that Italy had violated Article 8 of the ECHR, in that the Italian authorities had not, while making decisions relating to the removal and guardianship of a child, safeguarded the best interests of said child, born of surrogacy in Russia.

The applicants, who are Italian nationals, had decided to opt for surrogacy, by concluding an agreement to that effect in Russia. As part of that agreement, which provided for the *in vitro* fertilization of a surrogate mother in this country, a child was born in 2011.

Following the return of the applicants to Italy with said child, a request for carrying out DNA tests had been made by the juvenile court to establish the biological relationship of the child with the applicants. The tests helped establish, without the applicant being informed, that no genetic link existed between them. On the basis of these tests, the competent Italian authorities refused to recognise the filiation established abroad and register the birth certificate, on the basis of public order considerations. In particular, said decision of refusal mentioned the unlawful conduct of the applicants relating to circumvention of the Italian and international laws on the prohibition of adoption of an infant and also expressed doubts about their ability to adopt a minor child. The child was then taken away from the applicants and placed in the care of a guardian.

In this context, the ECtHR found that the contested measures to remove the child and place it under guardianship, constituted an interference with the applicants' family life. Recalling the essential principle of the best interests of the child, the Court found that the measures adopted by the Italian authorities had not sufficiently taken into account these interests, since being taken away from the family environment was an extreme and unjustified measure under the circumstances of the case. On this point, the Court emphasised that the reference to public order cannot be considered a carte blanche justifying any measure. Despite no biological link between the applicants and the child, and the brevity of the period during which the applicants took care of the child, the Court found that the national authorities had not preserved a fair balance between the interests involved and had, therefore, violated Article 8 of the ECHR.

It should be added, firstly, that the decision of the chamber was the subject of a referral to the Grand Chamber. Secondly, it must be noted that this decision differs from the Mennesson/France ruling (ruling dated 26.06.14, Mennesson/France, *Reflets No.* 2/2014, p. 7-8), also pertaining to children born of surrogacy, to the extent that, in this case, the freedom of States not to grant legal force to a surrogacy established abroad is recognised. However, this recognition is established under the condition that that State should refrain from adopting removal measures and respect the right of the applicants to "family life".

*European Court of Human Rights, ruling dated 27.01.15, Paradiso and Campanelli / Italy (request no. 25358/12), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-150770#{"itemid":["001-150770"]}*

IA/34077-A

[GANI]

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By its judgment of 6 June 2013, in the Haldimann e.a./Switzerland case, the ECtHR ruled that Switzerland had violated article 10 of the ECHR, as part of a criminal conviction of journalists who had prepared, recorded using a hidden camera and aired on a television broadcast, an interview with an insurance broker without his consent.

The applicants had taken the recording with the objective of stigmatising the improper business practices implemented within the professional operations of private insurance brokers and, in the general context of consumer protection, with regard to the sale of life insurance products. They referred the matter to the ECtHR arguing that the conviction by the Swiss courts ordering them to pay criminal fines, constituted a disproportionate interference with their right to freedom of expression, mainly on the grounds that the insurance brokerage practices represented a very important public debate in Switzerland.

The ECtHR, firstly, considered the fact that the registered broker was not a public figure and that the disputed report did not directly focus on him. More specifically, the interview had not taken place in the business premises of that broker or in the premises that he usually visited. Moreover, his face was pixelated carefully, his voice was modified, and the report gave no distinctive sign of his identity. Furthermore, the accuracy of the facts in the report was never challenged.

In this context, the ECtHR confirmed that the applicants' conduct violated the privacy of the broker and his professional and personal interests. However, it held that the interference with his private life was not so serious that it should take precedence over the public's interest in being informed.

Therefore, the ECtHR held that there has been a violation of Article 10 of the ECHR in that the sanctions imposed on the applicants had infringed their freedom of expression. In addition, the monetary penalties applied were not considered necessary in a democratic society, as they were, generally, likely to discourage the media representatives to express their criticism and condemn improper practices.

*European Court of Human Rights, ruling dated 24.02.15, Haldimann and others/Switzerland (Request No. 21830/09),* [*http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-152424#{"itemid":["001-152424"]}*](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-152424#{"itemid":["001-152424"]})

IA/34076-A

[GANI]

## EFTA Court

***European Economic Area - Industrial and commercial property - Patent law - Supplementary protection certificate for medicinal products - Scope of application - Product placed on the market before obtaining a marketing authorisation in compliance with Directive 2001/82/EC***

The EFTA Court received a request for an advisory opinion on the interpretation of Regulation (EEC) No. 1768/92 concerning the creation of a supplementary protection certificate for medicinal products. In essence, the request raised two main issues.

Firstly, the question of whether a veterinary medicinal product whose supply in the EEA has taken place under special exemptions or licenses issued by the competent authorities of Ireland and Norway respectively, which cannot be considered as falling within the scope of the regulation to the extent that it had already been placed on the market. Secondly, whether a marketing authorisation granted under Article 26, paragraph 3 of Directive 2001/82/EC on the Community code relating to veterinary medicinal products, could be regarded as constituting an authorisation for marketing within the meaning of Article 2 of Regulation (EEC) No 1768/92.

Regarding the first question, the EFTA Court held that:

"Under Regulation (EEC) No 1768/92, a supplementary protection certificate for a veterinary medicinal product may be granted in an EEA State on the basis of a marketing authorisation granted in that State pursuant to the administrative authorisation procedure set out in Title III of Directive 2001/82/EC, including the procedure for authorisation in exceptional circumstances under Article 26(3) of that directive. Such a marketing authorisation constitutes a valid authorisation and, where appropriate, may also constitute the first authorisation to place the product on the market as a veterinary medicinal product within the meaning of Article 3(b) and (d) of Regulation (EEC) No 1768/92.

Permissions granted on the basis of the first paragraph of Article 8 of Directive 2001/82/EC do not constitute a marketing authorisation within the meaning of Regulation (EEC) No 1768/92. That derogating provision strictly limits the use of the measures permitted under it, stating that it applies only in the event of serious epizootic diseases, in the absence of suitable medicinal products and after informing the EFTA Surveillance Authority of the detailed conditions of use (…)."

Then, regarding the second question, the EFTA Court held that:

"Pursuant to Article 4 of Regulation (EEC) No 1768/92, the scope of protection conferred by a supplementary protection certificate extends to a specific strain of a virus covered by the basic patent, but not referred to in the marketing authorisation for a virus vaccine relied on for the purposes of Article 3(b) of Regulation (EEC) No 1768/92, only if the specific strain constitutes the same active ingredient as the authorised medicinal product and has therapeutic effects falling within the therapeutic indications for which the marketing authorisation was granted. It is not relevant whether a medicinal product based on such other strain would require a separate marketing authorisation. The appreciation of such elements is a matter of fact which is to be determined by the national court.

A supplementary protection certificate is invalid to the extent it is granted a wider scope than that set out in the relevant marketing authorisation".

*EFTA COURT, Ruling dated 09.04.15, in Case E-16/14, Pharmaq AS / Intervet International BV, www.eftacourt.int*

IA/34082-A

[LSA]

*** Brief (EFTA)**

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On 31 March 2015, the EFTA Court held that by maintaining in force a regulation that requires a dentist fully trained and qualified in Austria, wishing to engage in a professional activity corresponding to his degree, to carry out this activity as an employee, under the supervision, orders and direct responsibility of a dental practitioner fully qualified in Liechtenstein ('Zahnarzt'), the latter State had failed to fulfil its obligations under Article 31 of the EEA agreement prohibiting restrictions on the freedom of establishment.

It notes, in this regard, that:

"Generally, *Dentisten* must be expected not to perform activities for which they are not qualified, whether they are employed or self-employed. *Dentisten* working independently may be subject to supervision, for example by way of reporting duties to the social security system, mandatory membership in a dental health service provider's association, and/or inspections by a national supervisory authority. Such measures would be less restrictive than the employment requirement, as they would allow *Dentisten* to pursue their profession in the legal form, in accordance with the economic interest and to the practical extent that they choose. By contrast, the employment requirement in Article 63 completely deprives *Dentisten* of their freedom of establishment in Liechtenstein. Hence, the employment requirement goes beyond what is necessary to attain the objective pursued.

A potential risk of confusion among the general public in the event that *Dentisten* were allowed to practise independently could be minimized by requiring *Dentisten* clearly to label their practice as such. Those not aware of the differences in dental qualifications between a *Zahnarzt* and a *Dentist* may experience being sent from the *Dentist* to a *Zahnarzt*, depending on the service they seek. Such minor annoyance cannot outweigh the interest of *Dentisten to pursue their profession on an independent basis"* (points 43-45).

*EFTA COURT, Ruling dated 31.03.15, in Case E-17/14, EFTA Surveillance Authority v the Principality of Liechtenstein,* www.eftacourt.int

IA/34083-A

[LSA]

## II. National courts

### 1. Member States

#### Germany

***Fundamental rights - Freedom of religion and belief - Principle of equal treatment in access to public service - National regulation prohibiting teachers from exhibiting external manifestations of religious views that could disturb the neutrality of the State vis-à-vis the students - Restrictive interpretation***

By an order of 27 January 2015, the Bundesverfassungsgericht (Federal Constitutional Court, the "BVerfG") developed its own case law on religious neutrality in schools, judging as contrary to the Grundgesetz (Basic Law), two decisions of the state of North Rhine-Westphalia (a dismissal and a warning), taken on the basis of the state law on schools ("SchulG-NRW"), following the refusal by a teacher and a socio-educational consultant, to remove the veil.

Hearing constitutional appeals brought by employees of the state concerned against the judgments of the administrative courts upholding said decisions of the state, the BVerfG ruled, more specifically, on Article 54, paragraph 4, of the SchulG-NRW, which prohibits any outward manifestation of political, religious, ideological or other opinions, would be likely to endanger or disturb the neutrality of the state vis-à-vis the students and parents.

In this regard, the BVerfG held that an extensive application of the prohibition on wearing religious symbols, on the basis of a mere abstract threat to peace in schools, is incompatible with the religious freedom of the applicants, guaranteed by Article 4, paragraphs 1 and 2 of the Grundgesetz. Given the compulsory nature of the religious commandment on which the use of the veil is based, the interference in the religious freedom caused by such a prohibition that can amount to a prohibition on access to the profession, cannot be justified by the objective of protecting, *in abstracto*, peace in schools and the religious neutrality of the State. Given the principle of proportionality, the prohibition on wearing clothes reflecting a religious connotation is admissible, according to the BVerfG, only in the case of a genuine disruption of and danger to peace in schools or the neutrality of the State.

While this interpretation of the Constitution was not shared by two constitutional judges who, in a dissenting opinion, highlighted the importance of neutrality of the State in schools and of the educational authority of parents, the BVerfG found, with a majority of six votes against two, that the administrative courts had not established facts for assessing the existence of a real danger. In these circumstances, the BVerfG had to refer the cases to the lower courts, in order to implement the restrictive review of the SchulG-NRW required by the Grundgesetz.
Moreover, to the extent that, according to article 54, paragraph 4, third sentence of the SchulG-NRW, the prohibition on the manifestation of religious symbols does not apply to the representation of Christian and western educational and cultural values, the BVerfG found a violation of the principle of equal access to public service, enshrined in Article 3, paragraph 3, read in conjunction with Article 33, paragraph 3, of the Grundgesetz. This provision was, therefore, declared unconstitutional by the BVerfG.

This decision must be read in line with the judgment of 11 September 2013 (6 C 25.12), in which the BVerfG itself recommended the wearing of the "burkini" to allow Muslim students to attend swimming lessons while respecting the rules of their faith.

On this subject, also refer to the judgment of the Constitutional Court of Belgium, on p. 22 of this Bulletin.

*Bundesverfassungsgericht, order of 27.01.15, 1 BvR 471/10, 1 BvR 1181/10, www.bundesverfassungsgericht.de*

IA/34122-A

[BBER]

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***Government bonds subscribed by private creditors - Insolvency of the issuing State and declaration of a state of necessity - Measures of external debt restructuring negotiated with a majority of the creditors - Request for repayment made by a creditor who has not consented to these measures ("holdout" creditor) - Rule of public international law allowing the issuing State (Argentina) to refuse repayment on the grounds of state of necessity - Absence***

In 2007, Argentina had issued bearer debt securities in the amount of approximately 500,000 euros. Following severe economic difficulties, the State decided to suspend the repayment of all external debts by declaring a state of necessity. Subsequently, the State concluded agreements for deferral of payment and debt restructuring with a majority of its creditors. Several creditors, described as "holdout" creditors, however, refused to accept such an agreement.

Hearing a request for repayment submitted by a "holdout" creditor for the securities he had acquired from Argentina as the final court of appeal, the Bundesgerichtshof (Federal Court of Justice) upheld the decisions of the lower courts that had accepted the request for repayment on the grounds that a State may not, in the present state of public international law, refuse repayment of obligations to private "holdout" creditors by citing a state of necessity.

By a 2007 judgment, the German Federal Constitutional Court had already noted the absence of general rules on the bankruptcy of a State in international law. Moreover, it held, in said judgment, that the state of necessity, while applicable in the context of legal relations falling exclusively under public international law, cannot, in the absence of a customary law in this regard, be invoked vis-à-vis private creditors.

In its judgment, the Bundesgerichtshof held that this decision, which was previously taken during the global financial crisis of 2008, is still valid. The Bundesgerichtshof pointed out, firstly, that the recovery measures - which have been taken on a voluntary basis - in the euro zone for Greece and Cyprus have not established general principles of international law governing the consequences of the insolvency of a State on its obligations vis-à-vis private individuals. Argentina had invoked, in this respect, equal treatment of all creditors and the integrity of an insolvency proceeding. Secondly, the Bundesgerichtshof found that the increasing use of "collective action clauses (CAC)", i.e. clauses used in the terms for borrowing during issuance of government bonds and allowing enforceability of decisions taken by the majority of creditors for all of them, has not led to the emergence of a rule of public international law on the matter.

*Bundesgerichtshof, ruling dated 24.02.15, XI ZR 193/14, www.bundesgerichtshof.de*

IA/34121-A

[KAUFMSV]

**** Briefs (Germany)***

Hearing an application for compensation due to a significant flight delay, brought on behalf of an infant who received a "reduction to zero" benefit given by an air carrier to passengers under two years of age, the Bundesgerichtshof (Federal Court of Justice, hereinafter the "BGH") provided clarification as to the personal scope of application of the right to compensation under Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in case of denied boarding and of cancellation or long delay of flights.

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The BGH held in particular that, in such a case, said regulation is not to be applied, since, under Article 3, paragraph 3 of that regulation, it does not apply to passengers who "travel free or at a reduced fare not provided directly or indirectly to the public". Citing, for the purposes of interpretation, different language versions as well as the origins and objectives of the Regulation, the BGH held that said restriction of the personal scope of application is not limited to "reductions to zero" that are not provided to the public.

In addition, the BGH held that, in case of air transport as part of a package holiday contract, the free transport must be assessed in the light of the relationship between the air carrier and the organiser of the trip, since Article 3, paragraph 3 of Regulation (EC) No. 261/2004 expressly refers to rates "indirectly" accessible to the public.

*Bundesgerichtshof, ruling dated 17.03.15, X ZR 35/14, www.bundesgerichtshof.de*

IA/34124-A

[BBER]

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In its judgment of 18 November 2014, the Bundesgerichtshof (Federal Court of Justice, hereinafter the "BGH") specified the criteria applicable, under German law, to the determination of quotas to be borne by different legal persons order jointly by the Commission to pay a fine for infringement of competition rules.

The ruling is delivered in the context of proceedings between several companies that had formed, during their participation in cartels in the calcium carbide market, a "single undertaking". As the fine of several million euros imposed by the Commission was fully paid by the parent company at the time, it brought before the BGH, a contributory action (action for the distribution of the fine between joint debtors) against its former subsidiaries in order to recover all or, alternatively, two-thirds of the amount paid.

Reiterating that, according to the case law of the Court of Justice (Commission/Siemens Österreich e.a. ruling, C-231/11 P, EU:C:2014:256), it is, in such cases, incumbent upon the national courts to determine the quotas by applying national law, the BGH ruled that in case they are not determined contractually, the quotas of the debtors must be determined in accordance with Article 426 of the German civil code.

Under this provision, the joint debtors are, in principle, liable to pay equal amounts. However, to the extent that a different determination of quotas may be appropriate under the particular circumstances of the case, the Bundesgerichtshof referred the case to the trial courts to establish the facts necessary to be able to assess the role of each participant in the infringement.

*Bundesgerichtshof, ruling dated 18.11.14, KZR 15/12, www.bundesgerichtshof.de*

IA/34125-A

[BBER]

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In its order of 25 November 2014, the Bundesfinanzhof (Federal Finance Court, hereinafter the "BFH") ruled on the impact of a pending preliminary ruling on the assessment, by the national judge in chambers, of conditions for granting a stay of execution. According to the BFH, the fact that a request for preliminary ruling involving the compliance with EU law of a national regulation is pending before the Court of Justice cannot compel the judge in chambers to grant a request citing serious doubts raised by the national court in respect of the said regulation. In such a case, the interests of the party seeking the stay of execution must not necessarily be favoured over the interest of the public in the immediate implementation of the contested measure.

The case is part of an appeal before the competent finance court, introduced by the operator of a nuclear plant against the collection, under a national regulation, of a tax on the use nuclear fuel for industrial power generation. The BFH, as judge in chambers at last instance, rejected the request made by said operator to obtain a stay of execution of the impugned taxation decision. Although, at the time of the summary procedure before the German courts, the Court of Justice was referred the Kernkraftwerke Lippe-Ems preliminary ruling (C-5/14, EU:C:2015:354), pertaining to the compliance with EU law of such regulations, the BFH held that, notwithstanding any doubts as to the validity of the legal basis of said tax, the conditions for granting a stay of execution were not met.

In this regard, the BFH emphasised that the stay of execution of the impugned taxation decision would have been equivalent to a suspension of the law on the tax on nuclear fuel, which would be possible, according to the case law of the Bundesverfassungsgericht ( Federal Constitutional Court) only in highly exceptional cases, characterised by a particular interest of the applicant for interim relief.

*Bundesfinanzhof, order of 25.11.14, VII B 65/14, www.bundesfinanzhof.de/*

IA/34123-A

[BBER]

**Austria**

***EU law - Principles - Equal treatment - Citizenship of the Union - Discrimination owing to nationality - Access to higher education - Limiting the number of students holding a high school diploma obtained in a Member State other than the host Member State, allowed to enrol for higher education in that State - Justification - Protection of public health - Assessment criteria***

In its judgment of 5 March 2015, the Verfassungsgerichtshof (Constitutional Court, hereinafter the “VfGH”) ruled on the compatibility with EU law of an Austrian regulation reserving 75% of the seats in medical and dentistry schools for holders of an Austrian high school diploma, with 20% of the seats being reserved for other EU citizens. These quotas have implemented in response to the influx of candidates from other Member States, mainly Germans, enrolling in medical schools with the aim of preventing a future shortage of qualified professionals in the Austrian public health sector.

Hearing an appeal submitted by a German national against a decision of the Vienna University denying him access to medical studies, the VfGH was required to verify compliance with Article 21, paragraph 2, of the Charter of fundamental rights of the Union, which prohibits any discrimination on grounds of nationality in the application of the treaties. Moreover, the applicant argued that the procedure for evaluation had amounted to discrimination based on gender, contrary to Article 21, paragraph 1, of the Charter, to the extent that this evaluation was broken down by gender to compensate for imbalances resulting from the particular nature of the examinations.

In this context, the VfGH reiterated its own case law according to which the rights guaranteed by the Charter can be invoked in support of a constitutional appeal, insofar as its object falls within the scope of application of the Charter (see the ruling of the VfGH of 14 March 2012, 466/11-18 and U 1836/11-13, *Reflets No. 2/2012,* p. 6). In this regard, the VfGH held, firstly, that the national regulation in question, adopted with the aim of meeting the obligations resulting, for Austria, from the judgments of the Court of Justice in the Bressol e.a. case (C-73/08, EU:C:2010:181) and Commission/Austria case (C-147/03, EU:C:2005:427) must be considered falling under the implementation of EU law, as defined by Article 51 of the Charter, since it is likely to have the effect of depriving the applicant of the enjoyment of the rights conferred by the EU citizenship status.

Then, regarding the alleged violation of article 21, paragraph 1, of the Charter, the VfGH found no breach of the prohibition of gender-based discrimination. According to the assessment of the constitutional courts, the evaluation method for entrance examinations temporarily used by the university concerned is designed to take into account differences in gender, in order to avoid a systematic under-representation of candidates of a specific gender.

Regarding the alleged discrimination owing to nationality, the VfGH held from the outset that the system of quotas in question constitutes unequal treatment based indirectly on nationality. As the rights guaranteed by Article 21, paragraph 2, of the Charter correspond to those under Article 18, paragraph 1, of the TFEU, the possible justification for this unequal treatment was therefore, according to the Constitutional Court, to be assessed in the light of the criteria defined by the Court in the Bressol e.a. ruling mentioned above, involving a similar regulation adopted by Belgium. According to this case law of the Court, the justification for such a regulation with the objective of maintaining a high-quality medical service that is balanced and accessible to all involves a prospective analysis of the risks to the protection of public health.

Since, according to said case law of the Court, it is the responsibility of the national authorities to demonstrate that such risks do exist on the basis of an objective, detailed and quantified analysis, the VfGH relied on data compiled by a study conducted by the competent ministry to conclude that there could be a shortage of health professionals in the near future. Moreover, the constitutional courts found, on the same factual basis, that the quota system may be considered appropriate to ensure the achievement of the objective of protecting public health and that the regulation was not going beyond what is necessary to achieve that objective.

In this regard, the VfGH specified that the Austrian authorities had set up a monitoring system to comply with the requirements arising from the Bressol e.a. judgment. Said authorities cooperated closely with the Commission, which suspended infringement proceedings initiated in 2007 to allow the Member State concerned to collect the data needed to justify an exception to the principles of free movement and equal treatment.

*Verfassungsgerichtshof, ruling dated 05.03.15, B 533/2013-18, www.vfgh.gv.at/*

IA/34126-A

[BBER] [SCHULLU]

**** Briefs (Austria)***

In its order of 26 February 2015, the Oberster Gerichtshof (Supreme Court, hereinafter the "OGH") ruled on the interpretation of the concept of “habitual residence of the child”, within the meaning of Article 8, paragraph 1, of Regulation (EC) No. 2201/2003 concerning the jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (“Brussels II bis” regulation). Citing the judgment of the Court of Justice in case C., (C-376/14 PPU, EU:C:2014:2268), the OGH held, more specifically, that a temporary displacement of the children concerned, following an interim decision, cannot substantiate a habitual residence in that sense.

The case falls within the context of a dispute between divorced parents. Following the divorce, a court action on custody rights had been brought before the Austrian courts. The case was pending when the father had moved to Germany, and had been provisionally granted custody by an interim decision of the Austrian court delivered in the main proceedings in December 2013. Since then, the children live with their father in Germany. In these circumstances, the mother had submitted a new application before the same court, requesting it to grant her specific visitation rights. However, this request was rejected, at first instance and on appeal, for lack of international jurisdiction. The Austrian trial courts had held that, in view of the new residence of the children concerned, the German courts had exclusive jurisdiction, under Article 8, paragraph 1, of the Brussels II bis Regulation, to hear cases concerning visitation rights.

However, the OGH, hearing an appeal for review (“Revisionsrekurs”) at last instance, held that the “habitual residence of the child”, within the meaning of Article 8 paragraph 1, must be determined in a uniform manner in respect of all aspects relating to parental responsibility. Thus, when a request for visitation rights is associated with a case concerning custody, Article 8, paragraph 1, of the Brussels II bis Regulation cannot, according to the OGH, be interpreted so as to divide international jurisdiction, notwithstanding any temporary displacement of the children involved.

*Oberster Gerichtshof, order of 26.02.15, 8 Ob 14 / 15i, www.ogh.gv.at/*

IA/34128-A

[BBER] [SCHULLU]

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Hearing an "individual appeal" brought by several Austrian companies against the Austrian law on working hours of shops, the Verfassungsgerichtshof (Constitutional Court, hereinafter the "VfGH") had the opportunity to provide clarifications with regard to its own case law according to which the Charter is taken into account for the purposes of constitutional review.

To the extent that said national regulation prohibits the opening of business on Saturday night and Sunday, the applicants alleged a violation of their freedom of enterprise, guaranteed by Article 16 of the Charter. In this regard, while the Austrian Constitution does not have any fundamental right concerning freedom of enterprise, the VfGH stated, upholding its leading judgment of 14 March 2012 (U 466/11-18, see *Reflets no. 2/2012,* p. 6) that, as part of the review of national provisions, the rights enshrined in the Charter are taken into account under the same terms as the Constitution.

However, the VfGH said that the implementation of the Charter extends only to the national provisions implementing EU law, within the meaning of Article 51, paragraph 1, of the Charter. In this case, the constitutional courts ruled that the law on working hours does not fall within the scope of a directive or that of a fundamental freedom and cannot, therefore, be used for the implementation of EU law (see the special edition of *Reflets No. 1/2013*). As such, the VfGH cited the case law of the Court of Justice on the scope of application of the Charter (Siragusa ruling, C-206/13, EU:C:2014:126 and Hernandéz ruling, C-198/13, EU:C:2014:2055), according to which the fact that a national regulation may indirectly affect EU law cannot constitute a sufficient connecting factor to broaden said scope.

*Verfassungsgerichtshof, ruling dated 03.03.15, G 107/2013/11, www.ogh.gv.at/*

IA/34127-A

[BBER] [SCHULLU]

## Belgium

***Fundamental rights - Right to education - Freedom of religion and expression - Lack of right for a parent to obtain on request, which is not substantiated, an exemption for the child from taking a study course of one of the recognised religions or that of non-denominational ethics***

The Belgian Constitutional Court, hearing a preliminary question referred by the Council of State, ruled that the rules under which a parent has no right to obtain on request, which is not substantiated, an exemption for his child from following the study course of one of the recognised religions or that of non-denominational ethics in schools, violate the right of parents to provide their children with education granted by the government in a way that respects their religious and philosophical convictions within the meaning of Article 24 of the Constitution, in conjunction with Article 2 of the first additional protocol to the ECHR.

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This preliminary question can be traced to the action for annulment brought before the Council of State against the decision by which a school in the city of Brussels had refused to provide a fourth-grader (high school) an exemption from following a course on philosophy. The student's parents had argued before the Council of State that they had been forced to enrol their daughter for the non-denominational ethics course to not jeopardise the validation of the certificate that was to be awarded to her at the end of the school year.

By requiring public schools to offer a choice between teaching one of the recognised religions and teaching non-denominational ethics, article 24, paragraph 1, section 4, of the Constitution, defines a fundamental right. This fundamental right granted to parents and students entails, on the part of these establishments, the obligation to organise courses on religions and non-denominational ethics. The same article of the Constitution guarantees every individual the right to education in accordance with the fundamental rights and freedoms. These fundamental rights include the right of parents to provide their children with education granted by the government in accordance with their religious and philosophical convictions.

The French community of Belgium allows the ethics course to be an enlisted course and authorises the person in charge of the course to testify in favour of a particular philosophical system. According to the Constitutional Court, it follows that the French Community does not guarantee that the courses on religion and non-denominational ethics offered to be chosen by the parents disseminate information or knowledge that is "objective, critical and pluralistic" according to the case law of the ECtHR which the Constitutional Court cites (see rulings of 29 June 2007, Folgero e.a./Norway, request no. 15472/02, and judgment of 9 October 2007, Hasan and Eylem Zengin/Turkey, request no. 1448/04).

It also appears from the aforementioned case law of the ECtHR that, to ensure the parents' right to not have their children experience a conflict between religious or moral education provided by the school and the religious or philosophical convictions of the parents, the pupils should be given assistance in the courses on religion or morality. In addition, to protect their right not to disclose their religious or philosophical beliefs, which comes primarily from within, the approach to be taken in order to obtain this exemption would not require parents to substantiate their request for exemption and thus reveal their religious or philosophical convictions.

On this, also refer to the order of the Bundesverfassungsgericht, on p. 16 of this Bulletin.

*Constitutional Court, ruling dated 12.03.15, No. 34/2015, www.const-court.be*

IA/34086-A

[NICOLLO]

**** Brief (Belgium)***

In its judgment of 7 May 2015, the Constitutional Court examined an appeal for annulment brought by a Finnish company producing "second-generation" bio-fuel, against certain provisions of the law of 17 July 2013 relating to minimum nominal volumes of sustainable bio-fuels to be incorporated in the volumes of fossil fuels annually released for consumption.

This law partially transposes Directive 2009/30/EC amending, in particular, Directive 98/70/EC on the quality of petrol and diesel fuels, and Directive 2009/28/EC on the promotion of the use of energy produced from renewable sources.

In support of its appeal for annulment, the Finnish company had claimed in particular that the provisions of said law favoured “first-generation” bio-fuels and, therefore, significantly limited the use of “second-generation” bio-fuels in Belgium, which would deprive it of the option of distributing its “second generation” bio-fuels in the Belgian market. The Constitutional Court accepted the appeal finding that the provisions of the law of 17 July 2013 called into question by the applicant company were incompatible with the principle of equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution, read in conjunction with Article 5 of Directive 98/70/EC, under which no Member State may prohibit, restrict or prevent the placing on the market of fuels that comply with the requirements of this Directive.

*Constitutional Court, rulings dated 07.05.15, No. 52/2015, [www.const-court.be/public/f/2015/2015-052f.pdf](www.const-court.be/public/f/2015/2015-052f.pdf)*

IA/ 34078-A

[EBN]

## Bulgaria

### * *Brief*

By its order of 8 May 2015, the Supreme Court of Cassation (Varhoven kasatsionen sad) ruled on the procedural rules applicable under national law in respect of the compensation for damage caused to individuals by the violation of EU law by the State.

In the present case, the applicant company had introduced, on the basis of Article 4, paragraph 3 of the TEU, an action for liability relating to compensation for damage that was caused to it by the violation of EU law resulting from a final decision of the supreme administrative court. This action was brought jointly against the National Assembly and National Revenue Agency.

Given that Bulgarian law does not provide for specific rules as regards the procedure applicable to such action and that the issue had been jointly addressed several times by the national courts, the Supreme Court of Cassation ruled as admissible, pursuant to Article 280, paragraph 1, points 2 and 3 of the civil procedure code, the appeal in cassation appeal brought by the applicant company against the order of the Sofia appellate court which had terminated the proceedings. This closure of the proceedings had been motivated by the non-execution of the appellate court's instructions relating to the payment of court fees according to the rules of civil procedure, particularly the payment of an advance on the court fees in the form of a tax at a single rate of 4% of the amount of the request.

In this regard, the Supreme Court of Cassation ruled that in this case it was appropriate to apply the rules of the administrative procedure laid down in Article 2 of the law on liability of the State and municipalities for damages caused (zakon za otgovornosta na darzhavata i obshtinite za vredi, hereinafter “ZODOV”). Therefore, it ruled out the applicability, in the main proceedings, of the rules of civil proceedings relating to tort liability under Articles 45 and 49 of the law on obligations and contracts.

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Therefore, a single fee of 25 lev (about 13 euros), as provided for in Article 9a, ZODOV, should be imposed on the applicant company.

On the grounds for its decision, the Supreme Court cited Article 4, paragraph 3 of the TEU, which requires in particular that Member States refrain from taking any measure that could jeopardise the attainment of the Union's objectives and also cited the case law of the Court of Justice under which each Member State is obliged to compensate for the damage caused to individuals by violations of EU law, which are attributable to them and, in particular, when the violation arises from a decision of a court adjudicating at last instance (refer to the Köbler ruling, C-224/01, EU:C:2003:513 and Francovich e.a. ruling, C-6/90 and C-9/90, EU:C:1991:428).

The aforementioned order of the Supreme Court of Cassation is of great importance since it ensures effective judicial protection in case of violation of EU law by national public institutions.

*Supreme Court of Cassation, order no. 269 of 08.05.15, (Varhoven kasatsionen sad)* www://domino.vks.bg/bcap/scc/webdata.nsf/Keywords/971E81A5BF5948BEC2257E3E0043C739

IA/33664-A

[NTOD]

**Cyprus**

**** Brief***

On 12 March 2015, the Supreme Court ruled on the interpretation of the Cypriot law transposing Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents. Specifically, the Supreme Court had to interpret the provisions of the law concerning the scope of application of Directive 2003/109/EC, and in particular its Article 3, paragraph 2 e), which provides that the directive does not apply to third-country nationals staying in the country on a temporary basis or when their residence permit has a limited duration.

The applicant had appealed against the trial decision upholding the decision of the administrative authority for immigration that had refused to grant him the status of long-term resident on the grounds that his residence permit had been formally limited under Article 3, paragraph 2 e) of Directive 2003/109/EC, and, therefore, was not within the scope of application of the directive. The applicant argued that the trial court had not correctly interpreted the judgment of the Court of Justice in the Singh case (C-502/10, EU:C:2012:636).

The Supreme Court rejected the applicant's arguments and confirmed the compliance of the contested decision with the case law of the Court of Justice. As regards the temporary nature of the stay provided for in Article 3, paragraph 2 e) of Directive 2003/109/EC, the Supreme Court found that, under the Singh judgment mentioned above, it is up to the national court to verify whether the formal limitation of a residence permit is temporary or not.

In addition, the Supreme Court found that the nature and purpose of the stay must be the determining factors in the context of such a verification and that, in this context, the temporary nature of a residence permit is only one of the elements to be taken into consideration.

*Supreme Court, second instance, ruling dated 12.03.15, No. 73/2010,* [*www://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2015/3-201503-73-10.htm&qstring=melanie%20and%20dela%20and%20cruz*](www://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2015/3-201503-73-10.htm&qstring=melanie%20and%20dela%20and%20cruz)

IA/34070-A

[LOIZOMI]

**Spain**

***Unfair terms in contracts concluded with consumers - Directive 93/13/EC - Recognition by the court of the unfairness of a clause - Recognition not affecting the effects of the term that occurred previously***

In a judgment of 9 May 2013, the Supreme Court had ruled on the effects over time of the declaration of nullity of certain terms contained in mortgage loan contracts, known as the "cláusulas suelo". These are clauses that set a minimum threshold for variable interest rates, so that consumers do not take advantage of decrease in official rates beyond this threshold. The Supreme Court stated that these terms were invalid, not as such, but only when they had not been explained to consumers in a clear and transparent manner. However, it had limited the retroactive effect of such a declaration of nullity, so that it is effective only from 9 May 2013, date of the judicial declaration of nullity of such terms *(ex nunc),*and not from the date of conclusion of the contract *(ex tunc)*.

The case which resulted in the judgment of 9 May 2013 was a class action. It was an action for an injunction, brought by a consumer protection association, which only intended to obtain a prohibition for banks to use such terms. In addition, the judgment had been pronounced at a time when the Spanish banking system faced serious systemic risks, whereas two years later these risks have mostly disappeared. It is for these reasons that some appellate courts have asked the question whether this doctrine was to be applied in case of individual action for obtaining reimbursement of excess interest paid by consumers before 9 May 2013, which resulted in a conflicting case law.

In a new judgment of 25 March 2015, the Supreme Court upheld the limitation of the retroactive nature of the declaration of nullity of such terms, also with regard to the repayment of interest paid in excess, based on its judgment of 9 May 2013. However, two judges of the Supreme Court issued a dissenting vote to highlight that, in its judgment of 9 May 2013, the Supreme Court had ruled on a declaration of nullity related to an action for injunction and not on the reimbursement of interest paid in excess. Therefore, the question of whether a repayment may be claimed by consumers is limited to the interest generated from 9 May 2013 remains open. The dissenting vote also highlights that in order to protect the right to an effective remedy, the judgment of 9 May 2013 should not apply in case of individual actions, in order not to deprive those individuals who were not parties to the proceedings of the right to claim full repayment of interest.

In this regard, it should be noted that compatibility with Directive 93/13/EC of such a limitation of the effects of the declaration of nullity of an unfair term has recently been the subject of a preliminary ruling by a Spanish court in the pending Gutiérrez Naranjo case (C-154/15). In addition, a consumer group in Málaga recently announced its intention to request a commercial court to submit a preliminary ruling on the compatibility of the decision of the Supreme Court in its judgment of 25 March 2015 with Directive 93/13/EC.

*Tribunal Supremo, Sala de lo Civil, ruling dated 25.03.15, No. 139/2015 (Recurso no. 138/2014), www.poderjudicial.es*

IA/33993-A

[OROMACR]

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***Judicial and police cooperation in criminal matters - Framework Decision 2008/909/JHA - Mutual recognition of judgments in criminal matters imposing sentences or measures involving deprivation of liberty - Cumulative sentences imposed in another Member State - Conditions***

By its order of 4 September 2014, the third chamber of the Audiencia Nacional had refused cumulative sentences imposed in France on Kepa Pikabea Ugalde, a member of the terrorist group ETA. However, by its order of 2 December 2014, the first chamber of the Audiencia Nacional had upheld cumulative sentences imposed in France on some other members of said terrorist group.

By its judgment of 27 January 2015, the Supreme Court upheld the order of the third chamber. By its judgments of 24 March 2015, 23 April 2015 and 7 May 2015, it has, moreover, ruled the cumulative sentences imposed in France for some members of the terrorist group ETA, upheld by the order of the first chamber, as contrary to the organic law 7/2014 of 12 November, concerning the exchange of information on criminal records and the consideration of court decisions delivered in the Union.

In the above cases, the Supreme Court ruled that the Organic Law 7/2014, transposing in Spanish law the framework decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing punishment or deprivation of liberty for the purpose of their enforcement in the Union, contains an exception to the cumulative sentences imposed by other Member States which is compatible with Article 3 of said framework decision. Under this provision, the framework decision applies only to the recognition of judgments and the enforcement of sentences within the meaning of this legal instrument. The Supreme Court found that the Spanish legislature had taken into account the possibility of establishing exceptions to the cumulative sentences imposed in other Member States, recognised in Article 3. Thus, it found that the said organic law had to be interpreted as meaning that the criterion for determining whether it is appropriate to cumulate the sentences imposed in other Member States must be whether the punishable offences could be tried in the same criminal proceedings.

It should be emphasised that, before the entry into force of the Organic Law 7/2014, the Supreme Court interpreted the Spanish provisions on cumulative sentences in the light of the framework decision 2008/909/JHA, considering that cumulating sentences in other Member States was possible.

After the entry into force of the Organic Law 7/2014, and by taking into account the derogation introduced by the legislature, the Supreme Court considers that an interpretation of said law according to which cumulating sentences is possible when the punishable acts cannot be judged in the same proceedings, constitutes an interpretation *contra legem*.

In the aforementioned judgments, the Supreme Court did not see fit to submit a preliminary question to the Court of Justice since it found that the exemption to the accumulation of sentences provided for by the Organic Law 7/2014 is compatible with the framework decision and that there were, moreover, no reasons justifying such a reference in this regard. Some judges, in a dissenting opinion, had, on their part, expressed their doubts as to the compatibility of said law with the framework decision holding that it was necessary to refer a preliminary question to the Court of Justice.

*Tribunal Supremo, rulings of 27.01.15, no. 874/2014, 24.03.15 no. 178/2015, 23.04.15 no. 235/2015 and of 07.05.15, no. 270/2015,* [www.poderjudicial.es](http://www.poderjudicial.es)

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[GARCIAL]

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***Social policy - Framework agreement ETUC, UNICE and CEEP on fixed-term work - Directive 1999/70/EC - National regulation concerning substitute judges - Compatibility with the framework agreement in the annexe to the Directive***

In a judgment of 19 February 2015, the Supreme Court ruled that the Spanish regulations for working terms of substitute judges and the social security system applicable to these judges comply with clauses 4 and 5 of the framework agreement on fixed-term work, annexed to Directive 1999/70/EC. It considered that such a regulation was justified by objective reasons within the meaning of clause 5 of the framework agreement and did not violate the principle of non-discrimination established by clause 4 of the framework agreement.

From the outset, it should be noted that in Spain, there are two categories of judges: first, judges who are officials of the administration, who are recruited through open competition (referred to as "professional" judges) and, second, the substitute judges, appointed by the administration under fixed-term contracts.

In their appeals, the applicants asked the Supreme Court to recognise the substitute judges as permanent public officials or public employees, under the same terms as "professional" judges, and to declare the discrimination between different categories of judges as contrary to directive 1999/70/EC. They also demanded that the fixed bonuses, three-year bonuses and unpaid supplements that they felt they were entitled to be retroactively paid and that they be included in the social security scheme for the duration of their tenure. The applicants also raised the need to refer the matter to the Court of Justice for a preliminary ruling on the compatibility of the national regulation applicable to substitute judges with Directive 1999/70/EC.

The Supreme Court reiterated that said directive is applicable to the substitute judges. Citing the judgments of the Court of Justice, Mascolo e.a. (C-22/13, EU:C:2014:2401), Kücük (C-586/10, EU:C:2012:39), Adeneler e.a. (C-212/04, EU:C:2006:443) and Fiamingo e.a. (C-362/13, EU:C:2014:2044), the Supreme Court, however, ruled that the national regulation applicable to the substitute judges is justified by objective reasons within the meaning of clause 5, paragraph 1, of the framework agreement. According to the court, the contracts with the substitute judges are justified by pre-determined, specific requirements of substitution or assistance, which are neither permanent nor long-term. Furthermore, said judges can exercise their judicial functions only when these functions can not be performed by professional judges.

The Supreme Court also held that the Spanish regulation is not contrary to the principle of non-discrimination in clause 4 of the framework agreement, in that the two categories of judges are not comparable. It concluded that, since the substitute judges are not part of a "judicial career", the terms laid down for them can, therefore, not be equivalent to that of official judges.

Finally, the Supreme Court noted that, in view of all these elements, a preliminary ruling before the Court of Justice was not necessary.

*Tribunal Supremo, ruling dated 19.02.15 (Recurso no. 394/2013), www.poderjudicial.es*

IA/33986-A

[GARCIAL]

**** Brief (Spain)***

In a judgment of 23 December 2014, the Audiencia Nacional dismissed the action brought against two decisions of the director of the Agency for medicines and health products (hereinafter the "Agency") prohibiting medicines from being sent to the UK and Denmark and making it mandatory to supply them in the Spanish market. This appeal was brought by a Spanish company distributing medicines after it was prohibited from supplying two types of products to said Member States. The Agency had adopted these decisions after taking into consideration the number of medicine units available in the domestic market compared to the consumption figures in Spain. Following this evaluation, the Agency had established the existence of a risk of shortage.

The Audiencia Nacional upheld the validity of the Agency's decisions on the basis of a national regulation that limits the shipment of medicines out of the country in case of possible supply problems, in order to prevent the occurrence of public healthcare problems related to drug shortages. The judgment emphasises, in particular, the proportionality of said decisions, in that they do not imply a general prohibition on sending the products concerned, but a prohibition on two specific shipments. The Audiencia Nacional further notes that the risk of supply problems is enough to justify such a prohibition and that it is thus not necessary to wait for the occurrence of an actual shortage in the domestic market.

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*Audiencia Nacional, ruling dated 23.12.14 (Recurso no. 24/2014), www.poderjudicial.es*

IA/33992-A

[OROMACR]

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In a judgment of 13 April 2015, the Supreme Court upheld a decision of the Audiencia Provincial of Madrid (Provincial Court) on the term of protection of copyright in Spain of the English writer G.K. Chesterton. Some works of this author were published by a Spanish editorial company without the permission of the company holding Mr. Chesterton's copyright, i.e. The Royal Literary Fund. Consequently, it had submitted actions for injunction and compensation, arguing that said works were protected by copyright in Spain, since the term of 80 years since the death of the writer, which occurred on 14 June 1936, had not yet expired.

The Supreme Court noted in its judgment that the national law of 1996 on intellectual property, applicable in this case, provides that the works of authors who have died prior to 7 December 1987 are protected for a period of 80 years. Thus, the Supreme Court rejected the interpretation put forth by the defendant, who maintained that these works were protected for a period of only 50 years after the death of the author, in accordance with Article 7, paragraph 1, of the Berne Convention of 1886 for the protection of literary and artistic works. The defendant also cited Article 7, paragraph 8, of said Convention, under which the protection term does not exceed the term fixed in the country of origin of the work, which, in this case, was less than 80 years. In this regard, the Supreme Court noted that, since this matter falls within Directive 93/98/EC, it is better to take into consideration the case law of the Court of Justice relating to the principle of the prohibition of discrimination based on nationality (see, for example, Phil Collins and e.a. judgment, C-92/92 et C-326/92, EU:C:1993:847, and Ricordi judgement, C-360/00, EU:C:2002:346). Under this case law, the term of protection granted by the regulation of a Member State to the works of an author who is a national of another Member State may not be less than that granted to the works of its own nationals. Therefore, according to the Supreme Court, the term for protection copyright owned by The Royal Literary Fund is 80 years.

*Tribunal Supremo, Sala de lo Civil, ruling dated 13.04.15, no. 177/201 (Recurso nº 1672/2013), www.poderjudicial.es*

IA/33994-A

[OROMACR] [GARCICR]

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The Supreme Court overturned four provisions of the Royal Decree 162/2014 approving the regulation of the operation of internment centres for foreigners, considering that those provisions were incompatible with Directive 2008/115/EC on common standards and procedures in Member States for returning third-country nationals staying illegally. Referring to the judgments of the ECtHR (Sunday Times//United Kingdom, judgment of 26 April 1979, request no. 6538/74, Malone/United Kingdom, judgment of 2 August 1984, request no. 8691/79; Valenzuela/Spain, judgment of 30 July 1998, request no. 2767/95), the Supreme Court ruled that the detention measures used for foreigners that are subject to a deportation procedure must only be established by law.

It noted that the government must provide foreign families without a right of residence with separate housing, pending their expulsion from Spain and must also ensure that all members of a family of foreigners are provided accommodation in the same place. In addition, citing the judgment of the Court of Justice, El Dridi (C-61/11 PPU, EU:C:2011:268), it found that the possibility for national authorities to conduct body searches established by the Royal Decree 162/2014 was contrary to the organic law 4/2000, concerning the rights and freedoms of foreigners in Spain and their social integration. The Supreme Court thus demanded more guarantees to allow police officers to carry out body searches.

*Tribunal Supremo, ruling dated 10.02.15, RJ\2015\350, www.poderjudicial.es*

IA/33990-A

[GARCIAL]

**France**

***Rights of airline passengers - Regulation (EC) No. 261/2004 - Compensation for cancellations or denied boarding - Exemptions - Scope***

Two decisions on airline passenger rights were delivered by the two highest French courts.

Firstly, by a decision of 27 February 2015, the Council of State, for the first time, had the opportunity to apply Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in case of denied boarding and of cancellation or long delay of flights. In this case, a "Ryanair" flight was cancelled due to repairs made necessary by a lightning strike suffered by the aircraft during a previous flight. The airline had re-routed some of the passengers to flights taking off only a day or two later and had reimbursed the price of their tickets. However, the airline refused to pay the fixed compensation payable to passengers under Articles 5 and 7 of regulation no. 261/2004 (EC) on account of the alleged occurrence of extraordinary circumstances, which are appropriate for an exemption on the basis of Article 5, paragraph 3 of the regulation: the impact of lightning, the short time between the incident and the departure time of the flight, unavailability of ten other aircraft in its fleet on that day and curfew in effect after 10 pm on departure from the airport.

According to Article 16 of the Regulation, the Minister of Civil Aviation had imposed an administrative fine on "Ryanair". The airline had filed an appeal against this decision, which the administrative courts of first instance and appeal had repealed, stating that they were indeed exempting circumstances.

Hearing the case, the Council of State noted that in accordance with the judgments of the Court in the Wallentin-Hermann case (C-549/07, EU:C:2008:771) and Eglītis et Ratnieks case (C-294/10, EU:C:2011:303), a strict interpretation of the exception to the principle of right to compensation for passengers in case of cancellation of a flight is required. The highest administrative court found that the airline did not provide any details on the measures envisaged to allow faster rerouting of passengers to an alternative flight. It also found that neither the unavailability of other company aircraft nor the curfew were sufficient "to show that the arrangement of an alternative flight would have been impossible or would have resulted in the company suffering unbearable financial consequences that were disproportionate to the objective of high-level protection for airline passengers".

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Accordingly, the Council of State repealed the judgment of the Administrative Court of Appeal and ruled the Minister's decision as well-founded.

Secondly, in a judgment of 5 March 2015, the Supreme Court applied Regulation (EC) No. 261/2004, as interpreted by the Court of Justice in a case involving the airline “Air France”, which had refused to compensate two passengers who were denied boarding on the first flight, before having to deal with the cancellation of a second flight.

The cancellation of the second flight was a result of poor weather conditions characterised by unexpected snowfall. The trial judge considered that the case involved exempting circumstances under Article 5, paragraph 3, of Regulation (EC) No. 261/2004 and that no lack of vigilance or precaution could be attributed to the airline. However, the Court of Cassation, referring to the Wallentin-Hermann judgement cited above, held that the trial court had not established that, even by taking all reasonable measures, the company could clearly not have prevented the extraordinary circumstances it faced from not leading to the cancellation of the flight.

Accordingly, the Court of Cassation reversed the trial judgment.

*Council of State, subsections 2 and 7 combined, decision of 27.02.15, appeal no. 380249, www.legifrance.gouv.fr/*

IA/33655-A

*Court of Cassation, 1st civil chamber, ruling dated 05.03.15, appeal no. 14-11.066, www.legifrance.gouv.fr/*

IA/33658-A

[WAGNELO] [GERBADE]

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***Social policy - Male and female workers - Equal pay - Seniority bonus in the calculation of the retirement pension subject to an interruption in professional activity of at least two months - Early retirement with immediate payment of pension - Admissibility - Conditions - Justification by a legitimate social policy objective - Proportionality - Assessment by the national court***

By a decision of 27 March 2015, the Council of State ruled on the compatibility with the principle of equal pay for men and women, as defined in Article 157 of the TFEU, of two provisions of the code for civilian and military retirement pensions which provide, firstly, for a child-related bonus and, secondly, for early retirement with immediate payment of pension. The benefit of this transitional arrangement is dependent on an interruption in work for a minimum period of two consecutive months to devote time to a child born before 1 January 2004.

After reiterating the relevant provisions in this case, the Council of State was based on the Leone and Leone judgment (C-173/13, EU:C:2014:2090), delivered following a reference for a preliminary ruling of the Administrative Court of Lyon, but which concerned the same provisions as those at issue in this case.

In that judgment, the Court of Justice had held that, unless it can be justified by objective factors unrelated to any discrimination based on gender, such as a legitimate social policy objective, and can be suitable for ensuring the objective cited and necessary for this purpose, the child-related bonus scheme and early retirement with immediate payment of pension entailed indirect discrimination in pay between female and male workers contrary to the Article [157 TFUE]. According to the Court, the will to compensate for disadvantages suffered in their professional career by all workers - men and women - who have stopped working for a certain period of time in order to devote time to their children was, as such, a legitimate social policy objective. The Court had, however, indicated that it was up to the national court to ensure, taking into account, in this regard, indications that have been provided to it, that the system in question actually contributed to achieving said objective and that it was implemented in a consistent and systematic manner in this perspective.

Thus, in this case, and relying in part on statistical data, the Council of State considered, firstly, that the system in question was objectively justified by a legitimate social policy objective, aimed at partial and fixed compensation for manifest prejudices to and delays in career development which have affected female employees and, secondly, that the system was suitable for securing that objective and necessary for this purpose. The Council of State thus ruled that the provision in question did not infringe the principle of equal pay, as defined in Article 157 of the TFEU.

It should be noted, finally, that by two decisions of inadmissibility of 15 October 2013, the ECtHR ruled as manifestly unfounded the requests of several male employees who were denied the right to child-related seniority bonus (Ryon/France case, decision of 15 October 2013, request no. 33014/08) and the right to early retirement with an immediate payment of pension (Greneche/France case, decision of 15 October 2013, request no. 34538/08). The applicants had argued that the provisions for the system in question constituted an indirect discrimination on grounds of gender with no objective and reasonable justification, thus infringing Article 14 of the ECHR, in conjunction with Article 1 of protocol no. 1 *(see, Reflets No. 1/2014,* p. 9-10).

*Council of State, assemblée du contentieux, decision of 27.03.15, no. 372426,* www.legifrance.gouv.fr

IA/33656-A

[CZUBIAN]

**** Briefs (France)***

In a judgment of 4 March 2015, the Court of Cassation ruled on the elements to take into account for determining the habitual residence of a child, in accordance with Article 11, paragraph 1 of Regulation (EC) No. 2201/2003.

This case concerns the determination of the residence of a child born in France, to a couple who moved to Belgium, the State where the father pursues a professional activity and where the mother enrolled her children in school, some of whom are from a previous marriage. However, to ensure that she could return to France with her children in case she was no longer living with the father, the mother maintained an apartment in a French city where the children were enrolled in school.

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After less than four months of living together, following failure of married life in Belgium, the mother had returned to France with her children; consequently, father brought proceedings for the return of the couple's common child who was unlawfully removed, under the Hague Convention of 25 October 1980 and Regulation (EC) No 2201/2003.

The appellate court found that the habitual residence of the child was not transferred to Belgium because of the short stay of the mother and child in that State. Reiterating the case law of the Court of Justice, in particular the judgments A (C-523/07, EU:C:2009:225), Wednesday (C-497/10 PPU, EU:C:2010:829) and C (C-376/14 PPU, EU:C:2014:2268), the Court of Cassation reversed the judgment of the Court of Appeal on the ground that the child's residence should be determined based on a set elements that reflect a pattern of integration in a social and family environment, and cannot be established solely on the basis of the length of the stay.

*Court of Cassation, 1st civil chamber, ruling dated 04.03.15, appeal no. 14-19015, www.legifrance.gouv.fr/*

IA/33657-A

[WAGNELO] [GERBADE]

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In a judgment of 17 March 2015, the Court of Cassation had to rule on the validity of a new provision in the statutes of the Syndicat national des moniteurs du ski français (National association of French ski instructors), referred to as "intergenerational pact", and to be integrated in the standard agreements signed between the ski schools and instructors. This was to encourage the hiring of young graduates with the gradual reduction of activity of ski instructors over 62 years of age.

After reiterating the terms of Article 6, paragraph 1 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, the Court of Cassation considered, firstly, that the court of appeal had not noted that the difference in treatment based on age, was objectively and reasonably justified by a legitimate aim of public interest, relating in particular to the policy adopted for employment, labour market or vocational training. In this regard, the Court of Cassation held that the consideration of a purely individual interest that is specific to the situation of the ski schools seeking to meet the demand of their customers could not be regarded as legitimate under Article 6 of Directive 2000/78/EC mentioned above. In addition, the Court of Cassation held that the appeal court had found that the means to achieve that aim were not appropriate and necessary. According to the French high court, the provision at issue merely provided a guarantee of minimum activity for the newly integrated instructors without specifying the age and it was thus not established that the redistribution of activity of the ski instructors over the age of 62 would only benefit the young instructors.

*Court of Cassation, Social Division, ruling dated 17.03.15, No. 13-27.142, www.legifrance.gouv.fr*

IA/33659-A

[CZUBIAN]

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In a judgment of 16 April 2015, the Court of Cassation ruled on the compatibility with the treaty rules on freedom of establishment, Directive 2006/123/EC on services in the internal market and the principle of equal treatment, of an obligation to register with and pay dues to professional associations of Belgian and French veterinarians.

In this case, a veterinarian who owns a firm in France and also performs a part of his professional activity in Belgium at his private residence, challenged, on the basis of the provisions on freedom of establishment and freedom to provide services, an order directing him to pay his dues to the national association of veterinarians in France, on the grounds that he had already paid his contribution to the Belgian association for that year.

The Court of Cassation, firstly, on the basis of the judgments of the Court of Justice in the Gebhard (C-55/94 EU:C:1995:411) and Schnitzer (C-215/01, EU:C:2003:662) cases, held that the present case falls within the freedom of establishment and not the freedom to provide services because the applicant owns a firm in France and provides a part of his veterinary services there.

Then, the Court of Cassation ruled that the obligation to register with the French of association of veterinarians, imposed on a veterinary who is a national of another Member State and wishes to practice in France, is not contrary to the freedom of establishment, even if the veterinarian is already subject to identical obligations in his home Member State. It had the same conclusion with regard to the double obligation to contribute, considering that it is not, in principle, contrary to freedom of establishment.

Finally, the Court of Cassation found that the applicant is not in a position comparable to that of a veterinarian performing this activity only in one or other of the Member States concerned and that thus, the principle of equal treatment has not been violated.

*Court of Cassation, 1st civil chamber, judgment of 16.04.15, appeal no. 13-27690, www.legifrance.gouv.fr/*

IA/33660-A

[WAGNELO] [GERBADE]

**Greece**

**** Briefs***

In a judgment of 2 February 2015, the Symvoulio tis Epikrateias (Council of State, “StE”) examined the applicability of the national clauses for removal of disability benefits in cases of overlapping of such benefits with similar benefits, when they are granted by occupational pension institutions established in different Member States.

The case is part of a dispute between a retired worker (hereinafter “the applicant”) to his occupational pension institution in Greece (“OGA”), concerning the refusal of that institution to grant him a disability pension. According to the OGA, the applicant, having worked in Greece and Germany for a number of years and receiving an occupational injury pension from his German occupational pension institution, was not entitled to disability pension due to the fact that the Greek national law, applicable *ratione temporis* in this case, ruled out cumulative social security benefits granted by various Member States, in particular, in cases where the amount granted by the institution of the other member State exceeded that of the minimum pension granted by the OGA.

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The StE, referring to several judgments of the Court of Justice on the matter (among other the Szemerey/Commission, 178/78, EU:C:1979:221, Cordelle, C-366/96, EU:C:1998:57, Schmidt, C-98/94, EU:C:1995:273 and Del Grosso, C-325/93, EU:C:1995:103) judgements, reiterated, firstly, the concept of "benefits of the same kind", within the meaning of Article 12 of Regulation 1408/71/EEC concerning the application of social security schemes to employed persons and their families moving within the Community. In this regard, the highest administrative court made a comparison between the industrial accident pension granted by the German institution and the request for disability pension submitted to the OGA, a comparison that showed that the objective, purpose, basis for calculation and conditions for granting of both social security benefits were identical. Since it involved benefits of the same kind, the StE concluded that the cumulative benefit of both pensions was in conformity with EU law and that, in these circumstances, a national rule against overlapping of benefits cannot be applied.

*Symvoulio tis Epikrateias, tmima A, apofasi tis 02.02.15, n° 323/2015, [http://lawdb.intrasoftnet.com.nomos2.han3.ad.curia.europa.eu/nomos/3_nomologia,php](http://lawdb.intrasoftnet.com.nomos2.han3.ad.curia.europa.eu/nomos/3_nomologia,php)(NOMOS database)*

IA/34073-A

[GANI]

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Ruling no. 820/2015 of 30 March 2015 of the trial court of Athens pertains to the collective dismissal of 199 applicants, working in the state-owned public radio broadcasting company ("ERT"), by their employer, the Greek State, following a ministerial decree adopted in June 2013 and entered into force on the day of its adoption. Said order pertained to the termination of operations at ERT for an indefinite period and provided no information or consultation procedure for workers and their representatives before their dismissal. This was in contradiction with the information and consultation procedure under national law 1387/1983, transposing Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies.

In light of the provisions of said directive which provide for the non-application thereof to public workers and public law institutions, and in order to determine the applicability of the directive in this case, the court examined whether the ERT could be likened to an authority involved in the exercise of public authority. In this context, the court relied on the case law of the Court of Justice on the matter (Nolan, C-583/10, EU:C:2012:638, Scattolon, C-108/10, EU:C:2011:542, Agorastoudis e.a., C-187/05 to C-190/05, EU:C:2006:535, and Netherlands and NOS/Commission, T-231/06 and T-237/06, EU:T:2010:525). It observed that, despite the fact that the ERT was incorporated as a non-profit entity by the State in 1987, it was governed throughout its operations by private law and in accordance with the rules of a market economy by carrying out commercial activities and collecting revenue through television and radio advertising. The lucrative nature of the entity required the application of the protective regime of the Directive on collective redundancies. Thus, the court, by accepting the application of the applicants, repealed their dismissal and ordered the defendant to re-employ them under the same regime and under the conditions that were in force before their dismissal.

The judgment was declared provisionally enforceable.

It must be noted that this ministerial decree that caused the dismissal of about 2,500 workers, was already the subject of a previous publication in *Reflets No. 2/2013*, on p. 26, about summary proceedings before the Greek Council of State concerning the decree.

*Monomeles Protodikeio Athinon, apofasi tis 30.03.15, n° 820/2015, [http://lawdb.intrasoftnet.com.nomos2.han3.ad.curia.europa.eu/nomos/3_nomologia.php](http://lawdb.intrasoftnet.com.nomos2.han3.ad.curia.europa.eu/nomos/3_nomologia.php)(NOMOS database)*

IA/34074-A

[GANI]

**Hungary**

***Preliminary rulings - Referral to the Court of Justice - National court of first instance - Request for a preliminary ruling of a party to the proceedings - Refusal without reasons - Judgment delivered without reference to EU law - Breach of procedural rules***

By an order of 12 November 2014, the Supreme Court ruled on the procedural consequences, under Hungarian law, of lack of adequate reasoning in the judgment of a court of first instance in respect of the refusal to refer the matter to the Court of Justice for a preliminary ruling.

The dispute resulted from a decision of the Hungarian environmental authority by which it had authorised a company to build a cement plant. Several local authorities and environmental groups had asked the administrative court, before the administrative tribunal, to repeal the decision and prohibit the construction of the plant in question. They cited, inter alia, the violation of the EU rules on environmental protection during the administrative procedure. In this regard, they also requested that the matter be referred to the Court of Justice for a preliminary ruling on the interpretation of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. They wanted, in particular, that the Court be asked about the extent of the obligation to conduct an environmental impact study and on the content required for such a study.

The Administrative Court delivered its judgment, dismissing the appeal without referred the matter to the Court of Justice for a preliminary ruling. In that judgment, the rejection of the request for a preliminary ruling had not been substantiated, and the provisions of the Directive had not been considered.

The applicants sought, as part of an exceptional appeal brought before the Supreme Court, the repeal or modification of the final judgment of the Administrative Court. They cited several grounds, including infringement of essential procedural rules. In this context, they particularly called into question the lack of reasons for rejecting their request for a preliminary ruling and concerning the interpretation of the Directive.

They also cited the provisions of the Civil Procedure Code relating to the possibility, for the Hungarian courts, to refer the matter to the Court of Justice under Article 267 of the TFEU. Some provisions of the Code establish the obligation for the national courts to rule on all the pleas raised by the parties.

In addition, under other provisions of this code, the courts are obliged to state adequate reasons for their decisions.

For the Supreme Court, it follows from a combined reading of these provisions that the failure, on the part of the administrative court to state reasons in its judgment for the rejection of the request for preliminary ruling, and the lack of consideration, as a legal basis, of the provisions of the Directive, were proof of a violation of the applicable procedural rules. Thus, the Supreme Court repealed the judgment of the Administrative Court and referred the case back to it for reconsideration and provision of a new judgment. Under the new procedure, the administrative court had to rule on the request for a preliminary ruling and, in the final judgment, substantiate the decision on all the pleas raised.

*Kúria, order of 12.11.14, No. Kfv.III.37.826/2014/6, www.acaeurope.eu/index.php/en/jurifast-en,*
*A Kúria Nemzetközi Kapcsolatok és Európai Jogi Irodájának Hírlevele 2014. December p. 43-44.*

IA/33978-A

[VARGAZS]

**Ireland**

***National law - Criminal law - Admissibility of evidence in criminal trials - Evidence obtained in violation of constitutional rights - Exclusionary rule - Discretionary enforcement***

On 15 April 2015, a majority (4 against 3) of the judges of the Supreme Court delivered a judgment that changed the rules of evidence in criminal matters. In essence, the exclusionary rule, in force since 1990 (People (DPP)/Kenny [1990] 2 IR 110), according to which the evidence obtained in violation of the rights guaranteed by the Irish Constitution were to be deemed inadmissible regardless of the intentional or unintentional nature of a violation, has been redefined by the Supreme Court, in that it is no longer considered automatic, but as falling to a certain extent within the discretionary power of the criminal judge.

This case concerned the evidence obtained on the basis of a search warrant issued on 10 May 2011, under section 29, paragraph 1 of the Offences Against the State Act, 1939. This provision was declared unconstitutional by the Supreme Court in the Damache/DPP [2012] IESC 11 case before the hearing in the present case took place before the Circuit Court.

The accused argued that, to the extent that the warrant issued against him had become invalid following the decision in the aforementioned Damache case, his arrest and his statements to the police, during his detention, were also invalid. The accused argued, inter alia, that his right to freedom and his right to be free from arbitrary interference in his house, protected by the Irish Constitution, had been violated and that, therefore, the court was required to apply the exclusionary rule for the evidence obtained.

In its judgment, the Supreme Court reiterated, firstly, the case law prior to the judgment in the Kenny case cited above, and referred to the The People (Attorney General)/O'Brien case [1968] I.R. 142. In the latter, the Supreme Court had introduced, for the first time, the terms “deliberate and conscious breach of the constitutional rights”, ruling that the evidence obtained in deliberate and conscious violation of the constitutional rights was inadmissible.

In the aforementioned Kenny case, the majority of the Supreme Court was of the view that the evidence must be ruled out regardless of whether the alleged violation was deliberate and conscious, except in extraordinary circumstances.

Taking into account the legal developments in comparable jurisdictions, namely the US, UK, Canada, New Zealand and South Africa, the Supreme Court observed that the rule established in the aforementioned Kenny case, was the most extreme position taken by the courts of common law.

By placing greater emphasis on whether the unconstitutional act was committed inadvertently rather than as a result of gross negligence, it identified a set of new criteria on which the admissibility of evidence will now depend. It is up to the prosecution to establish whether the evidence was obtained in accordance with the constitutional rights, and, where appropriate, whether it is necessary for the court to admit it. The facts alleged by the prosecution must be established beyond all reasonable doubt and the expression “deliberate and conscious” must be understood as referring to the knowledge of the unconstitutionality rather than to the acts performed in order to obtain the evidence.

*Supreme Court, ruling dated 15.04.15, The Director of Public Prosecutions / J.C., [2015] IESC 31, www.courts.ie*

IA/34308-A

[CARRKEI]

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***Citizenship of the Union - Right of EU citizens and their family members to move and reside freely within the territory of the Member States - Directive 2004/38/EC - Violation of EU law - Damages relating to this violation - Infringement of right to good reputation, guaranteed by Article 40.3.2 of the Constitution - Compensation***

By a decision of 22 December 2014, the High Court granted compensation to a Nigerian citizen who acquired Irish citizenship for infringement of EU law and violation of the right to good reputation, guaranteed by Article 40.3.2 of the Constitution. The violation of EU law had been established after the response of the Court of Justice to the request for a preliminary ruling in the Ogieriakhi case (C-244/13, EU:C:2014:323). The issue raised before the High Court in this case concerned the damages relating to the violation.

Regarding the violation of EU law, resulting from the failure to implement Article 16, paragraph 2 of Directive 2004/38/EC on the right of EU citizens and members of their families to move and reside freely within the territory of Member States, the High Court, pursuant to the Francovich case law (C-6/90), held, firstly, that this provision confers rights unconditionally to individuals. The High Court observed that this interpretation was confirmed by the reasoning of the Court of Justice in its Ogieriakhi judgment mentioned above.

Secondly, the High Court referred to the Brasserie du Pêcheur and Factortame case (C-46/93 and C-48/93, EU:C:1996:79), concluding that even if the competent national authority acted without malice and in good faith, the assessment of the severity should be objective.

It reiterated, according to the response of the Court of Justice to the third question in the reference for a preliminary ruling, that the fact that the national court considered it appropriate to submit a request for a preliminary ruling, cannot in itself be considered a decisive criterion for assessing the severity of the violation of EU law.

Finally, the High Court held that, since the applicant had been dismissed merely solely on the ground that it had not been established that he had the right to work or reside in Ireland, there was a causal link between the violation and the damage suffered.

Therefore, it granted the applicant a sum of 107,905 euros in compensation for losses incurred as a result of his dismissal.

As regards the violation of the right to good reputation guaranteed by the Constitution, the High Court ruled that inconvenience, disruption and distress that do not constitute moral damage cannot be compensated within the framework of an action for tort liability. Moreover, in common law, the compensation for damage to good reputation following the dismissal is not accepted under contractual liability (Addis/Gramophone Co. Ltd. (1909) AC 488).

It should be emphasised that the applicant has based its request on the Constitution. This is the first time that such a question of determining whether a person dismissed can claim a violation of his constitutional right to good reputation owing to an immediate and unlawful termination (i.e. contrary to the requirements relating to immigration in accordance with EU law) of employment, was raised in an Irish court.

In this regard, the High Court decided to grant a sum of 20,000 euros for the violation of Article 40.3.2 of the Constitution, since the damage to the reputation of the applicant resulted from the immediate and unlawful termination of his employment contract and the law did not adequately recognise this right of the applicant.

*High Court, ruling dated 22.12.14, Ogieriakhi / Minister for Justice and Equality & Ors (No. 2), IEHC 582, www.courts.ie*

IA/34310-A

[CARRKEI]

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***European Union - Police and judicial cooperation in criminal matters - Directive 2011/36/EU - Victims of human trafficking - Measures necessary to establish appropriate mechanisms for early identification of victims and for assistance and support for victims - Direct effect***

On 15 April 2015, the High Court ruled that national practice regarding the identification of victims of human trafficking does not comply with Directive 2011/36/EU on preventing human trafficking and the fight against this phenomenon and, in particular, Article 11, paragraph 4, of the Directive. The latter provision provides that the Member States shall take the necessary measures to establish appropriate mechanisms for early identification of victims and for assistance and support for victims, in cooperation with the relevant support organisations.

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In Ireland, according to the administrative provisions put in place in 2008 by the Ministry of Justice, the processing of applications for recognition of a person as a victim of human trafficking is attributed to a Garda (police officer) who holds a position that is equivalent, at least, to the rank of "superintendent" of the Garda National Bureau of Immigration.

In this case, the applicant, a Vietnamese national, was arrested in November 2012 in a "growhouse" on the basis of charges related to the possession and cultivation of cannabis plants. She argued that she had been a victim of human trafficking to Ireland. On this basis, and given the circumstances of her arrest, which indicate that she had been found alone in a "growhouse" enclosed by steel shutters, which could not be opened by use of force by the police, a request to recognise the applicant as a victim of human trafficking was presented to the defendant, i.e. the "Chief Superintendent" of the Garda National Immigration Bureau.

This request was dismissed without stating reasons in September 2013, which, according to the applicant, constituted a violation of the right to a fair trial, guaranteed by the Constitution, the Charter and the ECHR. Specifically, as regards Directive 2011/36/EU, the applicant claimed, firstly, that said directive had not been transposed correctly, since Ireland has not put in place an appropriate mechanism for the identification of victims of human trafficking. Secondly, in the absence of proper transposition, the applicant cited the direct effect of Article 11, paragraph 4, of the Directive.

Hearing the case, the High Court held, firstly, that the directive, based on which the applicant has the right to an appropriate mechanism to determine her status, has a direct effect as regards its Article 11, paragraph 4.

Secondly, the High Court observed that the Directive does not specify any particular procedure in this regard, since it refers to "appropriate mechanisms". According to the High Court, the term "appropriate" means "appropriate with regard to the issues to be resolved". It concluded that the mechanisms in question must, firstly, facilitate a review of the State's interest in investigating the human trafficking and, secondly, protect the interests of the victims by allowing them to receive help and support. In this context, the High Court also weighed the legitimate interests of Ireland in the investigation of human trafficking and the possible prosecution of a person suspected of such criminal activities in view of the interests of the applicant as a suspect or an accused person.

The High Court concluded that a mechanism can only be considered "appropriate" when it distinguishes between the application for recognition as a victim of human trafficking and the criminal investigation into the alleged activities of the person referred to. Therefore, it decided that the mechanism implemented in Ireland did not meet the requirements of the Directive.

*High Court, ruling dated 15.04.15, P / Chief Superintendent Garda National Immigration Bureau & ors, [2015] IEHC 222, www.courts.ie*

IA/34309-A

[CARRKEI]

## Italy

***Judicial cooperation in civil matters - Jurisdiction and enforcement of judgments in civil and commercial matters - Regulation (EC) No. 44/2001 - Execution of a penalty - Violation of internal public policy - Exclusion***

In a judgment of 15 April 2015, the Court of Cassation ruled on the compatibility with the internal public policy of execution of a penalty from another Member State.

The matter was referred to it following the rejection by the Court of Appeal of Palermo of the objection to the execution of the order of the trial court of Brussels declaring the liquidation of a fixed amount for the delay in re-issuance of shares to an execution creditor.

Based on the case law of the Court of Justice, and in particular on the Trade Agency ruling (C-619/10, EU: C:2010:298), the Supreme Court reiterated that the internal public policy clause in Article 34 of Regulation (EC) No. 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters, has the objective of protecting the consistency of the internal legal order and must be narrowly interpreted, given that it constitutes an obstacle to achieve an objective of the regulation. Therefore, the court must only verify whether the effects of the enforcement of the regulation at the basis of the foreign decision meet the condition of legality.

Then, the Court of Cassation examined the compatibility of the penalty with the internal public policy. In the absence of a national case law on the execution of penalties and on the basis of the fact that, according to the applicants, the penalty is similar to “punitive damages”, the Court of Cassation carried out the review taking into account the case law, according to which the “punitive damages” are incompatible with the internal public policy. In this regard, it observed, firstly, that the cases concerned pertained to the recognition of conviction decisions for non-contractual liability under which the amount payable was imposed for punitive reasons. Secondly, the High Court said that under Italian law, civil liability does not have a punitive function, but a damage compensation function. However, it stated that in case of non-performance of an obligation, general or specific measures for the execution have been introduced in the Italian legal system. One of these measures, under Article 614 of the Code of Civil Procedure, and very similar to the concept of penalty, empowers the court to determine a sum for delays in the execution of a decision.

Moreover, the Court of Cassation emphasised that, although the penalty and “punitive damages” operate as a sanction and an indirect constraint on the performance of the obligation, they constitute different measures, as the penalty does not compensate the damage but threatens to cause financial damage for non-fulfilment of said obligation. Through the penalty, the court shall ensure the execution of the obligation imposed by ordering a pecuniary judgment that is in addition to the main judgement.

Consequently, the penalty, pursuing the main objective of forcing an execution of an obligation and ensuring compliance with common principles such as the principle of fair trial and the right to economic freedom, is not contrary to the internal public policy.

Thus, the Court of Cassation upheld the execution of the Belgian decision delivered on the basis of Regulation (EC) No. 44/2001.

*Corte di Cassazione, ruling dated 15.04.15, No. 7613/15, [www.dejure.it](http://www.dejure.it)*

IA/34067-A

[GLA]

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***International agreements - ECHR - "Interposed" standards between the law and the Constitution - Conflict between the rules derived from said Convention and the Constitution - Obligation to interpret the ECHR in accordance with the Constitution***

The judgment of the Constitutional Court of 1 April 2015 is in line with the case law of this Court concerning the relationship between national law, EU law and the ECHR. According to that case law (see in particular judgment nos. 348 and 349 of 2007, No. 80/2011 and No. 113/2011), the EU law is supranational in nature involving the transfer of sovereignty to the Union while the law under the ECHR creates only conventional standards considered as "interposed standards" that are between the law and the Constitution and that benefit, as such, from a force of resistance allowing them to not give way in view of the contrary succeeding law. Therefore, the contradiction between a national standard and a conventional standard constitutes, according to the Constitutional Court, a question on constitutionality that must be asked to it by the court *a quo*.

In the main proceedings, the Court of Cassation and the court of Teramo referred to the Constitutional Court two disputes challenging the constitutionality of Article 44, paragraph 2 of the D.P.R. June 6, 2001, No. 38 on confiscation for unfair allotment. Under the terms of said provision, in case of unfair allotment, the confiscation applies even in the event of limitation of the offence and, therefore, even in the absence of a criminal conviction, provided that the existence of unfair allotment is proven in the context of a trial that guarantees an adversarial procedure. However, the judges concerned had noted the existence of the Varvara/Italy judgment (29 October 2013, request no. 17475/09) in which the ECtHR had established that the confiscation cannot be imposed in the absence of a conviction for the offence of unfair allotment, under penalty of violation of Article 7 of the ECHR. Said judges had, on that basis, raised questions on constitutionality of this provision for violation of Articles 2, 9, 32, 41, 42 and 117, section 1, of the Constitution.

The Constitutional Court ruled the applications as inadmissible. It clarified, firstly, that the relevant courts, rather than raising the question of the constitutional legitimacy of article 44, paragraph 2, should have raised a question concerning the constitutionality of Law No. 848 of 1955, concerning the ratification and implementation of the ECHR. According to the Constitutional Court, the fact that the Constitution has a higher rank than the ECHR means that the ECtHR cannot establish the meaning of the national law. Therefore, only the ECHR can be the subject of an interpretation of the ECtHR. The national court must, however, try to give an interpretation of national law that is most compatible with the ECHR while complying with the limits of the text of the law and the Constitution. "The duty of the common courts to interpret domestic law in accordance with the ECHR remains subordinate to the duty to adopt a constitutionally-oriented reading since such an approach reflects the predominance of the Constitution over the ECHR".

Logically enough, the referral requests have, therefore, been considered inadmissible because the courts concerned had felt obliged to interpret national law in the light of the Varvara/Italy judgment, cited above.

In this regard, the Court clarified that it is only on an exceptional basis in the presence of a consolidated case law that, the Italian court is obliged to apply the rule laid down by the ECtHR and, therefore, give the Italian law a meaning consistent with this rule. For the Constitutional Court, such a result must be achieved by means of an interpretation consistent with the Constitution or, failing that, by a constitutional reference.

The rule remains, however, that the national court is required to give to the principles set out by the ECtHR a meaning consistent with the Constitution.

In this regard, the Constitutional Court noted, firstly, that the Varvara/Italy judgment cited above did not contain a consolidated principle and does not, moreover, serve as a basis to give the Italian law a meaning consistent with the rules set out. Secondly, the Court held that the courts concerned had not provided a constitutionally-oriented interpretation of Article 44, paragraph 2.

For all these reasons, the questions were rejected as inadmissible.

*Corte Costituzionale, ruling dated 01.04.15, No. 49/2015, www.cortecostituzionale.it*

IA/34080-A

[LTER]

*** Briefs (Italy)**

In a judgment of 5 March 2015, the Court of Cassation clarified the scope of the review of application for international protection in cases where the applicant was unable to reveal his personal situation - in this case his homosexuality - to justify his first application.

A Liberian citizen had filed a first application for international protection in 2009 and second in 2011. Both applications had been rejected by the competent authority and he had challenged the second rejection before the court and then before the Court of Appeal of Naples. The latter had concluded that the inadmissibility of the application, as it was based on a personal situation that already existed, but had not been raised in the first application for protection.

The Court of Appeal had adopted this decision on the basis of Article 29 of the legislative decree 25/2008 transposing Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status in the Member States. This article provides that the competent authority shall declare the application as inadmissible if the applicant has submitted an identical application after a final decision without presenting new evidence regarding his personal situation and the situation in his country.

According to the Court of Cassation, said Article 29 must be interpreted as meaning that a new review of the application is possible when new details are provided, which already existed at the time of the introduction of the first application, but could not be revealed by the applicant.

The Italian Supreme Court thus quashed the rejection decision of the court of appeal ruling that it is necessary to take into account the personal and social circumstances of the applicant. The latter could not reveal his homosexuality because of his religious affiliation and the fact that homosexuality is a crime in his home country. The Supreme Court also stressed that the fact that homosexuality is considered a crime constitutes a serious violation of privacy and personal freedom and an objective situation for persecution.

*Corte di Cassazione, ruling dated 05.03.15, No. 4522/2015, www.dejure.it*

IA/34068-A

[GLA]

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The Constitutional Court declared incompatible with the Constitution Article 25, paragraph 25 of legislative decree 201/2011 on the pension reform, which planned to de-index inflation, for the years 2012 and 2013, for monthly pensions above 1,400 euros.

This provision was adopted in 2011, as part of a rigorous austerity policy, while the distrust of markets had boosted borrowing rates in Italy to very high levels.

The Constitutional Court, referring to its case law, highlighted the difference between the contested provision and other similar provisions on the same subject that had been deemed compatible with the Constitution. The Court reiterated that it had already indicated, in previous cases, the limits imposed on the legislature in the matter.

It held that neither the contested provision nor the preparatory work explained the reasons for justifying that financial requirements must necessarily prevail over individual rights strongly affected by this provision; they must be balanced against the objectives pursued by the provision in cause. According to the Constitutional Court, the right to adequate pension was sacrificed unreasonably for financial requirements that have not been clarified in sufficient detail, in violation of the principle of proportionality and adequacy of pensions.

The decision of the Constitutional Court received significant coverage in the international press, particularly because of its potential impact on Italy's public deficit.

*Corte costituzionale, ruling dated 10.03.15, n. 70 www.cortecostituzionale.it*

IA/34081-A

[RUFFOSA]

**Latvia**

***Freedom to provide services - Posting of workers as part of the provision of services - Directive 96/71/EC - Working and employment conditions - Minimum wage and reimbursement of expenses actually incurred due to a posting***

The judgment of the Supreme Court of 27 February 2015 pertains to the application of the provisions of labor law, including those implementing Directive 96/71/EC concerning the posting of workers in the framework of provision of services.

In the case in the main proceedings, a nurse was sent to Norway by her employer, established in Latvia, in order to carry out her tasks for a certain period in 2012. The employer and the nurse had agreed on the additional salary that the employer had to pay for that period. According to the nurse, since the latter did not compensate for all the expenditure actually incurred during the period of work in Norway, she brought an action against the employer.

Since the trial court and the appellate court upheld the appeal only partially, the applicant brought an appeal in cassation.

Hearing the appeal, the Supreme Court held, firstly, that the Court of Appeal had correctly described the work done by the applicant in Norway as a posting, within the meaning of Article 14 of the labour law. As Norway is a Member State of the European Economic Area, the provisions of said article, which transpose Directive 96/71/EC, were applicable in the main proceedings. However, according to the Supreme Court, the Court of Appeal was wrong to conclude that the posting could not be considered an assignment. However, it stressed that this was irrelevant since, according to Article 76 of the Labour Law, the expenses should be reimbursed in both cases.

The Supreme Court held that the employer was required to pay the minimum wage provided for by the law of the country where the worker had been sent. If this minimum wage was insufficient to cover all the expenditure actually incurred by the posted worker, the employer had to also repay the difference to the worker, for example, by giving said worker a daily allowance.

To reach these conclusions, the Supreme Court referred to the provisions of Directive 96/71/EC, as well as the case law of the Court of Justice (Sähköalojen Ammattiliitto judgment, C-396/13, EU: C:2015:86).

*Latvijas Republikas Augstākās tiesas Civillietu departaments, ruling dated 27.02.15, SKC-952/2015, www.at.gov.lv*

IA/33980-A

[BORKOMA]

**Luxembourg**

***European Union - Police and judicial cooperation in criminal matters - Directive 2010/64/EU - Right to interpretation and translation in criminal proceedings - Detention warrant - Right to a written translation - Assessment in concreto - Violation of rights of defence - Absence***

The decision of the Court of Appeal, sitting in chambers, on 20 January 2014, is part of an action brought against an order of the district court declaring as inadmissible the application for annulment of the detention warrant issued against the applicant.

In this case, the appellant invoked the violation of his rights of defence and of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, for obtaining the nullity of the detention warrant issued against him for lack of a written translation.

According to Article 3, paragraph 1 of the Directive, “Member States shall ensure that persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings”.

The Court of Appeal, sitting in chambers, considered that the applicant was entitled to invoke Directive 2010/64/EU providing for the submission of a written translation of the warrant, despite the failure to transpose it into Luxembourg law. However, it also held that the failure to provide a written translation must be assessed *in concreto* by reference to the rights of defence of the person concerned. In this case, the court of appeal ruled that the rights of defence of the applicant had not been violated, because he was assisted by an interpreter as well as a lawyer and was informed orally by the investigating judge that he would not be released on bail and that a warrant would be issued against him. The applicant had also received an information sheet about the possibilities of appeal against the warrant. According to the court of appeal, the failure of the obligation to provide a written translation of the warrant as defined by Directive 2010/64/EU (which, in this respect, does not provide for a penalty), shall not lead to the cancellation of the warrant whose consistency in itself was not challenged.

*Court of Appeal (in chambers), ruling dated 20.01.14, Pasicrisie luxembourgeoise no. 2/2014, p.563,*
*www.pasicrisie.lu/*

IA/33663-A

[IDU] [LEONAPH]

**Malta**

***Fundamental rights - Right to a fair trial by an independent and impartial court - Administrative authority having jurisdiction to impose heavy fines that are criminal in nature - Violation of the right to a fair trial***

In its judgment of 21 April 2015, the Civil Court, as part of the exercise of its jurisdiction in constitutional matters, ruled that the procedure for competition, under Maltese law relating thereto, violates Article 39, paragraph 1, of the Constitution and Article 6, paragraph 1, of the ECHR.

In this case, the Federation of Estate Agents (FEA) had received a statement of objections from the Office for Competition (OFC) indicating that the FEA had violated article 5, paragraph 1, of the law on competition and Article 101, paragraph 1, of the TFEU. In its response, the FEA argued that the investigation procedure carried out by OFC violated Article 39, paragraph 1, of the Constitution and Article 6, paragraph 1, of the ECHR.

Article 39, paragraph 1, of the Constitution states that all persons subject to criminal proceedings have the right to have their case heard by an independent and impartial court.

Referring to the Engel/Netherlands ruling of the ECtHR (ruling of 8 June 1976, request no. 5370/72), the Maltese court held that the fine imposed in this case by the OFC was a considerable amount, since it could reach a sum of 1,250,000 euros. It decided that, although the law on competition established the offences that it plans to present as administrative, the fine in question was not intended to compensate the damage. Consequently, it held that the fine was criminal.

The civil court examined whether, firstly, the Director-General for competition and, secondly, the competition and consumer court could be regarded as a court within the meaning of the Constitution of Malta. The Maltese case law (Montalto/Clews of 26 May 1987 & Kummissarju tal-Artijiet/Ignatius Licari of 30 June 2004) refers to a "court" when it comes to higher and lower courts. It held that neither the aforementioned Director-General nor the court can be regarded as a court in this regard.

By examining whether these two entities could be considered an independent and impartial court, in accordance with Article 6, paragraph 1 of the ECHR, the Maltese court stated that the members of the court in question are not judges and are paid by the Prime Minister. An appeal of a court decision can take place only on a question of law. However, according to the case law of the ECtHR, the decision-making body that decides the indictments must be subject to review covering both the legal as well as factual issues.

Therefore, by its decision of 21 April 2015, the civil court held that the proceedings under the law on competition violated Article 39, paragraph 1, of the Constitution of Malta and article 6, paragraph 1 of the ECHR.

*Civil court, constitutional jurisdiction, ruling dated 21.04.15, Federation of Estate Agents / Direttur Generali (Kompetizzjoni) (request no. 87/2013)www.justiceservices.gov.mt/*

IA/33995-A

[GALEAAN]

**Netherlands**

**** Briefs***

In its judgment of 9 April 2015, the Council of State ruled that the decision of the Secretary of State for Security and Justice of 12 December 2014 amending the circular of 2000 on foreigners to transpose Directive 2013/32/EU on common procedures for granting and withdrawing international protection, is not intended to substantially modify the substance of the framework for assessing asylum applications, but only to modify the manner in which the credibility of the asylum application is substantiated, in order to strengthen the judicial review. Consequently, according to the Council of State, it would not involve a change of policy regarding the processing of asylum applications.

With this decision, the Council of State goes against what had been considered by the advisory committee for matters relating to foreigners, and by several Dutch courts of first instance, as a policy change. According to them, the modification would mean that the competent Dutch authorities, when processing an asylum application, would examine in greater detail those elements of the asylum application which may constitute a legal basis to grant the asylum than the missing documents, which is why it is possible to exclude only some asylum applications that had been rejected for lack of declarations with a positive power of conviction and that may, following the above modification, be granted.

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*Raad van State, judgment of 09.04.15, 201501445/1/V2,*
*[www.rechtspraak.nl ECLI:NL:RVS:2015:1201](www.rechtspraak.nl)*

IA/34071-A

[SJN]

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In its judgment of 27 February 2015, the Dutch Supreme Court ruled that the taxes on gambling levied on profits made by a Dutch resident with an online operator of poker games, established in the Union, but outside the Netherlands, were contrary to the freedom to provide services.

Under Dutch law, domestic taxes on gambling are levied on the difference between the bets received and the total sums of prices paid. However, the foreign taxes on gambling are levied on the total sums of prices obtained by the player who pays said taxes. In this regard, the Supreme Court noted that the level of foreign taxes on gambling is generally higher than the level of domestic taxes on gambling.

According to the Supreme Court, said difference in treatment, depending on the place of residence of the online gambling operator, hinders the freedom to provide services.

This difference in treatment is not justified by overriding reasons of public interest. The argument that it would be very difficult to levy gambling taxes on operators based outside the Netherlands does not justify such differential treatment.

*Hoge Raad, ruling dated 27.02.15, 14/03069, [www.rechtspraak.nl](www.rechtspraak.nl)*
*ECLI:NL:HR:2015:472*

IA/34072-A

[GRIMBRA]

**Poland**

***Approximation of laws - Information procedure in the area of technical standards and regulations and rules on services of the information society - Directive 98/34/EC - Failure to notify technical regulations to the Commission - Consequences of the said failure on the consistency of the national legislative process and on the constitutionality of provisions containing the technical regulations - No impact***

On 11 March 2015, the Trybunał Konstytucyjny ("Constitutional Court", hereinafter "TK") delivered a judgment on the provisions of the Polish law of 19 November 2009 on gambling. Said law came into force five years ago and ever since, its validity and its application have been the subject of several disagreements and disputes in various Polish administrative and judicial courts.

The first main question behind all the legal controversies concerning the Polish courts was that of the qualification of the provisions of the law in question as "technical regulations", within the meaning of Directive 98/34/EC, laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by directive 2006/96/EC. The draft technical regulations should, under Article 8, paragraph 1, first sub section, of said Directive, be notified to the European Commission. However, the provisions of the law on gambling have not been the subject of such a notification. Their eventual qualification as "technical regulations" implies a second essential question, namely that of the consequences of failure to notify them on their validity and application.

In 2012, hearing a request for a preliminary ruling from a Polish administrative court, the Court of Justice ruled on the first of said above questions in the Fortuna judgment (C-213/11, EU:C:2012:495). The latter did not solve all the questions raised by the national courts. According to the Polish courts, the reading of this judgment resulted in differing interpretations. There was increasing confusion following a decision of the Supreme Court that suggested that the notification within the meaning of Directive 98/34/EC formed part of the national legislative process whose constitutionality could only be verified by a request sent to the TK. It is in this context that the latter, hearing requests brought by the Supreme Administrative Court and by a criminal court, delivered this judgment.

In its judgment, the TK, firstly, ruled the request on constitutionality as admissible. It then reviewed the nature of the notification as such and the consequences of the failure relating thereto, referring to the case law of the Court of Justice in the CIA Security International ruling (C-194/94, EU:C:1996:172), Commission/Italy ruling (C-139/92, EU:C:1993:346), Commission/Germany ruling (C-317/92, EU:C:1994:212), Bic Benelux ruling (C-13/96, EU:C:1997:173). It also conducted an analysis of the relationship between the notification and the national legislative procedure, which led it to the conclusion that the notification of technical regulations under Directive 98/34/EC and the national regulation on transposition, was not part of the national legislative procedure. Therefore, this notification is not a criterion for evaluating the constitutionality of the rules that had to be notified. As the omission of the notification under Directive 98/34/EC has no effect on the constitutionality of the disputed provisions of the law on gambling, those provisions are consistent with the Constitution.

The ruling of the TK was strongly criticised in a dissenting opinion. The judge in question argued that the request on constitutionality should have been rejected. According to him, the national courts could themselves answer the questions that have arisen in accordance with the principles of primacy and direct effect of EU law in the light of the case law of the Court of Justice. The ruling of the TK would not help settle the issues in the cases raised before the national courts as the recognition of the constitutionality of the provisions in question does not affect the assessment of the main issue, namely that of their compatibility with the Directive 98/34/EC and the consequences of its incompatibility with EU law.

*Trybunał Konstytucyjny, ruling dated 11.03.15, P 4/14,*
*http://otk.trybunal.gov.pl/orzeczenia/ezd/sprawa_lista_plikow.asp?syg=P%204/14*

IA/33982-A

[PBK]

*** *Brief (Poland)***

In a judgment of 11 December 2014, the Sąd Najwyższy (Supreme Court, hereinafter the "SN") interpreted Article 23, paragraph 1, point 4 of the law of 26 January 1982, Karta Nauczyciela (the teacher's charter, hereafter "KN"), in the version in force before 1 January 2013, in view of the provisions of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

Article 23, paragraph 1, point 4, of the KN provided for the obligation to terminate an employment relationship with a teacher who has attained the age of 65 and has acquired the right to a retirement pension. As the latter two conditions were fulfilled by the applicant, his employer terminated his employment contract. Challenging that decision, the applicant had submitted an application for reinstatement to the district labour court. As the application was rejected, the applicant appealed to the Regional Court. Said court upheld the action, ruling the provisions of Article 23, paragraph 1, point 4 of the KN as incompatible with the principle of non-discrimination on grounds of age, enshrined in EU law and in the Polish Constitution, as well as non-compliant with the provisions of Directive 2000/78/EC.

Hearing an appeal in cassation, the SN repealed the judgment of the Regional Court and dismissed the applicant's appeal against the judgment of the district court. Relying on the case law of the Court of Justice in the Palacios de la Villa judgment (C-411/05, EU:C:2007:604), Hörnfeldt judgement (C-141/11, EU:C:2012:421), Fuchs and Köhler judgement (C-159/10, EU:C:2011:508), and referred to Article 6, paragraph 1 of Directive 2000/78/EC, the SN argued that the prohibition of any discrimination on grounds of age does not preclude a national regulation under which the clauses relating to compulsory retirement that are objectively and reasonably justified, in the context of national law, by a legitimate aim shall be considered valid. The SN ruled that the regional court had wrongly limited itself to the arbitrary declaration that the tasks of schools and the objectives of the education policy as well as the reasoned policy for employment in education did not justify the solution under Article 23, paragraph 1, point 4 of the KN. It is concluded that, according to the SN, it is possible that such policies can justify compulsory retirement of teachers at the age of 65.

*Sąd Najwyższy, ruling dated 11.12.14, I PK 120/14,*
*www.sn.pl/sites/orzecznictwo/Orzeczenia3/I%20 PK%20120-14-1.pdf*

IA/33981-A

[PBK]

**Portugal**

***EU law - Rights conferred upon individuals - Violation attributable to a national court whose decisions are not subject to judicial remedy under national law - Obligation to compensate for the damage caused to individuals - National regulation making the right to compensation subject to the prior repeal of the court decision that caused the damage - Admissibility - Conditions***

In its judgment of 24 February 2015, the Supremo Tribunal de Justiça (Supreme Court) had to rule on the interpretation of a provision of the national legislation on non-contractual liability of the State and companies governed by public law. According to said provision, the right to compensation for the damage caused by violations by a national court, including a court whose decisions are not subject to judicial remedy under national law, is subject to a condition based on the prior cancellation of the decision that caused the damage.

This judgment stems from an extraordinary remedy for review filed by a Portuguese citizen against the State because he had suffered pecuniary damages as a result of a court decision vitiated by manifest errors in the assessment of facts. This decision was delivered by the Supremo Tribunal de Justiça in the context of a dispute between this citizen, a former sports coach who terminated his fixed-term employment contract for cause, and his employer.

In support of his application, the applicant cited a violation of Article 22 of the Constitution, titled "Liability of public entities", and the national legislation on non-contractual liability of the State. Moreover, he invoked the unconstitutionality of a provision of that legislation which made the right to compensation subject to the prior annulment of the judicial decision that caused the damage, especially in a case such as that at issue in the case in the main proceedings, in which the contested decision was delivered by a national court whose decisions are not subject to judicial remedy under national law.

In that judgment, the Supreme Court, in essence, held that the error of judgment must be invoked and proved in the same judicial proceedings in the context of which the damage was caused and using the remedies available for challenging the decision terminating those proceedings and not in the context of an action for damages. When such proof has not been provided in the context of the same proceedings that caused the damage, the subsequent action for damages must necessarily be rejected as unfounded.

This judgment, which aims to end the criticism of a part of the national doctrine arguing the unconstitutionality of the contested provision, has a significant benefit from the perspective of EU law.

By that judgment, the Supremo Tribunal de Justiça answers negatively to the question of whether EU law and, in particular, the principles formulated by the Court of Justice in the Köbler judgement (C-224/01, EU:C:2003:513) regarding the liability of the State for damage caused to individuals as a result of a violation of EU law attributable to a national court whose decisions are not subject to judicial remedy under national law, must be interpreted as meaning that they preclude a national regulation making the obligation of compensation for damage subject to the prior annulment of the decision that caused the damage.

*Supremo Tribunal de Justiça, ruling dated 24.02.15, available on:*
*www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/680e9e23adcf72ba80257df6005801d3?OpenDocument*

IA/33983-A

[MHC]

**** Brief (Portugal)***

In its judgment of 25 February 2015, the criminal chamber of the Tribunal da Relação de Coimbra (Coimbra Court of Appeal) found an unlawful interference with the right to honour and to the reputation of a member of the Portuguese parliament, resulting from the dissemination of information in the press published with the intention of damaging his personal reputation and insult him.

In its assessment of the admissible restrictions on freedom of expression in the area of political discourse, the Tribunal da Relação de Coimbra recognised, in accordance with the case law of the ECtHR, that, in respect of a politician, referred to as such, the limits of admissible criticism are certainly wider than in relation to a private individual in that, unlike the latter, the former is inevitably and knowingly exposed to close scrutiny of his actions by both journalists and citizens. However, when the information disseminated is false, decontextualised or presented to cast doubt on the honour or reputation of the person and, thus, exposing him to contempt and public discredit, this does not constitute legitimate public criticism but an attack on honour and reputation.

*Tribunal da Relação de Coimbra, ruling dated 25.02.15, available on:*
*www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/7f0f11e15f0c5d6880257dfd0051d1e5?OpenDocument&Highlight=0,difama%C3%A7%C3%A3o*

IA/33984-A

[MHC]

**Czech Republic**

***Consumer protection - Unfair commercial practices of companies vis-à-vis consumers - Directive 2005/29/EC - Unfair commercial practices - Assessment by the national authorities - Commercial decision - Concept - Broad interpretation***

In its judgment of 23 October 2014, the Nejvyšší správní soud (Supreme Administrative Court) has made some clarifications on the qualification of certain commercial practices as unfair within the meaning of national provisions transposing Directive 2005/29/EC on unfair commercial practices of companies vis-à-vis consumers in the domestic market. The review by the Nejvyšší správní soud focused, in this case, on a practice followed by of a natural gas supplier that had not taken into account the valid termination of the supply contract by a consumer and, despite the termination, had provided its services, thus forcing him to become his customer.

The Nejvyšší správní soud specified, based on the case law of the Court of Justice and on the Commission's instructions in the matter, the approach to be taken by a national authority when assessing a commercial practice. According to the Nejvyšší správní soud, it should, firstly, ascertain whether the practice does not constitute any of the practices deemed as unfair under all circumstances set out in the relevant annexes to the law on consumer protection or in Annexe I to Directive 2005/29/EC. During this verification, it is not necessary to examine whether the practice in question substantially distorts or is likely to distort the economic behaviour of the average consumer, as required by the general clause in Article 5 of Directive. If the authority considers that the practice in question does not constitute any of the enumerated prohibited practices, it then examines whether the practice in question can be regarded as a misleading or aggressive practice within the meaning of Articles 6 to 9 of the Directive. It is not until the last step, when the practice cannot be qualified as misleading or aggressive, that the authority examines whether the practice is unfair on the basis of the general clause.

The Nejvyšší správní soud also found that the concept of "commercial decision", which a consumer would not have taken otherwise, must be interpreted broadly in accordance with what the Commission has indicated in its instructions. According to the Czech High Court, this type of decision is not confined to the conclusion or termination of a contract. In this regard, the trial judge had wrongly concluded that there was no aggressive practice in this case, by simply stating that the consumer had neither signed nor terminated the contract under pressure from the supplier. The concept of commercial decision also includes the failure of the supplier to take into account the termination of the contract by the consumer or the fact that the consumer becomes the supplier's customer against his will, or the fact that he is not able to exercise his freedom of choice of supplier.

As the trial court did not take into account these details, the Nejvyšší správní soud repealed the impugned judgment and referred the case back to it.

*Nejvyšší správní soud, ruling dated 23.10.14, 7 As 110/2014-52, www.nssoud.cz*

IA/33985-A

[KUSTEDI]

**Romania**

***Approximation of laws - Review procedures concerning the award of public supply and public works contracts - Directive 89/665/EEC - Challenging of decisions taken by the contracting authority for the award of public contracts - Obligation to pay a financial guarantee under penalty of inadmissibility of the objection - Right to an effective remedy - National legislation transposing this Directive - Partial unconstitutionality***

By its judgment of 15 January 2015, the Constitutional Court ruled as partially unconstitutional the obligation to pay a financial guarantee "in good faith", as defined by the national legislation, in case a decision taken by the contracting authority concerning the award of public contracts is challenged, failing which said objection will be considered inadmissible. In its analysis, the Constitutional Court examined the compatibility of said guarantee with the rights of access to justice, equality before the law and the voluntary and free nature of the special administrative courts, enshrined in the Constitution.

This issue is also the subject of two requests for a preliminary ruling currently pending before the Court of Justice, introduced by Romanian courts, namely cases C-488/14 (Max Boegl România and Construcții Napoca) and C-439/14 (Star Storage). These courts question the extent to which a national legislation, which establishes a financial guarantee in case of objection to a decision of the contracting authority, is compatible with EU law, in particular with the requirements of an effective and accessible remedy under Directive 89/665/EEC on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

Under national law, the obligation to pay the financial guarantee in question is provided for by the government emergency ordinance no. 34/2006 concerning the award of public procurement contracts, public works concession contracts, and services concession contracts, which transposes Directive 89/665/EEC into national law.

The Constitutional Court held, firstly, that the guarantee "in good faith" corresponds to the intention of the legislature to prevent the misuse of certain procedural rights and therefore, cannot be interpreted as restricting the access to justice. Nevertheless, the Court pointed out that while the existence of such a financial guarantee does not in itself restrict access to justice, its actual terms, including the fact that it is retained in all situations where a challenge is dismissed, do not meet the objective of preventing the misuse of procedural rights. To the extent that the guarantee is returned to the applicant if the objection is accepted, it should also be returned if the challenge is dismissed, provided that the applicant has not acted improperly in the exercise of his procedural rights.

Given the principle of equality before the law, the Constitutional Court concluded that there was no violation of the principle since only economic operators are required to provide such a guarantee to the exclusion of contracting authorities. When the dispute is between an individual and a public authority, the principle of equality of citizens before the law is not applicable.

*Constitutional Court, ruling dated 15.01.15, No. 5, www.ccr.ro/*

IA/33979-A

[CLU] [PRISASU]

**United Kingdom**

***1954 convention relating to the status of stateless persons - Definition of "stateless person" - Concept of "under the operation of its law" in that definition - Inclusion of government practices - Assessment of the proportionality of a decision depriving a person of his nationality***

In a judgment of 25 March 2015, the Supreme Court reviewed the definition of "stateless person", as provided by article 1, paragraph 1, of the 1954 Convention relating to the status of stateless persons, and the application, in this context, of the principle of proportionality according to EU law, the ECHR and national law.

This judgment concerns a decision of the Home Department Minister to deprive the applicant of his British nationality because of his alleged involvement in terrorist activities. Born in Vietnam in 1983, the applicant had arrived in the UK in 1989, had sought asylum with his family and had then become, in 1995, a British national. Although the applicant had never held a Vietnamese passport, he had not taken any action to give up his Vietnamese nationality. By deciding to withdraw his nationality on 22 December 2011, the Home Department Minister had ignored the fact that the applicant became, in effect, a stateless person. Thereafter, the Vietnamese government refused to recognise the applicant as a Vietnamese national.

The 1954 Convention defines a stateless person as a person that no State considers as its national under the operation of its law. To determine whether the applicant could be described as a stateless person under this convention, the Supreme Court had to interpret the concept of "under the operation of its law" contained in said definition. Taking into account the guidelines of the United Nations High Commissioner for Refugees, it held that this concept covers not only the relevant laws of the State in question, but also includes the practice of the government concerned, even if the latter is not likely to be subject to effective judicial review.

Moreover, it held that, even in interpreting this concept in the broadest sense, there was no Vietnamese legislation or practice to consider that the applicant was not a Vietnamese under the application of the national laws.

Although the Supreme Court did not rule on the proportionality of the contested decision, it reviewed the Rottman case (C-135/08, EU:C:2009:588) concerning statelessness and the loss of status of an EU citizen. It noted, in this regard, that the nature and intensity of an assessment of proportionality do not seem so different under national law and EU law and can lead to the same result.

*Supreme Court, ruling dated 25.03.15, Pham / Secretary of State for the Home Department, [2015] UKSC 19, www.bailii.org*

IA/34312-A

[HANLEVI]

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

On 26 March 2015, the Supreme Court upheld the judgment of the Court of Appeal by which the latter had repealed the decision of the Attorney General to block the public dissemination of letters sent by Prince Charles to government departments between 2004 and 2005. According to the Supreme Court, as long as the obligation to disclose these letters has already been declared by a court decision, the Attorney General, who is a senior legal advisor of the government, cannot override this decision by issuing a certificate attesting that the letters are non-communicable.

*Supreme Court, ruling dated 26.03.15, R (on the application of Evans) and another / Attorney General, [2015] UKSC 21, www.bailii.org*

IA/34311-A

[PE]

## 2. Other countries

### United States

***Supreme Court of the United States - Fundamental rights - Right to marry - Homosexual couples - Recognition of a constitutional right***

In a judgment of 26 June 2015, the Supreme Court of the United States held that, under the 14th Amendment of the Constitution, marriage is a constitutional right for homosexual couples.

On 26 June 2013, the Supreme Court had declared as unconstitutional a section of the federal law DOMA (Defense of Marriage Act) which defined marriage as a union between a man and a woman. The solemnisation of the marriage however remained a matter for the states.

In this case, the case consisted of combined applications and fourteen couples and two people whose partner had died. Four states were involved, either because they refused two people of the same sex the right to marry one another (Michigan and Kentucky), or because they did not recognise such marriages that were legally solemnised elsewhere (Ohio, Tennessee and Kentucky).

In these four states, the Federal District Courts had ruled in favour of the applicants but the Court of Appeal for the Sixth Circuit had subsequently invalidated their decisions on the ground that there was no constitutional obligation for the states to authorise same-sex marriages or to recognise such marriages.

The applicants had then cited before the Supreme Court the due process clause and the equal protection clause of the 14th Amendment.

The Supreme Court based its decision on four principles that reflect that the right to marry is a fundamental right, for heterosexual couples as well as homosexual couples.

Firstly, the Court emphasised that the choice to marry is inherent in the individual freedom of each person. It is associated with individual autonomy, regardless of the person's sexual orientation.

Secondly, it noted that marriage represents the most intimate union possible between two people and that this possibility of commitment cannot be denied to same-sex couples.

Thirdly, the Court held that, in several states, adoption is not permitted for homosexual couples and children, therefore, have only one legal parent. As marriage offers recognition and family stability, in the child's interest, same-sex couples should have the right to marry.

Finally, it reiterated that the states offer many social and economic benefits to married couples. It is unusual for homosexual couples to not benefit from this support.

Thus, the Supreme Court found that as a result of the 14th Amendment of the Constitution, same-sex marriage is legal throughout the United States. Therefore, all the states must, firstly, allow same-sex marriage and, secondly, recognise such marriages that are solemnised in other federal states.

The Supreme Court issued its decision with 5 votes against 4. The dissenting opinions, including that of the President of the Court, criticised the fact that the Court did not merely interpret the law but acted as a legislator, without respecting the democratic process.

In this respect, the Supreme Court stated that while a conservative approach could be recommended, the dynamics of the American constitutional system means that it is not necessary to wait for legislative action to assert a fundamental right.

*Supreme Court of the United States, ruling dated 26.06.2015, Obergefell e.a./Hodges (request no. 576 U.S.)* http://www.supremecourt.gov/

IA/34087-A

[GALEAAN] [DUBOCPA]

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***National law - United States - Territorial scope of application of American law - Civil action brought by the European Community and the Member States under the Racketeer Influenced and Corrupt Organisations Act (RICO) and the Foreign Sovereignty Immunities Act (FSIA) - Extraterritorial application of the RICO - European Community considered as a body of a foreign State***

In its decision of 23 April 2014, the US Court of Appeals ruled on the scope of application of the Racketeer Influenced and Corrupt Organisations Act (hereinafter "RICO"), concerning the imposition of criminal sanctions against certain types of criminal organisations.

On 31 October 2002, the European Community had introduced, under the RICO, a civil action before the United States District Court for the Eastern District of New York against the trading company Reynolds American Inc. (hereinafter "RJR"). It argued that RJR had directed, managed and controlled a global system of money laundering together with other organised criminal groups in violation of the RICO. The European Community also argued that these actions had had consequences on its territory. The Federal Court had dismissed the appeal, firstly, on the grounds that the RICO does not apply to activities performed outside the United States. It had based its decision on the ruling in the Morrison case 529 U.S. 598, establishing the prohibition of extraterritorial application of US law. Secondly, it considered that the European Community cannot be regarded as an organ of a foreign State under law 28 U.S.C., Section 1332, 1603.

Hearing the case, the Court of Appeal held that the court had erred in law as regards the question of the extraterritorial application of the RICO. It stressed that certain criminal offences relating to money laundering apply, under RICO, to the activities performed outside the United States. It also found that the European Community meets the cumulative criteria under the Foreign Sovereignty Immunities Act under which it can be considered as a body of a foreign State. It therefore repealed the judgment delivered by the Federal Court for the District of New York.

*U.S. Court of Appeals, decision of 23.04.14, 11-2475-cv, European Community vs. RJR Nabisco, INC.,*
*www://caselaw.findlaw.com/us-2nd-circuit/1664121.html*

IA/34078-A

[SAS] [GALEAAN]

## B. National legislations

### 1. Member States

### Germany

***Law to establish a general minimum wage***

Since 1 January 2015, any employment relationship is subject to a minimum wage of 8.50 euros gross per hour. The law establishing a general minimum wage applies to all business sectors, without prejudice to the collective sectoral agreements providing for higher wages and the statutory minimum wage systems applicable to posted and temporary workers. Any stipulation contrary to the provisions of this law is void. A permanent commission, jointly comprising six voting members and two representatives from the scientific domain, who, however, only have an advisory role, is responsible for reassessing the hourly rate at the end of each year.

The personal scope of application of the law extends to all salaried employees working in Germany, regardless of the employer's headquarters. While it also covers trainees in principle, the law excludes from its scope of application certain categories of training, including that provided as part of school or university training, orientation courses and voluntary internships over a period of less than three months. The law also excludes from the scope of application, apprentices, volunteers and, for the first six months of paid employment, former long-term unemployed individuals.

The assessment of the constituent elements of the minimum wage takes into account the allowances and supplements which do not alter the relationship between the service of the worker and the consideration that he receives, including the supplements agreed by sector. Moreover, the wage calculation does not include special allowances, bonuses and other allowances that are paid on a conditional basis or after unspecified periods. It is the same for certain benefits provided by the employer which are, for example, granted for overtime hours or following the work carried out under special or difficult conditions.

The question of a general minimum wage has been the subject, in Germany, of a very controversial political debate, which gathered momentum following the downturn in the late 2000s, concerning decisions to extend collective agreements to all business sectors. In addition to the specific statutory systems applicable to posted workers and temporary agency workers, there was so far, only an indirect regulation for minimum wage in most states. The contracting authority in the field of public works contracts was generally required to do assign as contractors only those companies that, when submitting the bid, undertook in writing to pay their employees, in return for the performing the services concerned, at least the remuneration prescribed by the collective agreement applicable to the place of execution of the work.

In the Rüffert (C-346/06, EU:C:2007:541) and Bundesdruckerei (C-549/13, EU:C:2014:2235) judgments, the Court of Justice ruled that such provisions are contrary to the freedom to provide services, noting in particular that insofar as they apply only to public procurement contracts, such national measures are not capable of achieving the objective of worker protection if there is no index suggesting that active workers in the private market do not need the same wage protection as those active in the context of public procurement. It must be reiterated that under Article 3, paragraph 1, second section of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, setting the minimum wage rate falls within the authority of the Member States.

By an order of 25 June 2015, the Federal Constitutional Court ruled as inadmissible an appeal against the law establishing a general minimum wage, on the grounds that the applicants, i.e. transport companies located in several EU Member States that challenged the application of the law to individual employment contracts of truck drivers passing through Germany while domiciled in another Member State, must first refer the matter to the lower courts before bringing an appeal before it.

*Gesetz zur Regelung eines allgemeinen Mindestlohns - Mindestlohngesetz (MiLoG), BGBl. I p. 1348,*
*www.gesetze-im-internet.de/bundesrecht/milog/gesamt.pdf*

[KAUFMSV]

**Bulgaria**

***Law governing the acquisition of agricultural land***

Following the letter of formal notice sent to Bulgaria by the Commission under Article 258 of the TFEU concerning the law governing the acquisition of agricultural land, amendments to the law on public offering of transferable securities were introduced in Bulgarian law.

Under these amendments, the prohibition of ownership of agricultural land by foreigners and foreign companies from outside the Union will not be applicable to public companies and special purpose entities.

According to the Commission, the law governing the acquisition of agricultural land, in its version prior to the amendments, contained a number of provisions that, from the perspective of EU law, may be regarded as restrictions on free movement of capital and freedom of establishment and may lead to discriminatory treatment of investors from other Member States.

In order to respect the principles of non-discrimination and proportionality, the Bulgarian legislature introduced said amendments to paragraph 59 of the final provisions of the law of 12 May 2015 amending the law on financial instruments.

*Law of 12.05.15 amending the law on financial instruments,*
*www://pravo1.ciela.net/Document.aspx?id=2135556966&category=normi&lang=bg-BG*

[NTOD]

**Cyprus**

***Law on assistance to assisted reproductive technology***

On 15 May 2015, the Cypriot Parliament adopted the law on assistance to assisted reproductive technology. This law is an important contribution to medical law and to the Cypriot family law, in that it establishes the legal framework for the authorisation and practice of assisted reproductive technology (hereinafter “ART”) including surrogacy.

Firstly, the law provides for the creation of a national council for ART which is responsible for the implementation of the provisions of the law, including any administrative issue regarding management. The law also provides for the establishment and monitoring by the council of the ART units in medical institutions as well as the regulation of donations and donors. The ART is authorized only to: a) enable infertile heterosexual couples, who are married or are in a stable and lasting relationship, and (under certain conditions) single infertile individuals, to become parents; or b) prevent transmission of a serious illness to the embryo. In addition, the donation, testing, development, maintenance, storage, distribution and use of reproductive tissues, gametes and embryos are regulated under the medical and ethical guidance of the council and the provisions of the relevant Cypriot laws.

Then, the law defines the authorised ART methods that include artificial insemination, *in vitro* fertilization and embryo transfer. The law also lists techniques to implement these authorised ART methods, including cryopreservation of embryos and sperm, freezing of sperm, pre-implantation genetic diagnosis and any other technique approved by the council. The methods are available to couples until the age of natural reproduction capacity (set by law at 50 years). A single person who wishes to have a child through an authorised ART method may submit a request for authorisation to the council, citing medical or other reasons justifying an authorisation in his case. However, the law provides for certain limitations based on legal, ethical and bioethical principles as established by the parliament. The law prohibits, in particular, the violation of any provision of the ECHR concerning the implementation of the law, the mixing of the genetic material of two persons of the same sex, cloning for reproductive or therapeutic purposes, sex selection of the child (except in the case of prevention where the objective is the prevention of transmission of a serious illness to the embryo), creation of an *in vitro* embryo for research purposes, and transfer of a human embryo to an animal (and vice versa).

Finally, the law provides for a surrogacy authorisation, only for heterosexual couples, and regulates all procedural and legal aspects. The surrogacy authorisation must be granted by an order of the District Court, upon obtaining the written permission of the council. To give its approval, the council must verify that a written agreement for surrogacy for altruistic reasons was reached between the intended parents and the surrogate mother, all the parties are residing in Cyprus and that it has been proven that the intended parents are unable to have children. Except for the payment by the intended parents of expenses related to pregnancy, childbirth and postpartum period, negotiating an agreement for surrogacy on a commercial basis, and any form of advertising for surrogacy, are expressly prohibited by law.

*Law no. 69(I)/2015 on assistance to assisted reproductive technology (Official Journal, Annexe 1, Part 1, No. 4510, p. 849), 15.05.15,* [*www.mof.gov.cy/mof/gpo/gpo.nsf/All/A1017F76C2A5D19FC2257E4600232804/$file/4510%2015%205%202015%20PARARTIMA%201o%20MEROS%20I.pdf*](www.mof.gov.cy/mof/gpo/gpo.nsf/All/A1017F76C2A5D19FC2257E4600232804/$file/4510%2015%205%202015%20PARARTIMA%201o%20MEROS%20I.pdf)

[LOIZOMI]

**Spain**

**** Brief***

Organic Law 4/2015 of 30 March 2015 on the protection of public safety introduced a new provision in Organic Law 4/2000 of 11 January 2000 on the rights and freedoms of foreigners in Spain and their social integration. This new provision aims to legalise the practice of "hot" returns of immigrants attempting to cross the wire mesh fences at the Spanish borders of Ceuta and Melilla, to enable the police forces to prevent them from illegally returning to Spain. Said provision states that these deportations are conducted to ensure compliance with international standards on human rights and international protection standards endorsed by Spain. However, the new provision has raised doubts in civil society as to its compatibility with the rules of the asylum law.

Following the approval of this measure, the European Commission reminded Spain of the need to allow immigrants to submit their asylum applications without having to climb over such fences. The practice of "hot" returns has been criticised by the Council of Europe and by several associations defending human rights. Several of these associations have asked the Spanish ombudsman's office to introduce an appeal on unconstitutionality against this provision. However, it is the political parties of the opposition that finally introduced on 21 May 2015, an appeal on unconstitutionality covering several provisions of Organic Law 4/2015, including, in particular, the provision in question.

*Organic Law 4/2015, of 30.03.15, on the protection of public safety (Official Journal No. 77 of 31.03.15),* *www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3442.pdf*

[OROMACR]

**Ireland**

***Referendum on the amendment of the Constitution***

On 22 May 2015, Ireland held a referendum to amend the Constitution in order to extend the right to civil marriage to same-sex couples. Ireland is the first country to approve same-sex marriage through a popular vote. The Irish were consulted on the addition of an amendment to Article 41 of the Constitution, which will now read: "marriage may be contracted in accordance with law by two persons without distinction as to their sex". 62.7% of voters voted in favour of this change. Thus, marriage between two people of the same sex has the same status, under the Constitution, as a marriage between a man and a woman. Given the amendment of the Constitution, no new civil partnerships will be registered in Ireland. The existing civil partnerships will retain that status along with the rights, privileges, obligations and responsibilities relating thereto, unless the couple chooses to marry. In this case, their civil partnership will be suspended. The Marriage Bill 2015 should be adopted in late July 2015.

Also refer to the judgment of the US Supreme Court of 26.06.15 on p. 56 of this Bulletin.

*www.justice.ie/en/JELR/General%20Scheme%20of%20the%20Marriage%20Bill%202015.pdf/Files/General%20Scheme%20of%20the%20Marriage%20Bill%202015.pdf*

[CARRKEI]

**Lithuania**

**** Brief***

On 1 May 2015, a law amending certain provisions of the Lithuanian Administrative Code and prohibiting minors from smoking and possessing tobacco or tobacco-related products, such as electronic cigarettes entered into force. Any violation of this prohibition is punishable by a fine and confiscation of the product. The fine is imposed on the parent or guardian when the minor concerned is under the age of 16.

Although these changes are indirectly related to the transposition into national law of Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, they are more focused on achieving the goal of the Union of "promote the well-being of its peoples" (art. 3 TEU) and implementing the "Europe 2020" strategy. In this regard, the national legislature held that there can be positive effects on productivity and competitiveness when citizens are healthy and active, and when they are protected against diseases and helped prevent a premature death.

*Law of 21.04.15 amending Articles 13, $37^{2}$, $1731^{2}$, $185^{2}$, $185^{4}$, $214^{2}$, 225, $241^{1}$, $247^{5}$, 320 of the Administrative Code and adding Article $185^{6}$ to the Code, www.lrs.lt*

[LSA]

**Poland**

***Amendment of the Code of Civil Procedure for the application of European instruments falling within the jurisdiction, recognition and enforcement of judgments in civil and commercial matters***

The law of 5 December 2014 amending the code of civil procedure and the law on legal costs in civil cases (O.J. 2015, position 2), entered into force on 10 January 2015. The latter date has been made to coincide deliberately with the effective date of Regulation (EC) No. 1215/2012 concerning jurisdiction, recognition and enforcement of judgments in civil and commercial matters (rewriting) ("Brussels I Regulation"). It was on this occasion that the Polish legislature decided to introduce, in the Polish civil procedure, new special provisions to ensure that national courts correctly apply the EU regulations relating to cooperation in civil and commercial matters. Special provisions have been previously added successively to the code of civil procedure. However, this new amendment is a first attempt at a comprehensive approach to address said problem, since it includes provisions relating to the application of the regulation that recently entered into force as well as to other applicable regulations of the Union, affecting the national civil procedure (regulations (EC) no. 805/2004, no. 1896/2006, no. 861/2007, no. 4/2009, no. 606/2013).

This new global approach has, firstly, helped create a section of the common general provisions for all the aforementioned regulations (the entire new fourth book of Part IV of said code, titled "Recognition and enforcement of certain decisions of courts of Member States of the Union, court settlements and authentic instruments derived from them"), and, through this, avoid unnecessary casuistry. Secondly, it has helped maintain consistency between the provisions concerning the different regulations.

The addition of a special section dedicated to decisions and authentic instruments derived from Member States should make it easier for the national courts to apply the provisions of said regulations. With regard to the decisions falling within the scope of Regulation (EC) No. 44/2001 (Brussels I), the courts so far only had provisions relating to the recognition and enforcement of all foreign decisions, which, in relation to decisions from Member States, requires their application by the court in order to guarantee the effectiveness of EU law.

*Law of 05.12.14 amending the code of civil procedure and the law on legal costs in civil cases (O.J. 2015, position 2), http://orka.sejm.gov.pl/proc7.nsf/ustawy/2847_u .htm*

[PBK]

## 2. Other countries

### United States

***"Freedom Act": Reform of the "Patriot Act " concerning the collection of telephone data***

In its decision of 7 May 2015, ACLU vs. Clapper (Case No. 14-42), the Court of Appeal of the second circuit of the United States had held that the mass collection of telephone data had not been authorised under the Patriot Act (an anti-terrorism act, hereinafter the "Patriot Act"). This led to the adoption of the "Freedom Act" (an internal security act, hereinafter the "Freedom Act"), effective on 2 June 2015.

Firstly, the Freedom Act repealed the possibility of mass collection of telephone data by national security agencies. It also reformed the Foreign Intelligence Surveillance Act (act on physical and electronic surveillance, hereinafter the "FISA") under which all stages of judicial proceedings conducted under this law were to be held in secret. Such legal proceedings are now public and the decisions published. Furthermore, Freedom Act provides for the assignment of a lawyer to represent the citizens who consider that there has been interference with their right to privacy. Finally, the Freedom Act amended Section 702, paragraph b, of the FISA by prohibiting surveillance agencies from intercepting communication between American citizens. In this regard, under the Freedom Act, the telephone data are now stored by communications companies and the national security agencies can access it only if there is a link with a terrorist group and if the competent court provides the authorisation required for this.

*www.congress.gov/114/bills/hr2048/BILLS-114hr2048enr.pdf*

[SAS] [GALEAAN]

### People's Republic of China

***Food safety law***

The executive committee of the National People's Congress of China gave its green light to the new food safety law on 24 April 2015, following a series of food scandals. This new law will come into force on 1 October. Since its enactment in 2009, this is the first time that the food safety law has been amended.

The new law has added fifty new articles to the 104 articles of the old law. The main innovations introduced by this law consist of strengthening the safety of infant formula, extending the scope of the law to food purchased online and introducing tougher penalties for non-compliance with these provisions.

The new law provides that the consumers affected by non-compliance can claim punitive damages amounting, at the consumer's discretion, to ten times the price of the product concerned, or three times the amount of damage suffered, while providing a minimum threshold of 1000 RMB (about 140 euros). Once sentenced to imprisonment for a food safety-related offence, the person will be deprived for life of the right to work in the food sector. In case of failure of the competent authorities, not only the authorities concerned but also the local government shall be considered as liable.

*Food safety law, adopted on 28.02.09 and last amended on 24.04.15 by the Executive Committee of the National People's Congress of China, www.npc.gov.cn/npc/cwhhy/12jcwh/2015-04/25/content_1934591.htm*

[WUACHEN]

## C. Doctrinal echoes

***On the possibility of the host State excluding EU nationals from social benefits: comments on the ruling of the Court in the Dano case (C-333/13, EU:C:2014:2358)***

By its Grand Chamber judgment of 11 November 2014, in the Dano case, the Court of Justice ruled that the Member States may exclude from the benefit of certain non-contributory benefits, within the meaning of Regulation (EC) No. 883/2004 on the coordination of social security systems, nationals of other Member States when these persons are not economically active and do not benefit, in the host Member State, from the right of residence under Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States.

*Relationship between Regulation (EC) No. 883/2004 and Directive 2004/38/EC: an approach based on the right of residence*

A number of authors have questioned the relevance of the approach taken by the Court based on the existence of a right of residence within the meaning of Directive 2004/38/EC. Thus, **Eichenhofer** rules this approach as contrary to the principles of coordination of social security systems, set out in Regulation (EC) No. 883/2004, while admitting its justification by the objective of resolving the existing fundamental contradiction between the legislation on the coordination of social security systems and the legislation on the right of residence: "Die Entscheidung verbindet Koordinierungsrecht mit Aufenthaltsrecht [und] steht […] mit zentralen Aussagen der die Koordinierung der Leistungen sozialer Sicherheit normierenden VO (EG) Nr. 883/2004 nicht im Einklang. […] Mittels der Maximen des Europäischen koordinierenden Sozialrechts lässt sich die vom EuGH gefundene Entscheidung […] nicht überzeugend erklären, ganz im Gegenteil ihnen läuft sie zuwider! […] Auf diese Weise wird [jedoch] der zwischen den Prinzipien des EU-Koordinierungs- und des EU-Aufenthaltsrechts andernfalls offenkundige Widerspruch überwunden. Dies ist im Interesse der Einheit des EU-Rechts zu akzeptieren. Darin liegt eine 'schöpferische' Auslegung des EU-Rechts, welche aber innere Friktionen zwischen zwei miteinander eng verbundenen Materien des EU-Rechts vermeidet: Ihr zentrales Ziel liegt damit in dem Bemühen, einen legislatorischen Widerspruch aufzuheben und zu harmonisieren"[1].

[1] EICHENHOFER, E., "Ausschluss von ausländischen Unionsbürgern aus deutscher Grundsicherung?", Europarecht, 2015, p. 73-79, 76-77.

Similarly, **Schreiber** observes that the objective of coordination pursued by Regulation (EC) No. 883/2004, namely that of ensuring general application of the law of the State of residence, precludes, in principle, the right to social benefits from being subject to the legality of the residence: "Die […] Funktion der Sozialrechtskoordinierung, [d.h.] die Anwendung des Rechts des Wohnstaates allseitig verbindlich auch gegenüber dem Staat der Staatsangehörigkeit oder dem Staat der letzten Beschäftigung vorzuschreiben, spricht auch gegen die Heranziehung der Legalität des Aufenthalts. […] Zu kritisieren ist die einseitig an den Wertungen der Unionsbürger-Richtlinie ausgerichtete Argumentation, die die Wertungen der Sozialrechtskoordinierung nach der VO (EG) 883/2004 ausblendet" [2]. Similarly, **Janda** regrets that the Court has left some doubt as to the relationship between the two acts, noting that the possibility of discrimination between citizens of the Union, if it is inherent in Directive 2004/38/EC, is in principle foreign to the logic of the coordination of social security systems: "Der EuGH bleibt […] eine fundierte Bestimmung des Verhältnisses der Unionsbürgerrichtlinie zur Koordinierungsverordnung schuldig. […] Es bleibt dabei, dass Art. 24 Abs. 2 RL 2004/38/EG eine Ungleichbehandlung zulässt, während die VO (EG) 883/2004 - ebenso wie das Primärrecht, sofern eine ‘tatsächliche Verbindung’ zum Arbeitsmarkt des betreffenden Mitgliedstaates besteht - die Gleichbehandlung gewährleistet. […] Die Ungleichbehandlung mag zwar in Art. 24 Abs. 2 RL 2004/38/EG angelegt sein; sie ist aber der Sozialrechtskoordinierung fremd"[3]. With a more conciliatory approach, **Verschueren** notes that "[t]his case law actually adds a supplementary condition to the entitlement to these benefits which is not included in Regulation 883/2004 itself"[4].

For **Gazin,** “the Court intends basing its reasoning entirely on Directive 2004/38/EC and bows to the European Parliament with regard to inactive EU citizens. It thus reflects a desire for ‘self-restraint’, putting aside its creative and audacious work based on Articles 18 and 20 of the TFEU. This caution is explained very likely by an overall strategy of preservation of the main elements of the European acquis regarding residence and movement of citizens”[5].

*Relations with the previous case law regarding the free movement of EU citizens: a broad or narrow interpretation of the Dano ruling?*

[2] SCHREIBER, F., "Die Bedeutung des Aufenthaltsrechts für die sozialrechtliche Gleichbehandlung von Unionsbürgerinnen und Unionsbürgern", Zeitschrift für Ausländerrecht und Ausländerpolitik, 2015, p. 46-52, 48-49.

[3] JANDA, C., "Ungleichbehandlung im Grundsicherungsrecht - eine Nachlese zur Rechtssache ‘Dano’", Informationsbrief Ausländerrecht, 2015, p. 108-112, p. 110; see also FUCHS, M., "Arbeitnehmerfreizügigkeit und Sozialleistungen – Zugleich eine Besprechung von EuGH, Rs. C-333/13 (Dano)", Zeitschrift für europäisches Sozial- und Arbeitsrecht, 2015, p. 95-101, 100.

[4] VERSCHUEREN, H., "Preventing ‘benefit tourism’ in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?", Common Market Law Review, nº 2, 2015, p. 363-390, 385.

[5] GAZIN, F., "Droit aux prestations sociales", Europe, nº 1, 2015, comment 6, p. 3.

According to **Thym**, "there are two ways to read the judgment. First, it can be argued that the Court considered art. 18 TFEU and/or the corresponding provisions in secondary law to be applicable ratione materiae to citizens residing abroad irrespective of whether they have sufficient resources. […] Secondly, one may interpret the Grand Chamber to have assumed that citizens residing unlawfully 'cannot invoke the principle of non-discrimination' […]" [6]. **Verschueren** also considers two readings of the judgment: "The first one starts from a narrow interpretation of the judgment, based on the principle that the limitations on the free movement of persons have to be interpreted strictly. The second hypothesis starts from a broad interpretation of the possibilities this judgment offers the Member States to restrict these Union citizens' right to equal treatment regarding social benefits as much as possible. […]. [A] strict interpretation of the Dano judgment seems logical from a legal point of view […]. [However,] the wording of this judgment could very well lead to [a] broad interpretation […] [which] could result in a situation in which free movement is, in practice, restricted to those who are lucky enough not to have to rely on public solidarity mechanisms. It may also lead to the paradox that a Union citizen is only entitled to social assistance in the host State, if he/she has sufficient resources and therefore not in need of any social assistance"[7].

Several authors regret that the Dano ruling goes against the previous case law that interpreted the free movement of EU citizens in a broad manner. Thus, **Aubin** finds a departure from "the logic of the Martinez Sala case law [which] marks the end of the right to stay for certain poor and unemployed European citizens applying for welfare while living in the territory of a Member State of which they are not a national for less than five years. [8] While the Martinez Sala judgment had 'directed the concept of citizenship towards social content' [...] the Dano ruling establishes, without saying it, a normative border with the countries of Central and Eastern Europe. [...] Consequently, this illustrates the paradox of removing from the territory of EU citizens because they are poor and unemployed, while receiving social welfare could place them on a professional path that will help bringing them out of the poverty" [9]. **Peers** believes that "[…] the Court now defers to the EU legislature and accepts the limits on access to benefits set out in the EU Directive, rather than insist (as it did before) that any legally resident EU citizen can in principle claim equal treatment as regards access to benefits based on the Treaties" [10]. In this regard, **Vonk** notes that "the CJEU skillfully maneuvers around the possible guarantees included in its own case-law on European citizenship and the ones triggered by Regulation 883/2004 on social security coordination" [11].

[6] THYM, D., "When Union citizens turn into illegal migrants: the Dano case", European Law Review, 2015, p. 249-262, 255.
[7] VERSCHUEREN, H., cit. *supra* note 4, p. 370-371.
[8] Martinez Sala ruling, C-85/96, EU:C:1998:217.

[9] AUBIN, E., "L'arrêt Dano de la CJUE: quand sonne le glas de la citoyenneté sociale européenne ?: Court of Justice of the European Union, 11 November 2014, Mr. Dano, case C-333/13", Actualité juridique du droit administratif, 2015, p. 825-828, 828.
[10] PEERS, S., "In light of the Dano judgment, when can unemployed EU citizens be expelled?", EU Law Analysis, 12 November 2014, available on: http://eulawanalysis.blogspot.com/2014/11/in-light-of-dano-judgment-when-can.html; see also HANCOX, E., "Elisabeta Dano, Florin Dano v Jobcenter Leipzig", Journal of Immigration Asylum and Nationality Law, 2015, p. 62-65, 64, and RENAUDIÈRE, G., "Free movement and social benefits for economically inactive EU citizens: The Dano judgment in historical context", EU Law Analysis, 12 November 2014, available on: *http://eulawanalysis.blogspot.com/2014/11/free-movement-and-social-benefits-for.html.*
[11] VONK, G., "EU-freedom of movement: No protection for the stranded poor", European Law Blog, 25 November 2014, available on: *http://europeanlawblog.eu/?p=2606.*

Other authors believe, however, that the Dano judgment does not question the earlier case law of the Court, generally in favour of free movement of EU citizens. Thus, **Gazin** notes that "[the Court] has never applied a total equal treatment between nationals and citizens of other Member States. Except to some extent in the Trojani ruling [12] [...], for which Directive 2004/38/EC does not apply, [the Court] has always allowed States to limit the granting of social benefits, particularly by making them subject to a real link between the European citizen concerned and the territory of the Member State of residence". [13] In this context, **Simon** observes that "[t]here is nothing revolutionary in the judgment of the Court. The response to the questions for a preliminary ruling result directly from the logical application of Article 24, paragraph 2 of Directive 2004/38/EC" [14]. **Rutledge,** in turn, holds that "[g]iven the factual scenario in Dano the CJEU's conclusion seems 'inevitable' […] in contrast to the situation in Vatsouras [15] […] where the applicants had retained the status of workers"[16]. Finally, Berthet believes "[that] one must certainly not conclude from this case that the Brey case law [...] is abandoned. [17] Only the assessment of the individual circumstances of the applicant citizen can justify the refusal to grant benefits"[18].

*The scope of citizenship after the Dano ruling*

Regarding the scope of citizenship after the Dano ruling, **Aubin** highlights that this decision "places emphasis on the worker rather than the inactive European citizen [and] puts in place a flexible law for non-national and inactive EU citizens (unemployed and without resources) wishing to exercise their freedom of movement" [19]. According to **Pataut,** "the Dano ruling very crudely illustrates the limits of solidarity in Europe" [20] while **Hilpold** notes that, although it seemed so far that the Court requires 'unlimited solidarity' between Member States, now limits itself to a 'certain solidarity'. [21]

[12] Trojani ruling, C-456/02, EU:C:2004:488.
[13] GAZIN, F., cit. *supra* note 5, p. 3.
[14] SIMON, D., "L'arrêt Dano ou comment se créent les mythes…", Europe, nº 12, point 11, p. 1.
[15] Vatsouras and Koupatantze ruling, C-22/08, EU:C:2009:344.
[16] RUTLEDGE, D., "Dano and the exclusion of inactive EU citizens from certain non-contributory social benefits", Freemovement, 19 November 2014, available on: *https://www.freemovement.org.uk/dano-and-the-exclusion-of-inactive-eu-citizens-from-certain-non-contributory-social-benefits.*
[17] Brey ruling, C-140/12, EU:C:2013:565.
[18] BERTHET, P., "La fin du 'tourisme social' ?", Actualité Juridique Famille, 2014, p. 655; see also SCHREIBER, F., "Unionsrechtliche Gleichbehandlung beim Arbeitslosengeld II-Bezug ohne Aufenthaltsrecht?", infoalso 2015, p. 3-7, 5.
[19] AUBIN, E., cit. *supra* note 9, p. 826-827; see also ROJO, E., "UE. No todos somos iguales. Sobre la libre circulación de personas, el derecho de residencia, el acceso a prestaciones sociales no contributivas, y la necesidad de disponer de recursos suficientes. Notas a la sentencia del Tribunal de Justicia de la Unión Europea de 11 de noviembre (Asunto C-333/13)", El blog de Eduardo Rojo, 16 November 2014, available on: *http://www.eduardorojotorrecilla.es/2014/11/ue-no-todos-somos-iguales-sobre-la.html.*
[20] PATAUT, E., "Les limites de la solidarité en Europe", Revue du droit du travail, 2015, p. 161-163, 161.
[21] HILPOLD, P., "Die Unionsbürgerschaft - Entwicklung und Probleme", Europarecht, 2015, p. 133-148, 144.

According to **Thym**, "the Grand Chamber judgment in the Dano case was much more than an exercise of doctrinal interpretation. Judges in Luxembourg had to decide about the constitutional potential of Union citizenship at the outer limits of free movement law. […] By denying an application of the non-discrimination guarantees to citizens without residence rights, the Court effectively established a class of 'illegal migrants' living unlawfully in other Member States without equal treatment guarantees; citizens who are economically inactive automatically lose their residence rights"[22].

**Solanke** highlights that "[t]he interpretation of 'sufficient resources' as 'own resources' is reminiscent of the so-called 'Playboy Directives' [which] extended the right of free movement only to those who had sufficient personal finances to support themselves. Their repeal and the creation of the more inclusive Citizenship Directive was seen as a progressive step towards fairer and broader access to the privileges of EU membership. Dano therefore suggests a retreat from the fabric and values of EU citizenship - the market citizen is re-affirmed"[23]. The reappearance of the traditional concept of 'economically active market citizen' is also reiterated by **Thym**: "Es erfolgt eine Rückkehr zum traditionellen Leitbild des wirtschaftlich aktiven 'Marktbürgers'"[24].

Regarding the role of the Court in the development of the concept of citizenship, some authors have also noted the influence of the political context in which the Dano judgment is delivered. **Thym** holds that "[the Court] abandoned earlier attempts to participate in the legal construction of 'real' citizenship. It may be no coincidence that this happened at a moment when free movement is in the political limelight. It is noticeable that earlier debates about social benefits case law or the substance of rights test were dominated by academics more than by politicians, in part because of the limited number of persons to which the judgments applied. At this juncture, the picture looks different. Free movement and the EU in general have become salient issues in domestic debates across Europe; the vision of further integration, which the supranational institutions often developed beneath the radar of public opinion, cannot benefit from a permissive and benevolent consensus any longer. Moreover, free movement is not the only arena where EU law is being challenged; think of the emphasis on national constitutional identity or the quarrels about the financial crisis"[25]. According to **Pataut,** the ruling illustrates a "subtle change of era: it no longer appears to be the largest and most generous support possible for the needy; it is rather a firm reminder of the limits of the commitments of Member States. [...] In the final analysis, only the State of nationality is obliged to support the offender or the needy ".[26]

[22]THYM, D., cit. *supra* note 6, p. 249; see also LIROLA DELGADO, I., "La Sentencia Dano: ¿El punto final de los 'malabarismos' del TJUE en materia de libre circulación de los ciudadanos de la Unión inactivos económicamente?", Revista General de Derecho Europeo, 2015, p. 1-27, 21-22.

[23]SOLANKE, I., "The end of free movement of persons? The CJEU Decision in Dano", Eutopia law, 13 November 2014, available on: *http://eutopialaw.com/2014/11/13/the-end-of-free-movement-of-persons-the-cjeu-decision-in-dano.*

[24]THYM, D., "Die Rückkehr des 'Marktbürgers' - Zum Ausschluss nichterwerbsfähiger EU-Bürger von Hartz IV-Leistungen", Neue juristische Wochenschrift, 2015, p. 130-134, 130-131.

[25]THYM, D., cit. *supra* note 6, p. 261.

[26]PATAUT, E., cit. *supra* note 20, p. 163.

With regard to these political considerations, especially in view of the media attention with which the Dano judgment was received, several authors have considered it appropriate to point out, firstly, that it is limited in scope to legal issues and, secondly, that it focuses on citizens combining specific conditions. Thus, **Morvant** notes that “this decision does not have [...] political significance, and merely revives with the secondary legislation, a time overshadowed by primary law” [27] . In addition, **Simon** specifies that “the judgment does not have a general scope that some have attributed to it: the Court clearly states that only the economically inactive EU citizens exercising their freedom of movement for the sole purpose of obtaining the benefit of the welfare of another member State even when they do not have sufficient resources to claim the benefit of a right of residence and, when it is necessary, in any case, to conduct an examination of the economic situation of each person, may be excluded from certain social benefits" [28] . However, some authors believe that the judgment can have a political impact: in fact, **Peers** considers that the decision "has […] facilitated a possible renegotiation of the EU free movement rules on this issue"[29].

*Non-applicability of the Charter of Fundamental Rights*

Some authors have questioned the refusal of the Court to assess the question of conditions for granting the benefits in question in the light of the Charter. On a positive note, **Wollenschläger** believes that this refusal is the logical consequence of the non-recognition of a right of equal treatment as regards the granting of benefits arising from the prohibition of discrimination: "Folgt aus dem unionsbürgerlichen Diskriminie-rungsverbot kein Gleichbehand-lungsanspruch hinsichtlich der begehrten Sozialhilfe, hätte es einen weitreichenden (und in der Sache abzulehnenden) Akt richterlicher Rechtsfortbildung bedeutet, dieses Ergebnis mit Blick auf unionsgrundrechtliche Wertungen zu korrigieren"[30].

In contrast, other authors were more critical. **Vonk** believes that the Court "wrongly denies the relevance and applicability of the EU Charter of Fundamental Rights […] [O]nce you have a benefit scheme, the question of under what conditions rights arising from such schemes must be granted to EU nationals, cannot deemed to be fully a national issue. This is European law pur sang and it has been ever since 1958, the year that the first social security regulation came into being" [31]. In this regard, **Thym** notes that "[the Court’s] focus on the absence of substantive harmonisation measures can be read as a deliberate rejection of parallel interpretation of the scope ratione materiae of art. 18 TFEU and of art. 51 [of the Charter]" [32] .

[27] MORVAN, P., "Les limites de la citoyenneté européenne", Revue du droit du travail, 2015, p. 158-161, 158; see also RUTLEDGE, D., cit. *supra* note 16.
[28] SIMON, D., cit. *supra* note 14.
[29] PEERS, S., cit. *supra* note 10.
[30] WOLLENSCHLÄGER, F., "Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rechtssache Dano vom 11.11.2014", Neue Zeitschrift für Verwaltungsrecht, 2014, p. 1628-1632, 1630.
[31] VONK, G., cit. *supra* note 11.
[32] THYM, D., cit. *supra* note 6, p. 258.

**Frenz** notes that the Court puts a limit to the broad interpretation of the scope of the Charter, as initiated in the Åkerberg Fransson judgment [33], while taking the opportunity to question the potential impact of the universal scope of human dignity on the question of the applicability of the Charter: "Es genügt also nicht, dass die Materie als solche unionsrechtlich normiert ist. Dies muss vielmehr für die konkrete Frage gelten, welche Grundrechten unterliegen soll. Damit wird die Ausdehnung der Grundrechte im Urteil Åkerberg Fransson begrenzt. […] Insoweit stellt sich aber doch die Frage, ob die Universalgeltung der Menschenwürde nicht sämtliche Bereiche erfasst, welche durch Unionsrecht normiert bzw. zumindest wie hier durch das allgemeine Freizügigkeitsrecht überformt sind, auch wenn den Mitgliedstaaten die Regelung überlassen wird. Diese müssen dann eine Regelung treffen, welche die Menschenwürde wahrt - indes bezogen auf das Gesamtniveau der Union und nicht des Aufnahmemitgliedstaates. Damit wäre gleichfalls ein 'Sozialhopping' ausgeschlossen" [34]. **Schreiber** notes that the Court finally declared its refusal to decide, in the light of fundamental rights to human dignity and a right to minimum income enshrined in the Charter[35], on the existence of a minimum rate for social benefits: "Damit ist auch davonauszugehen, dass es niemals ein 'Regelsatz-Urteil' des EuGH geben wird, bei dem allein aufgrund europarechtlicher Gleichbehandlungsverpflichtungen das materielle Leistungsniveau an der Menschenwürde […] oder an der Garantie des Existenzminimums […] überprüft wird"[36].

Nevertheless, according to **Verschueren**, "we should not conclude […] that Member States are completely free to determine the conditions for the grant of social benefits. States must comply with EU law [which] includes the right to equal treatment of Union citizens with the nationals of the host State. Therefore the generally worded position of the Court on the scope of the EU Charter is surprising. […] Even if one would admit that when the Member States lay down the conditions for the grant of 'special non-contributory cash benefits' and the level of such benefits they are not implementing EU law, the refusal of such a benefit on the basis of the 'right-to-reside-under-Directive-2004/38-test' is definitely part of the implementation of EU law and should therefore respect the provisions of the EU Charter"[37].

*Scope of the Dano judgment beyond the case*

Regarding the practical effect of the Dano ruling, some authors, such as **Emerson,** observe that the judgment of the Court helps clarify the division of jurisdictions between the Union and the Member States: "the EU Court of Justice is taking a position on the details of the frontier territory between EU and national competences, and coming down firmly in defence of the latter. […] [T]he case is one of the EU Court endorsing and clarifying national competences, rather than extending them" [38].

[33] Åkerberg Fransson ruling, C-617/10, EU:C:2013:105.
[34] FRENZ, W., "Deutschland darf Hartz IV verweigern", Deutsches Verwaltungsblatt, 2015, p. 36-38, 37-38.
[35] Articles 1 and 34, paragraph 3, of the Charter of Fundamental Rights.
[36] SCHREIBER, F., cit. *supra* note 18, p. 6.
[37] VERSCHUEREN, H., cit. *supra* note 4, p. 387-388.
[38] EMERSON, M., "The Dano case - Or time for the UK to digest realities about the balance of competences between the EU and national levels", Centre for European Policy Studies, 14 November 2014, available on: http://aei.pitt.edu/57379/1/ME_Dano_case.pdf, p. 1-2, 2.

Moreover, many commentators have tried to foresee the consequences that the Dano ruling could have in case of events other than those of the case. Thus, several authors have questioned the whether this judgment would be applicable vis-à-vis the economically inactive citizens who do not have sufficient resources, but who have a right of residence derived from a basis other than Directive 2004/38/EC, particularly national law. In this regard, **Claessens** notes that "EU citizens who had no lawful residence on the basis of EU law but whose residence was not disputed by the host Member State could still rely on the non-discrimination provision laid down in European Law […]. In Dano the CJEU puts an effective end to this practice since it has now ruled that people who have no legal right of residence in the light of [Directive 2004/38/EC] (so irrespective of their status under national law) have no right to equal treatment on the basis of article 24 of the [Directive]"[39]. More generally, **Verschueren** considers that this interpretation could be applied to citizens whose right of residence is based "on another EU instrument, such as Article 12 of Regulation 1612/68 [40]or even Article 45 TFEU as in Saint-Prix [41], or on national law which is more favourable than Directive 2004/38"; cependant, il conclut que "such a broad interpretation would run counter to other provisions of EU law and to the […] idea that any exception to the general principle of non-discrimination on grounds of nationality should be interpreted narrowly"[42]. In addition, **Cavallini** raises the question of the applicability of the Dano ruling to a "national who would have moved within Europe and, after returning to his home State, would have recourse to the social assistance system. [ ...] The judgment in question could lead one to wonder if, now, the State could not [...] require its 'Europeanised' national to provide evidence that he enjoys a right of residence within the meaning of Directive [2004/38/EC], and thus, that he has sufficient resources, and, if not, deny him access to social assistance. Such a solution would nevertheless imply a broad interpretation of Directive 20[0]4/38/EC which applies to all EU citizens who move to or reside in a Member State of which they are not a national' [...]; it is therefore hardly likely"[43].

Some authors address the question of the effects of the Dano judgment as regards removal measures, since they also fall under Directive 2004/38/EC. They question, in particular, whether the judgment implies that Articles 14 and 15 of the Directive, which provide for rules on expulsion measures, do not apply to citizens who do not enjoy a right of residence under said directive.

[39]CLAESSENS, S., "Dano, or how the CJEU limits rights granted to EU citizens", Maastricht University, 13 November 2014, available on: http://law.maastrichtuniversity.nl/newsandviews/dano-or-how-the-cjeu-limits-rights-granted-to-eu-citizens/.

[40]Regulation (EEC) No. 1612/68 on the free movement of workers within the Community, repealed by Regulation (EU) No. 492/2011 concerning the free movement of workers within the Union.

[41]Saint-Prix ruling, C-507/12, EU:C:2014:2007.

[42]VERSCHUEREN, H., cit. *supra* note 4, p. 378-379.

[43]CAVALLINI, J., "Citoyenneté européenne et accès aux aides sociales: CJUE, gr. ch., 11 Nov. 2014, aff. C-333/13, Elisabeta Dano, Florin Dano c/ Jobcenter Leipzig", La semaine juridique sociale, 2015, p. 43-45, 44.

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According **Peers,** a negative response is required; he puts forward several arguments, including "the wording of the judgment itself: the Court states that its ruling applies 'so far as concerns access to social benefits', as regards the 'equal treatment' rules. The Court is careful to refer to equal treatment and social benefits throughout its ruling, rather than exclusion from the scope of the Directive entirely", as well as "the wording of the Directive, which the Court relies on to justify its ruling. The right to equal treatment in Article 24(1) applies to 'all Union citizens residing on the basis of the Directive'. But no such qualification applies to Articles 14(3), 15(1) or 15(3)"[44]. In addition, several authors point out that under the terms of Article 14, paragraph 3 of Directive 2004/38/EC, the recourse to the social assistance system does not automatically entail an expulsion measure, such that the Dano judgment does not relieve the national authorities of their obligation to apply a proportionality test when adopting of an expulsion measure: "an expulsion measure is still subject to [the] proportionality test"[45].

Many commentators also question the scope of the judgment in respect of nationals of a Member State who travel to another Member State in search of employment, since these are citizens who are economically inactive but are applying for a social benefit that is specifically intended to enable job search[46]. Thus, **Nazik** and **Ulber** specify that the Dano judgment does not address the central issue in these cases, namely, what are the conditions under which such persons may obtain social benefits during the job search:"[d]ie Entscheidung in der Rechtssache Dano […] trifft aber (noch) nicht das Kernproblem, nämlich unter welchen Voraussetzungen Unionsbürger, die zum Zwecke der Arbeitssuche in einen anderen Mitgliedstaat einreisen, dort auch die Mittel zur Finanzierung ihres Lebensunterhalts während dieses Zeitraums beanspruchen können"[47]. In addition, **Ring** notes that the Dano judgement could force the authorities in charge of granting the social benefits sought by job seekers to prove, case by case, that the person concerned has not made efforts to look for a job: "[l]etztlich läuft die Entscheidung […] auf eine schwierige Einzelfallprüfung des Sozialhilfeträgers hinaus, in deren Rahmen positiv festgestellt werden muss, dass ein mittelloser Unionsbürger auch 'keine Anstrengungen zur Arbeitssuche' unternimmt"[48].

[44]PEERS, S., cit. *supra* note 10.
[45]VERSCHUEREN, H., cit. *supra* note 4, p. 384.
[46]See in particular JIMÉNEZ BLANCO, P., "Derecho de residencia en la Unión Europea y turismo social", La Ley Unión Europea, nº 22, 2015, p. 5-16, 8.

[47]NAZIK, G., et ULBER, D., "Die 'aufenthaltsrechtliche Lösung' des EuGH in der Rechtssache Dano", Neue Zeitschrift für Sozialrecht, 2015, p. 369-374, 370 ; see also GROTH, A., "Ausschluss mittelloser und wirtschaftlich inaktiver Unionsbürger von Grundsicherungsleistungen ('Dano')", jurisPR-SozR 2/2015 Anm. 1.
[48]RING, G., "Zulässiger Ausschluss nicht erwerbstätiger Unionsbürger im Aufnahmemitgliedstaat vom Bezug beitragsunabhängiger Geldleistungen", Neue Justiz, 2014, p. 517-519, 518.

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*Conclusion*

[KAUFMSV] [OROMACR] [GARCIAL]

The doctrine seems unanimous on the point that EU law, particularly the citizenship of the Union, does not admit the possibility of what has been described as 'social tourism', in the sense of migration of EU citizens exclusively for social assistance in another Member State[49]. In this context, most authors also note a unifying motivation of Member States in the approach of the Court. This is particularly the case of **Thym**, who observes that "the Court […] will have considered potential implications of judicial choices at a time when eurosceptical political parties are on rise across the continent […]. The shift towards doctrinal conservatism in Dano could be seen as an attempt to evade further criticism"[50]. In this context, **Stachyra** hopes that the judgment "will help to reduce the existing tensions between Member States in issues regarding social system matters and free movement of people. Whereas there may arise anxiety about the next steps - whether will they move away - and how far - from principles which are currently accepted in the EU"[51].

In any case, most authors highlight the legal scope and limited practice of the Dano ruling and await the Court's judgments in the pending Garcia Nieto e.a. case, C-299/14 and Alimanovic case, C-67/14 on the issue, more important in practice, of exclusion from social benefits of EU citizens who have a real link with the labour market of the Member State of residence[52]. Nevertheless **Frenz** has already concluded that the right to free movement of EU citizens does not imply the existence of a 'union with a social dimension': "Die Freizügigkeit für Unionsbürger begründet keine Sozialunion"[53].

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[49] See in particular WOLLENSCHLÄGER, F., cit. *supra* note 30, p. 1632, et BERTHET, P., cit. *supra* note 18, p. 655.

[50] THYM, D., cit. *supra* note 6, p. 254.

[51] STACHYRA, K.,"ECJ about 'benefit tourism'. Historical ruling?", Europens Blog, 24 November 2014, available on: *https://europensblog.wordpress.com/2014/11/24/ecj-about-benefit-tourism-historical-ruling/.*

[52] See in particular NAZIK, G., and ULBER, D., cit. *supra* note 47, p. 373.

[53] FRENZ, W., cit. *supra* note 34, p. 38.

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## Warning

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