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R E F L E T S

Legal developments of interest to the European Union

Preface

This edition of the bulletin *Reflets no. 3/2015* specifically includes two rulings of the ECtHR, clarifying the compliance of reception conditions of asylum seekers and migrants under the Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the ECHR (p. 7-9). It also includes a judgment of the Supreme Court of Croatia concerning the unfairness of clauses contained in loan agreements between banks and consumers (p. 23-24) and the ruling of the Spanish Supreme Court on this same subject, except that the latter refers to personal loans (p. 24-25). Then, the Belgian (p. 20-21) and Slovak (p. 47-48) constitutional courts each made a decision repealing their national law transposing directive 2006/24/EC, following the Digital Rights Ireland ruling (C-293/12 and C-594/12, EU:C:2014:238) of the Court of Justice. In addition, the bulletin also comprises a Turkish legislation allowing the authorities to block websites (p. 59-60). Finally, the Doctrinal Echoes (p. 60-69) pertain to the comments on the opinion 2/13 of the Court of Justice declaring the incompatibility of the agreement on accession of the EU to the ECHR with EU treaties and TEEC.

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

A. Case law

I. European and international jurisdictions

European Court of Human Rights

ECHR - Prohibition of inhuman or degrading treatment - Slapping inflicted by law enforcement officials on persons under their control - Violation of Article 3 of the ECHR

In a ruling of the Grand Chamber of 28 September 2015, the ECtHR held that the fact that police officers slapped persons under their control constituted degrading treatment implying a violation of Article 3 of the ECHR.

The applicants, two brothers whose family was known to the police, claimed to have been slapped by law enforcement officials while being questioned, which the latter denied.

In a judgment of 21 November 2013, a chamber of the ECtHR (fifth section) had concluded, unanimously, that there was no violation of Article 3 of the ECHR in this case. The chamber had noted that the slaps in question were isolated acts that were not intended to extract confessions from the applicants and that they had been inflicted on impulse in a tense situation. It had, therefore, affirmed that even if proven, the acts complained of by the applicants were not sufficiently serious to be considered as treatment contrary to Article 3 of the ECHR.

The Grand Chamber reiterated, firstly, that when a person who has faced the police claims to be the victim of a violation of Article 3 of the ECHR and produces medical evidence of physical abuse, he benefits from a presumption of abuse. It is thus up to the State to prove that his allegations are not proven.

The ECtHR further emphasised the importance of respect for human dignity. It then stated that any conduct of law enforcement officials that undermines human dignity constitutes a violation of Article 3 of the ECHR. This applies in particular to the use of physical force against a person, even though his behaviour does not make it strictly necessary regardless of the impact this has had on the person concerned. As such, the ECtHR noted, firstly, that a slap on the face was particularly significant and, secondly, that it may suffice that the victim feels humiliated for there to be degrading treatment within the meaning of Article 3 of the ECHR.

The ECtHR added that the exasperation of the police, because of the applicants' conduct, was irrelevant. In this regard, it reiterated that, in a democratic society, abuse never constitutes an adequate response to the challenges that authorities face. In addition, it took into account the vulnerable situation of persons placed in the hands of the police, especially that of minors.

As regards the procedural aspect, the ECtHR noted, firstly, that the investigating judge who investigated the case had taken no specific investigative measure and, secondly, that the duration of the investigation had been significant (over four years), even though a rapid response from the authorities is essential when it comes to investigation for allegations of abuse.

The ECtHR thus found that the applicants did not benefit from an effective investigation.

Therefore, the ECtHR concluded in this case that there was a violation of Article 3 in its substantive and procedural aspects.

In a partially dissenting opinion, judges, De Gaetano, Lemmens and Mahoney, disagreed as to the finding of the violation of Article 3 of the ECHR, in its substantive aspect. They mostly disapproved the "eminently dogmatic" position (§ 6) adopted by the ECtHR to the detriment of an analysis of the actual circumstances. According to them, while police violence is unacceptable, it is necessary to "avoid trivializing the findings of violations of Article 3" (§ 7), at the risk of imposing "an unrealistic standard by negating the requirement a minimum level of severity for abuse committed by law enforcement officials" (§ 7). In this case, the three judges held that, although the treatment in question infringed human dignity, it did not attain the level of severity required to be considered in the category of degrading treatment under Article 3 of the ECHR. Similarly, they felt that the ECtHR followed an excessively theoretical approach when it made the age of the first applicant (minor at the time) the essential element to deduce his vulnerability, without taking into account the particular circumstances of the case.

European Court of Human Rights, ruling dated 28.09.15, Bouyid / Belgium (request no. 23380/09),
www.echr.coe.int

IA/34401-A

[DUBOCPA] [NICOLLO]

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ECHR - Prohibition of inhuman or degrading treatment - Right to an effective remedy - Reception conditions for asylum seekers and migrants - Situation of saturation of the reception network - Extreme poverty conditions - Unlawful detention - Violation of Articles 3 and 13 of the ECHR

Two rulings of the ECtHR, dated 7 July and 1 September 2015, shed light on the reception conditions to be complied with for asylum seekers and migrants, under the ECHR.

The first case, V.M. e.a./Belgium, pertained to the reception conditions of a family of Serbian nationals, asylum seekers in Belgium, in a situation where the Member State concerned was not responsible for examining the asylum application.

The applicants had originally applied for asylum in France, which had been rejected. They later went to Belgium where they had filed a second application. Under the Dublin II Regulation, Belgium had addressed a request to return to France, which had accepted it. The Belgian authorities were not responsible for examining the asylum application and had thus issued the applicants a refusal of residence with orders to leave the country and to report to the French authorities. The applicants, who were no longer entitled to any material aid, had been excluded from the accommodation centre where they lived.

The ECtHR held that the conditions of extreme poverty in which the applicants lived for four weeks from the time of their expulsion from the accommodation centre to their return to Serbia, engaged the responsibility of Belgium.

It considered that the situation of saturation of the network of asylum seekers in Belgium at that time did not justify this failure to take into account the vulnerability of the applicants, and especially the presence of children, including an infant and a disabled child. Furthermore, the ECtHR noted that this situation could have been avoided or shortened if the applications for annulment and suspension of the refusals of residence had been processed faster. Moreover, the lack of suspensive appeal against the order to leave Belgian territory had forced the applicants to return to their home country without their fears of being exposed to a violation of Article 3 of the ECHR being examined. Thus, the ECtHR found violation of Article 3 of the ECHR (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) and 3 combined.

Article 2 of the ECHR (right to life) was also invoked, as the eldest daughter of the applicants, with motor and cerebral disability, had died after returning to Serbia. In this regard, however, the ECtHR found that it was not shown that the death was the result of the living conditions in Belgium.

The second case, Khlaifia e.a./Italy, pertained to the detention conditions in a reception center and on ships moored in a port in Italy, of three Tunisian nationals who were subsequently deported. These events took place in the context of the “Arab Spring” and the humanitarian crisis that Italy had faced in that period. Faced with an influx of migrants by sea, Italy had declared a state of humanitarian emergency.

The Italian government assured that the reception centre and the ships were relief and assistance locations. However, the ECtHR considered the placement of the applicants in these places as a deprivation of liberty. It noted that such detention had no legal basis, that its reasons were not communicated to the applicants and that they had been unable to challenge it. Thus, the ECtHR found a violation of Article 5, paragraph 1 (right to liberty and security), paragraph 2 (right to know the reasons for the deprivation of liberty in the shortest time) and paragraph 4 (right to have the legality of the deprivation of liberty verified) of the ECHR.

Moreover, while the ECtHR did not underestimate the difficulties encountered by Italy in this particular context, it nevertheless reiterated that Article 3 of the ECHR (prohibition of inhuman treatment or degrading treatment) could not be derogated from, for which it found a violation concerning the detention conditions in the reception centre. Although the applicants' stay there only lasted four days, the ECtHR held that it had infringed the dignity of the applicants.

Regarding the deportation of the applicants, the ECtHR held that it was a collective expulsion. Even if they had indeed been the subject of identification and of individual repatriation decrees, the latter did not refer to their personal situation. In addition, the applicants had not had an effective remedy that, in such a situation, was to be suspensive. The ECtHR thus found a violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) and Article 13 (right to an effective remedy) combined with Articles 3 and 4 of Protocol No. 4.

European Court of Human Rights, ruling dated 07.07.15, VM e.a./Belgium (request no. 60125/11),

IA/34093-A

European Court of Human Rights, ruling dated 01.09.15, Khlaifia e.a./Italy (request no. 16483/12),
www.echr.coe.int

IA/34094-A

[DUBOCPA]

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ECHR - Right to respect for private and family life - Specific legal framework to recognise and protect unions between same sex couples - Absence - Violation of Article 8 of the ECHR

In its Chamber judgment in the Oliari e.a./Italy case, the ECtHR ruled unanimously that the complete lack of a regulatory framework on civil union was contrary to Article 8 of the ECHR concerning the right to respect for private and family life.

Hearing a matter submitted by three Italian gay couples, who complained that the Italian law does not allow them to marry or to contract another form of civil union, the ECtHR held that not only does the protection currently provided under Italian law for gay couples not meet the basic requirements of a couple in a stable relationship, but it also lacks reliability. According to the ECtHR, a civil union or a registered partnership would be the most appropriate way for homosexual couples, such as the applicants, to have their relationship recognised by law. The ECtHR noted, in particular, that there is within the Member States of the Council of Europe, a tendency towards legal recognition of homosexual couples since 24 of the 47 Member States have adopted laws enabling such recognition, and that the Italian Constitutional Court repeatedly called to ensure such protection and recognition.

The ECtHR has held in previous cases that the union of a gay couple living together in a stable relationship under common law is covered by the concept of "family life" under Article 8. It also recognised that homosexual couples are in a situation comparable to that of heterosexual couples in terms of their need for legal recognition and protection of their relationship.

The ECtHR held that the need to apply to the courts repeatedly for issues arising in the context of a relationship, knowing that the Italian judicial system is overburdened, would amount to significantly hindering the efforts taken by the applicants to ensure respect for their private and family life.

It follows that there is a conflict between the reality of social life of the applicants, who essentially live their relationship openly in Italy, and the law, which does not grant them any official recognition. The ECtHR noted that fulfilment by the Italian State of the obligation to recognise and protect homosexual unions would not place any additional burden on it.

Therefore, the ECtHR found a violation of Article 8 of the ECHR by Italy.

As regards the complaint under Article 12 (right to marriage), considered independently and together with Article 14, the ECtHR ruled as in previous cases that Article 12 of the ECHR does not require States to fulfil the obligation to giving same-sex couples, such as the applicants, the option of marriage. Accordingly, it declared the complaint under those provisions as inadmissible.

The ECtHR ordered Italy to pay 5,000 euros to each applicant as compensation for moral damage.

European Court of Human Rights, ruling dated 21.07.15, Oliari e.a./Italy (request no. 18766/11 and 36030/11), www.echr.coe.int

IA/34403-A

[NICOLLO]

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ECHR - Protection of property - Forced displacement in the Nagorno-Karabakh conflict - Displaced persons having no access to their property - Violation of Articles 8 and 13 of the ECHR and Article 1 of Protocol 1

In two judgments of 16 June 2015, the ECtHR held that Armenia and Azerbaijan had violated and continued to violate Articles 8 and 13 of the ECHR and Article 1 of Protocol No. 1, in the context of the Nagorno-Karabakh conflict between the two countries.

In the first case, *Sargsyan / Azerbaijan*, the applicant, an Armenian national, was forced to flee his home and leave his plot of land located in the village of Golestan, an Azerbaijani district in the vicinity of the Nagorno-Karabakh Autonomous Oblast (hereinafter the NKAO). The abandonment of property was caused by the political upheaval in the region and the beginning of armed conflicts that had erupted after the self-proclamation of independence of "Nagorno-Karabakh" in 1991, comprising the NKAO. This independence has never been recognised by any State or international organisation.

An applicant who, following his forced displacement by Azerbaijani forces in 1992, lives with his family as a refugee in Armenia, complained before the Court about the continuing refusal of the Azerbaijani government, either to give him access to and control of his property or to compensate him for the loss of enjoyment of said property.

The Court examined the exhaustion of domestic remedies in the context of the conflict in the region in question. It observed that there were considerable barriers for persons from either of the countries concerned, who wished, in practice, to initiate and continue legal proceedings in the other country. These obstacles consist of, among others, closed borders and the absence of diplomatic relations between Armenia and Azerbaijan. In this context, it considered that Azerbaijan had not taken adequate measures to provide the applicant with a remedy capable of resolving the situation. Thus, the Court found a violation of Article 13 of the ECHR by this State.

With regard to the impossibility for the applicant to have access to his property, which represents a substantial economic interest to him, the Court ruled that the person's rights relating to the protection of his property had not been respected by Azerbaijan. Despite security considerations invoked by the Azerbaijani government, relating to the fact that the applicant's village was in an area of military activity considered dangerous for civilians, the Court noted that this State should implement measures to ensure the right balance between public interest and competing private interests. In particular, a mechanism for easily claiming property that is accessible to the persons affected by the Nagorno-Karabakh conflict should be made available to them along with measures for restoration of rights to their property or, alternatively, compensation for loss of enjoyment thereof.

Since the Azerbaijani authorities did not take such measures, the Court found a violation of the applicant's rights under Article 1 of Protocol no. 1.

Finally, by examining the complaint concerning the violation of Article 8 of the ECHR, the Court observed that the cultural and religious attachment of the applicant to his home and to the graves of his relatives had to be included in the concept of private and family life. In this regard, the impossibility for him to return to his village, constituted an unjustified interference with his right to privacy.

In the same factual context, the judgment in the *Chiragov e.a. / Armenia* case, concerns a series of petitions filed by Azerbaijani citizens complaining of the lack of access to their property in the district of Lachin, since they were forced to abandon the region in 1992 because of the worsening of the armed conflict and the Armenian occupation and take refuge in Baku, Azerbaijan. Since the events, in view of the continuous effective control of Armenia on said district, it was impossible for them to return and retake possession of their property. In that case, the ECtHR, following reasoning identical to that of the aforementioned *Sargsyan* case, reached a finding of a violation of the same provisions of the ECHR by Armenia.
It should be noted that the Nagorno-Karabakh conflict resulted in hundreds of thousands of displaced people in both the Armenian as well as Azerbaijani side, despite the ceasefire agreement of May 1994 still in force between the warring parties. The ECtHR is currently hearing more than a thousand individual requests submitted by people displaced by the conflict.

European Court of Human Rights, rulings dated 16.06.15, Sargsyan / Azerbaijan (Request no. 40167/06) and Chiragov e.a. / Armenia (request no. 13216/05), www.echr.coe.int

IA/34406-A
IA/34404-A

[GANI]

**** Briefs (ECHR)***

ECHR - Right to respect for private and family life - Life imprisonment - Extended prohibition of family visits - Proportionality - Absence - Violation of Article 8 of the ECHR

In its judgment of 30 June 2015, the Grand Chamber of the ECtHR held unanimously that there had been a violation by Russia of the right of a prisoner to respect for his private and family life in view of the various restrictions for family visits that have been imposed on him for the first ten years of his detention. The applicant, sentenced to life imprisonment, complained of severe restrictions on the frequency and duration of visits from his family.

The prisoner was allowed only one visit from two adult visitors every six months, for duration of four hours. Furthermore, the applicant was subjected, during these visits, to various surveillance measures.

The Court found, firstly, that the contested restrictions constituted a particularly harsh prison system, characterised by the extreme rarity of visits allowed. This interference in the applicant's private and family life, aggravated by its particularly long duration, while stipulated in the Russian penal execution code, not only led the prisoner to isolation without mental and physical stimulation but also made his reintegration into society more difficult.

Notwithstanding the objective, which is legitimate in principle, pursued by the national legislation in question, or even the "restoration of justice, amendment of the offender and prevention of new crimes", such restrictions have been considered disproportionate. In this regard, to the extent that they had made it impossible for the applicant to maintain close ties with his family, the ECtHR noted that the restrictions constituted a serious breach of the latter's right to respect for his family life guaranteed by the ECHR. To the extent that Russia, therefore, only had minimum discretionary power in this regard, the Court found a violation of Article 8 of the ECHR.

European Court of Human Rights, ruling dated 30.06.15, Khoroshenko / Russia (request no. 41418/04),

www.echr.coe.int

IA/34405-A

[GANI]

ECHR - Protection of property - Austerity measures - Portuguese law reducing the amount of pensions - Violation of Article 1 of Protocol No. 1 in the ECHR - Absence

In a decision dated 1 September 2015, the ECtHR unanimously found that a request for reduction in the amount allocated for retirement pensions in Portugal was inadmissible.

This reduction was part of the austerity measures, and more particularly the extraordinary solidarity contribution, adopted in Portugal for the period 2011 to 2014, in return for financial support from the European Union, Member States of the euro area and the International Monetary Fund.

The applicant, whose monthly retirement pension amount was reduced in 2013 and 2014, alleged that these measures violated his right to property under Article 1 of Protocol No. 1 of the ECHR.

The ECtHR first noted that there had been a violation of the right to respect for property of the applicant. However, taking into account the general interests at stake in Portugal in the context of the financial crisis, and the limited and temporary nature of the measures, it held that the pension reduction was a proportionate restriction with the legitimate objective of achieving medium-term economic recovery.

The ECtHR also noted that the Portuguese Constitutional Court had validated these measures stressing that there was no alternative to reduce the budget deficit and overcome the crisis. The ECtHR held that, given the discretionary power enjoyed by States to determine their socio-economic policy, it was not its responsibility to analyse whether other measures could have been considered.

European Court of Human Rights, decision of 01.09.15, Da Silva Carvalho Rio / Portugal (request no. 13341/14) *www.echr.coe.int*

IA/34091-A

[DUBOCPA]

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ECHR - Right to respect for private and family life - Protection of property - Prohibition on donating embryos from in vitro fertilisation for scientific research - No violation of Article 8 of the ECHR and Article 1 of Protocol No. 1 of the ECHR

In a Grand Chamber judgment of 27 August 2015, the ECtHR held that the prohibition on donating embryos derived from in vitro fertilisation (IVF) for scientific research and not intended for implantation for pregnancy was not contrary to Article 8 of the ECHR (right to respect for private life). The case concerned an Italian law that prohibited any experiment on human embryos.

The ECtHR held that Article 8 of the ECHR was applicable in this case because the embryos conceived by IVF contained the genetic heritage of the applicant and thus represented a constituent part of his identity. However, it held that the right invoked was not one of the core rights protected by Article 8 of the ECHR. Italy should therefore enjoy a broad discretionary power in the matter, especially since there is no European or international consensus on this. The ECtHR held that the prohibition in question was necessary in a democratic society.

The applicant also invoked the violation of Article 1 of Protocol No. 1 to the ECHR (protection of property) but the ECtHR held that it was not applicable, since human embryos cannot be reduced to property. Moreover, Article 2 of the ECHR (right to life) was not involved.

Finally, the ECtHR examined for the first time the question of whether the constitutional review introduced in Italy in 2007 was a domestic remedy to be exhausted before its referral. It considered that this was not the case.

European Court of Human Rights, ruling dated 27.08.15, Parillo / Italy (request no. 46470/11), *www.echr.coe.int*

IA/34092-A

[DUBOCPA]

II. National courts

1. Member States

Germany

Right of access to administrative information - Operational activities of an intelligence service - Legitimate benefit in maintaining confidentiality - Violation of Article 10 of the ECHR - Absence

By order of 20 July 2015, the Bundesverwaltungsgericht (Federal Administrative Court) refused to grant the representatives of the press the right of access to information on the operational activities of the German federal intelligence service *(Bundesnachrichtendienst,* BND) and on the cooperation of the latter with foreign intelligence services.

In this case, the editor of a newspaper had asked the BND to provide him with the names of German individuals and companies on the list of individuals and companies to be subject to wiretap measures. The list was prepared by the *National Security Agency* (NSA) based on certain criteria ("selectors"). The Bundesverwaltungsgericht dismissed the request directing the BND to disclose such information on the ground that the refusal was justified by the need for confidentiality of the list in question.

The Bundesverwaltungsgericht stated that the right to access information held by federal authorities, recognised by the German constitution to representatives of the press, is limited by the legitimate interest justifying the confidentiality of such information. In this regard, it stressed that some functional areas of executive activity may be exempted from the scope of application of this right, without a balancing of interests involved on a case to case basis being necessary. These areas include the operational activities of the BND, especially the acquisition and processing of information of considerable importance for the foreign and security policy. According to the Bundesverwaltungsgericht, the disclosure of information concerning such activities would be likely to make it more difficult, or even impossible, to subsequently obtain additional information and could jeopardise the execution of the BND's missions.

The Bundesverwaltungsgericht adopted a broad interpretation of the concept of "operational activities" of the BND, saying that it includes both the issue of the opportunity as well as the terms and extent of cooperation with foreign intelligence services. According to it, such cooperation requires the guarantee of mutual trust between the intelligence services concerned, in the sense that any information deemed confidential by one service and passed on to another service shall be treated so by the latter.

In addition, the Bundesverwaltungsgericht held that the applicant could not cite Article 10, paragraph 1 of the ECHR, under which a contracting State cannot prevent a person from receiving information. Without ruling on the exact scope of this right, the Bundesverwaltungsgericht considered that in any event, the refusal in this case was justified in that it was a measure that was necessary for national security and prevention of disclosure of confidential information, as it pursued a legitimate aim and was necessary in a democratic society, within the meaning of Article 10, paragraph 2, of the ECHR.

Bundesverwaltungsgericht, order of 20.07.15, 6 VR 1/15, www.bundesverwaltungsgericht.de

IA/34140-A

[KAUFMSV]

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Tax provisions - Common system for value added tax - Exemption for medical care and for the operations that are closely linked to it - Preservation of fertilised ova for possible future use for reproductive purposes - One of the partners wishing to procreate being affected by organic infertility - Exemption

In its judgment of 29 July 2015, the Bundesfinanzhof (Federal Finance Court, the "BFH") clarified the extent to which the exemption, granted under national provisions implementing Article 132, paragraph 1, sub c) of Directive 2006/112/EC (VAT directive) and intended for "medical care for individuals provided as part of the practice of the medical and paramedical professions", should benefit services conserving fertilized ova by means of freezing.

The case before the BFH pertained to the issue of exemption of services provided by a medical service specialising in reproductive medicine subjected to VAT by the Finance Department. The contentious activity consists of the preservation of ova collected and fertilized for future possible use for reproductive purposes.

The BFH, hearing an appeal on a "point of law", confirmed the impugned judgment of the Finanzgericht (Finance Court) of Lower Saxony, by holding that, when one of the partners wishing to bear children suffers from organic infertility, such services fall within the concept of "medical services for individuals" within the meaning of Article 4, paragraph 14, of the law on turnover tax. In order to ensure an interpretation consistent with the VAT Directive, the BFH cited, in the context of the interpretation of national law, the criteria developed by the Court in the context of this directive. Specifically, the BFH referred to the indications provided by the Court as regards the criterion relating to the therapeutic purpose of the services. In this regard, the BFH reiterated in particular that if the "medical care" and "medical services for individuals" must have a therapeutic purpose, it does not necessarily follow that this purpose must be understood in a narrow sense of the term. Thus, the medical services provided for the purpose of protecting, including maintaining or restoring the health of individuals are entitled to exemption from VAT.

Given these factors, the BFH held that the services in question must be entitled to exemption from VAT. The uncertainty about the future use of the ova for reproductive purposes is not opposed to this qualification, which also applies to sperm.

However, when such services are provided to individuals who are not affected by infertility, in order to enable long-term family planning ("social freezing"), these services cannot, according to the BFH, be considered "medical services" within the meaning of the VAT regulations. By citing the case law of the Court (CopyGene judgment, C-262/08, EU:C:2010:328, paragraph 47), the BFH held that, in such cases, there is not and will probably never be a principal provision under the concept of "medical care", for lack of an illness requiring such care.

Bundesfinanzhof, ruling dated 29.07.15, XI R 23/13, http://www.bundesfinanzhof.de/

IA/34134-A

[BBER]

**** Briefs (Germany)***

Procedural safeguards - Excessive duration of proceedings before a constitutional court - Compensation for moral damage

For the first time, the Board of Appeal of the Bundesverfassungsgericht (Federal Constitutional Court) noted the excessive nature of the time taken to process a case brought before this court.

In this case, the proceedings concerning a constitutional complaint had been closed only five and a half years after it was introduced, with the final allocation of the case within the jurisdiction being given only 39 months after the action was brought because of a jurisdictional dispute between two chambers and a subsequent change in the allocation plan of the cases. The Board of Appeal considered that these difficulties should have been resolved within a period not exceeding nine months in total, the additional duration, therefore, being described as excessive.

To assess the excessive nature of the duration of legal proceedings brought before the Bundesverfassungsgericht, the Board of Appeal referred to both the case law of the latter concerning the excessive duration of proceedings before the lower courts as well as to the relevant case law of the ECtHR concerning Article 6, paragraph 1, of the ECHR. It specifically referred to a series of cases concerning proceedings before the German courts, including the judgment of 25 February 2000, Gast and Popp / Germany, no. 29357/95, in which the ECtHR had held that, if the obligation of the contracting States to organise their judicial systems so as to ensure the handling of cases within a reasonable time cannot be interpreted in the same way for a constitutional court as for an ordinary court, a chronic overload cannot justify excessive duration of proceedings. In this regard, the Board of Appeal stressed in particular that, following a re-organisation of the allocation plan for cases, the exceptionally high workload of the reporting judge linked to politically sensitive cases cannot justify a lack of re-assignment of the case concerned for a period of 21 months.

As for the compensable damage, the Board of Appeal considered that if the applicant had not proved to have suffered material damage directly caused by the excessive duration of the proceedings in this case, he was nevertheless entitled to request for an amount of 3,000 euros in compensation for moral damage, the existence of which is presumed, under German laws providing for its compensation amounting to EUR 1,200 for each year of the proceedings considered excessive.

Bundesverfassungsgericht, order of 20.08.15, 1 BvR 2781/13 - Vz 11/14, *www.bundesverfassungsgericht.de*

IA/34138-A

[KAUFMSV]

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Right of free movement and residence within the territory of Member States - Right of permanent residence - Concept of 'legality of residence' - Conditions - No loss of right of residence for a period of five years - Compliance with the material conditions of the right of free movement

Hearing a case concerning the right of permanent residence granted to nationals of the European Union in the host Member State by Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of Member States, the Bundesverwaltungsgericht (Federal Administrative Court) interpreted the concept of "legality of residence" of such a national in Germany. In this case, the lower courts had granted a right of permanent residence to a Hungarian national, considering that the mere absence of acknowledgment by the competent authorities of the loss of the right of residence during the relevant period of five years, required for obtaining a permanent right, justified the legality of their stay.

The Bundesverwaltungsgericht repealed these decisions holding that the requirement of legality of residence implies not only the absence of acknowledgment of the loss of the right of residence for a period of five years, but also compliance, throughout this period, with the material conditions of the right of free movement of the person concerned, within the meaning of Article 7, paragraph 1 of Directive 2004/38/EC. It deduced that the acknowledgement of the loss of the right of residence is likely to occur after the expiry of the period of five years, provided that the person concerned has not fulfilled those conditions. Therefore, it referred the case to the appellate court to determine if that was the case, urging the latter to ascertain, firstly, whether the person had a health insurance and sufficient resources to avoid becoming a burden on the social security system and, secondly, whether that person could claim retention of the right of residence as a family member of a person authorised to stay in German territory.

Bundesverwaltungsgericht, ruling dated 16.07.15, 1 C 22/14, www.bundesverwaltungsgericht.de

IA/34139-A

[KAUFMSV]

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Social policy - Equal treatment as regards employment and work - Claim for compensation based on the alleged non-compliance with Directive 2000/78/EC on national provisions relating to the retirement age for police officers –

Limitation period of two months under the national law transposing the directive - Inapplicable

Hearing an action for damages against the State, based on the alleged non-compliance with Directive 2000/78/EC establishing a general framework for equal treatment as regards employment and work and national regulations on the retirement age of police officers, the Bundesgerichtshof (Federal Court of Justice, the "BGH") provided clarifications concerning the limitation of such a right to compensation.

The judgment of 23 July 2015 is delivered in the context of the forced retirement of a police officer under the law of North Rhine-Westphalia on civil servants. This law provides that the retirement age for police officers will be gradually increased to 62 years, a limit lower than that applicable to other groups of civil servants. The applicant, who had sought, unsuccessfully, an extension of his period of service, argued that such legislation constituted discrimination contrary to Directive 2000/78/EC.

While the two-month period for bringing an action aimed at the compensation for discrimination, provided for by the transposing law, had expired, the BGH held that this period does not apply in the context of an action for damages against the State for violation of EU law by the legislature. In this context, the application of a brief limitation period is not justified by the need to preserve social peace in the company and ensuring legal certainty for employers.

The BGH, however, rejected the claim as unfounded, holding that, having regard to the case law of the Court on Directive 2000/78/EC, the retirement plan in question complies with the requirements under this Directive.

Bundesgerichtshof, ruling dated 23/07/15, III ZR 4/15,
http://www.bundesgerichtshof.de/

IA/34135-A

[BBER]

Austria

Environment - Assessment of the impact of certain projects on the environment - Right of appeal of the public concerned - Environmental organisations - Status of a party to an administrative procedure - Exclusion

In its judgment of 28 May 2015, the Verwaltungsgerichtshof (Administrative Court, hereinafter the "VwGH"), hearing a matter submitted by an environmental organisation, ruled on the potential obligation under Directive 85/337/EEC concerning the assessment of the impact of certain public and private projects on the environment, to provide such an organisation the status of a party to an administrative procedure to determine whether a project requires environmental impact assessment (EIA).

Contrary to several previous decisions of the Bundesverwaltungsgericht (Federal Administrative Court), the VwGH held that no such obligation arises under said Directive. In this regard, the VwGH relied in particular on the distinction between the recourse available to the parties to administrative procedures and the right of recourse granted to environmental organisations approved against decisions involving negative findings vis-à-vis an EIA. While both types of recourse fulfil the same objective, i.e. to ensure effective control of decisions involving negative findings, the nature of the proceedings introduced as part of these appeals differs in procedural law, owing to the structure and economy of the relevant provisions of the Austrian law on EIA (Umweltverträglichkeitsgesetz, UVP-G). The specific appeal created in 2012 in the UVP-G is analysed particularly as a simple request for reconsideration and not as a procedural law related to the status of a party.

In this case, the environmental organisation concerned could not take advantage of the new specific appeal, since it did not exist at the time of the introduction of the case. In addition, the VwGH concluded that the appeal brought by this organisation should not be redefined for the purposes of reviewing the admissibility, as this was a specific remedy. Thus, the Austrian courts held that said appeal was inadmissible, for lack of standing.

As regards compliance with EU law, the VwGH referred to the case law of the Court citing Directive 85/337/EEC, particularly the Mellor judgment (C-75/08, EU:C:2009:279). In that judgment, the Court stated that third parties must be able to ensure that the competent authority has verified that an EIA was or was not necessary, and that this requirement may result in the possibility of recourse brought directly against the decisions involving negative findings. Moreover, the VwGH reiterated that, according to the Court, members of the "public concerned" fulfilling the criteria laid down by national law as regards "sufficient interest" or, where appropriate, "infringement of right" must be able to appeal against a decision not to carry out an EIA in the context of such proceedings (Gruber ruling, C-570/13, EU:C:2015:231, paragraph 50).

Given these elements, the VwGH considered that the case law does not necessarily require that the status of a party to the administrative procedure be given to environmental organisations. It would be sufficient, according to the VwGH, to provide for the possibility of an appeal for such organisations, without this remedy necessarily being described as an "appeal". The "VwGH" stated that the specific right of recourse, created in 2012, meets this requirement, even if the recourse does not imply recognition of party status of such organisations.

Verwaltungsgerichtshof, ruling dated 28.05.15, 2013/07/0105,
https://www.vwgh.gv.at/

IA/34137-A

[SCHULLU] [BBER]

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Judicial cooperation in civil matters - Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility - Regulation (EC) No. 2201/2003 - Article 15 - Transfer to a court better placed to hear the case - Remedies in the member State of the court to which the matter was first referred

In its order of 24 June 2015, the Oberster Gerichtshof (Supreme Court, hereinafter the "OGH") ruled on the remedies against a referral to a foreign court to hear a case, within the meaning of Article 15 of Regulation (EC) No. 2201/2003 concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (Brussels II Regulation).

The decision of the OGH essentially referred to a decision by which an Austrian district court of first instance, hearing an application for parental responsibility, had refused to exercise jurisdiction, pursuant to the referral of the case to a German court. To the extent that the child involved in the matter was of German nationality and lived with his mother in Germany, the District Court, as "court first seised", within the meaning of Article 15 of the Brussels II bis Regulation, had held that the court of the place of residence of the child was better placed to hear the father's application seeking the joint exercise of parental authority. Thus, the Austrian court, firstly, had informed the parties of its intention to refer the case to a German court and, secondly, had invited the latter to exercise jurisdiction. That court had acknowledged receipt of this request and had entered it in the register.

Meanwhile, the father had submitted a new application before the Austrian court, seeking sole custody of the child. In this context, the court had refused to exercise jurisdiction, because of the concurrent proceedings pending before the German court.

The OGH, to which a "Revisionsrekurs" (application for review) was referred at last instance against the declaration of lack of jurisdiction of the court first seised, found, firstly, that Article 15 of Brussels II bis regulation does not specify the formal requirements or the remedies that apply under the referral procedure.

These aspects fall, according to the OGH, under national law. In this regard, the OGH explained that, under Austrian law, the referral to a court better placed must be capable of being the subject of judicial remedy to ensure that the conditions of the transfer of jurisdiction are actually fulfilled. Therefore, such a decision must be adopted as an order, which must also acquire a res judicata status before the matter is referred to court better placed. However, the fact that the role of the court first seised is limited, as in this case, to informing the parties of the referral cannot be enough.

Moreover, the OGH specified that the decision by which a court exercises jurisdiction, in accordance with Article 15, paragraph 5, of the Brussels II bis regulation, constitutes the transfer of jurisdiction. While this decision must not be explicitly designated an "order", it must nevertheless have the characteristics of a court order, in order to express unequivocally the will of the court better placed to take on the case. Thus, the subsequent order by which the court first seised shall refuse to exercise jurisdiction may only have a declaratory effect.

Nevertheless, to the extent that such a declaratory decision confirms that the formal conditions for the transfer of jurisdiction were met, this decision shall, according to the OGH, be eligible for an appeal.

In this case, the OGH, therefore, declared admissible the application brought by the father against the decision by which the court first seised had refused to exercise jurisdiction. Moreover, the OGH held that, in the absence of an order for reference, the formal conditions for the transfer of jurisdiction were not fulfilled. Furthermore, the OGH held that the order by which the German court declared to have jurisdiction, under Article 15, paragraph 5, of the Brussels II bis regulation, was also ineffective; the court simply acknowledged receipt and assigned a case number. Consequently, the OGH repealed the contested decision.

Oberster Gerichtshof, Order of 24.06.15, 9 Ob 14/15x,
http://www.ogh.gv.at/de

IA/34136-A

[SCHULLU] [BBER]

Belgium

Retention of data generated or processed in connection with the provision of publicly available electronic communications services - Directive 2006/24/EC - National legislation transposing this directive - Unconstitutionality

By a judgment of 11 June 2015, the Constitutional Court repealed the law of 30 July 2013 requiring electronic communication service providers to retain "traffic" data derived from telephone conversations or e-mails, transposing Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of electronic communications services available to the public or of public communications networks and amending Directive 2002/58/EC. The Constitutional Court thus followed the Digital Rights Ireland ruling (C-293/12 and C-594/12, EU:C:2014:238) of the Court of Justice.

Two appeals were filed before the Constitutional Court, respectively by the Ordre des barreaux francophones et germanophone and by the Human Rights League, criticising the law for treating the users of telecommunications services or users of electronic communications services subject to professional secrecy, in particular lawyers, and other users of these services identically. In addition, according to the applicants, the law also wrongly treated litigants subject to investigation or prosecution measures and those not subject to such measures identically. Furthermore, one of the applicants claimed the violation of many general principles of law such as those of legality, legal certainty, proportionality and respect for private life.

The Constitutional Court held that the obligation imposed by the directive on electronic communications service providers to retain for a certain time data relating to the private life of a person and to his communications, constituted in itself an interference with the rights to respect for private life and communication, even more so in that it allowed the competent national authorities to access these data.

In addition, the directive required the retention of all traffic data for fixed telephony, mobile telephony, Internet access and email and Internet telephony, thus covering all individuals and all means of electronic communication, without making a distinction based on the objective of the fight against certain serious offences.

The Constitutional Court noted that the law of 30 July 2013 pursued exactly the same objectives. It is also applicable to persons for whom there is no evidence to suggest that their behaviour can have a link, even if indirect or remote, with the serious offences indicated. Similarly, it is applied without exception to persons whose communications are subject to professional secrecy.

Moreover, the law did not require that there be any relation between the data that was to be retained and any threat to public safety. It did not limit data retention to a time period or a defined geographic area, not did it make any distinction between the categories of data depending on their potential usefulness or based on the persons involved.

For all these reasons, and "for reasons similar to those that had led the Court of Justice to declare the directive as invalid", the Constitutional Court repealed the law of 30 July 2013 as a whole, since its various articles are inseparable from each other.

On this, also refer to the judgment of the Slovak Constitutional Court, p. 47 of this Bulletin.

Constitutional Court, ruling dated 11.06.15, No. 84/2015,
www.const-court.be

IA/34402-A

[NICOLLO]

Bulgaria

* ***Brief***

Freedom to provide services - Service providing a means of linking vehicle owners and customers wishing to move within the country by way of IT tools - National legislation stipulating the obligation to obtain authorisation for passenger transportation - Judicial decision ordering the cessation of such service

By a final order of 23 September 2015, the Supreme Administrative Court (Varchoven administrativen sad) prohibited the carpooling services of Dutch companies Uber BV and Rasier Operations BV in Bulgaria. In doing so, the Supreme Court validated the decision of the Commission for Protection of Competition (Komisia za na zashtita konkurentsiata, hereinafter the "KZK") prescribing the immediate cessation of such unfair commercial practices.

Said Dutch companies had appealed to the Supreme Administrative Court to prevent the provisional execution of the decision of the KZK. They argued that the decision of the KZK, on the immediate cessation of the activities of said carpooling companies, violated the principle of freedom to provide services and could lead to action against Bulgaria for failure to fulfil its obligations on the basis of Article 258 of the TFEU.

In this context, the Supreme Administrative Court noted that the provisional execution of the decisions of the KZK, which results from the law for protection of competition, cannot be subject to an assessment by the administrative authorities according to the criteria established in the Code of Administrative Procedure. In this regard, the Supreme Court stressed that said execution may be suspended under Article 166, section 4 of said code only in case of evidence that such a measure may, firstly, cause significant damage that is difficult to repair to the companies in question and, secondly, undermine public interest. Such evidence has not been provided in this case by the companies involved.

Moreover, the Supreme Administrative Court noted that the violations found by the KZK undermine public interest particularly with regard to fair commercial practices relating to the provision of passenger transportation services in accordance with the national laws that aim to ensure the protection of health and life of individuals.

It should be noted that the suspensive effect of the appeal against an administrative act constitutes a general principle in Bulgarian administrative law. According to the Bulgarian court, this principle does not constitute an infringement of EU law, all the more so in this case since the Bulgarian law provides for the possibility to appeal against the provisional execution of the administrative act concerned.

Order of the Supreme Administrative Court No. 9696 of 23.09.15 (Varchoven administrativen sad), http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/ad6e19f6241b6a5dc2257ec30041553e?OpenDocument&Highlight=0,%D1%8E%D0%B1%D0%B5%D1%80

IA/33667-A

[NTOD]

Cyprus

**** Brief***

Police and judicial co-operation in criminal matters - Framework Decision on the European arrest warrant and the surrender procedures between Member States - Possible prosecution for offences committed before the issuance of the European arrest warrant - Request for extension of the European arrest warrant - Decision taken in the absence of the applicant - Infringement of the right to be heard

The Supreme Court had the chance to apply the case law of the Court of Justice in the Jeremy F (C-168/13 PPU, EU:C:2013:358) and Pupino (C-105/03, EU:C:2005:386) rulings, concerning article 27, paragraph 4 of the framework decision 2002/584/JHA of 13 June 2002 of the Council on the European arrest warrant and the surrender procedures between Member States. This is part of a case concerning the possible prosecution for offences committed before the issuance of a European arrest warrant, following the Ypermachos judgment of 23 July 2015. The applicant, a Greek national, sought the repeal of a decision of the District Court of Larnaka granting consent for the extension of a European arrest warrant until July 2013, to surrender the applicant to the Greek authorities, so that he is also prosecuted for offences committed before the issuance of the European arrest warrant issued by said court, under the provisions of law no. 133(I)/2004 transposing the framework decision 2002/584/JHA.

The applicant had made a request to repeal the decision in question since it was taken following an ex parte request by the Ministry of Justice, without having communicated it to his legal representative. Citing the case law of the Court of Justice in the Jeremy F and Pupino rulings mentioned above, the Supreme Court found that the proceedings in question were judicial in nature and that, therefore, there was an obligation, during this procedure, to respect the fundamental rights of the applicant, particularly the right to be heard, as guaranteed by Article 47 of the Charter of fundamental rights (applicable in this case under Article 51, paragraph 1, of the Charter) and Article 6 of the ECHR and Article 30, paragraph 3, of the Constitution.

Accordingly, the Supreme Court found that the applicant's right to be heard had not been respected in the proceedings before the District Court of Larnaka and welcomed its request to repeal the decision.

Supreme Court, first instance, Certiorari warrant request, order of 23.07.15, No. 95/2015, http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_1/2015/1-201507-95-15PolAit.htm

IA/34097-A

[LOIZOMI]

Croatia

Unfair terms in contracts concluded between a professional and a consumer - Loan agreements between banks and consumers denominated in a foreign currency - Admissible - Clauses allowing banks to change the applicable interest rate by a unilateral decision - Inadmissibility

By a decision of 9 April 2015, the Supreme Court ruled on the unfairness of the clauses in loan agreements between banks and consumers.

Between 2003 and 2008, eight banks had concluded with consumers loan contracts that had variable interest rates and that were denominated in Swiss francs.

However, simultaneously with the appreciation of the Swiss franc, seven of the banks involved had also increased, by unilateral decision, the interest rate applicable to these contracts. These seven banks concerned had inserted into the loan agreements a clause under which they could increase the interest rate merely based on their decision. Such clauses, also widely used by banks in Croatia, did not specify any method of calculation of this variable interest rate by referring, for example, to EURIBOR, LIBOR, thereby allowing the banks concerned to freely increase the interest rate at their sole discretion. In this case, the only recourse against the bank that actually refers to the LIBOR was rejected.

Regarding the denomination of the loans in Swiss francs, the Supreme Court held that this clause was clear and understandable to the consumer within the meaning of Article 4, paragraph 2 of Directive 93/13/EEC on unfair terms in contracts concluded with consumers, and that, therefore, its possible unfairness was not subject to any control. However, as regards the clause relating to the variable interest rates, the Supreme Court found that this clause, although clear, was not understandable for the consumer, to the extent that its application depended only on the unilateral decision of the banks, without the parameters of the variability of this interest rate being specified in the contract. With this decision, the Supreme Court put an end to an unfair practice which had been widespread in Croatia for decades.

The particular importance of this decision is reflected in its aspect relative to the principle of interpretation of national law in the spirit of EU law, in that the Supreme Court upheld the obligation of an interpretation that complies with EU law in respect of legal relationships established before Croatia's accession to the European Union; this principle extends to the period of applicability of the Stabilisation and Association agreement (2005-2013).

Supreme Court, ruling dated 09.04.15, No. 249/14-2, http://sudskapraksa.vsrh.hr/supra/

IA/33732-A

[STANKDA]

Spain

Unfair terms in contracts concluded with consumers - Directive 93/13/EEC - Personal loans - Clauses for default interest - Unfair nature - Prohibition on the court to moderate the amount of interest

In a judgment of 22 April 2015, the Supreme Court ruled on the conditions for reporting the unfair nature of the clauses on default interest (or interest on late payment) included in the personal loan agreements. While the question of the unfair nature of default interest clauses included in mortgage loan contracts had already been the subject of decisions of the Spanish courts as well as decisions of the Court of Justice (see, for example, the Unicaja Banco and Caixabank rulings, in joined cases C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21), the question of the unfair nature of the same type clauses, when they are included in personal loan agreements, had, meanwhile, not yet been addressed by the Supreme Court.

While recognising and highlighting the differences between these two types of loan contracts, especially as regards the determination of the interest rates (whether compensatory or default), the Supreme Court applied the principles arising from the case law of the Court of Justice concerning unfair clauses in mortgage loan contracts to the main proceedings. It particularly addressed the prohibition for national courts to revise the content of unfair clauses and, thereby, to moderate an interest rate declared to be unfair, like the obligation to fully exclude the application of any unfair clause. Moreover, the Supreme Court also refused to replace the unfair clauses on default interest with the supplementary provisions of national law providing for the application of legal interest, since such a replacement would only be possible in case the invalidation of the unfair clause would require the court to repeal the contract as a whole, thereby exposing consumers to consequences such as penalties (see, to that effect, the Kasler and Káslerné Rabai ruling, C-26/13, EU:C:2014:282).

Finally, the Supreme Court established in this judgment the criteria for assessing the unfairness of clauses on default interest. Thus, it set as the "judicial doctrine" (which implies that all Spanish courts remain bound by this interpretation) that, as regards personal loan contracts concluded by consumers, the clauses establishing a default interest that goes beyond two percentage points in relation to the compensatory interest rate set by the parties shall be considered unfair.

Tribunal Supremo, Sala de lo Civil, judgment of 22.04.15, No. 265/2015 (Recurso nº 2351/2012),
www.poderjudicial.es

IA/34000-A

[OROMACR]

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Rights and freedoms of foreigners - Right to education - National legislation guaranteeing the right to education for foreigners over 18 years in Spain regardless of their residence - No incompatibility with the Constitution

The Constitutional Court dismissed an appeal against unconstitutionality brought by the parliament of the Autonomous Community of Navarre (hereinafter the "applicant"), concerning Article 9, paragraph 2, of the Organic Law 4/2000 on the rights and freedoms of foreigners in Spain.

Under Article 9, paragraph 2 of the Organic Law 4/2000, foreign citizens over 18 years of age living in Spain have the right to education. In addition, the second sentence of said provision states that foreign citizens over 18 years of age who are "residents" have the right to post-compulsory education under the same conditions as Spanish citizens.

In this case, the applicant argued that the second sentence of the contested provision did not guarantee the exercise of the right to education to foreign citizens over 18 years in an irregular situation, in that the word "residents" excludes foreign citizens who are non-residents from said right. The applicant claimed that the right to post-compulsory education, enshrined in Article 27 of the Spanish Constitution, applies to all citizens, regardless of their residence status.

In its judgment, the Constitutional Court determined the rules under which the contested provision must be interpreted, by preferring the interpretation that was most favourable to the right to education of non-resident foreign nationals in Spain. The Constitutional Court reiterated that, by its order in the Vikulov/Latvia case, the ECtHR held that the right to education of foreign citizens is independent of the right of residence in the territory of a country. In this regard, the Constitutional Court stressed that it is necessary to distinguish the fundamental right to education from the right to freedom of movement. It reiterated its case law according to which foreign citizens in an irregular situation can be expelled from the country, but cannot be denied the right to education when they are on Spanish territory.

In addition, the Constitutional Court reiterated the judgment of the ECtHR in the Tarantino e.a./Italy case (request no. 25851/09), according to which the right to education is absolute in the stages of primary education, while, as regards post-compulsory education, it can be subject to proportional limits. It also noted that, in the Ponomaryovi v/s Bulgaria judgment, the ECtHR ruled that the limitations on the exercise of the right to education of foreigners may be based on their irregular residence situation, by taking into account the circumstances that led to the absence of a residence permit of the person concerned in every individual case.

Finally, the Constitutional Court concluded that the intention of the Spanish legislature was not to limit the right to education for non-resident foreigners, since the contested provision has the opposite aim to ensure equal conditions of access to the right to education for foreigners who are in Spain.

Constitutional Court, Pleno, ruling dated 09.07.15, No. 155/2015 (Recurso de inconstitucionalidad, No. 2085/2010),www.tribunalconstitucional.es

IA/33999-A

[GARCIAL]

**** Brief (Spain)***

Judicial cooperation in criminal matters - Framework Decision on the European arrest warrant and the surrender procedures between Member States - Reasons for non-execution of the arrest warrant - Interpretation of the Extradition Act of the United Kingdom

By an order of 7 August 2015, the Audiencia Nacional ruled on the different interpretations of the UK Extradition Act adopted by the various authorities of that State. In this case, the Administrative Court of the United Kingdom had rejected the execution of a European arrest warrant issued by the Spanish Audiencia Nacional against a person in the United Kingdom, suspected of belonging to a terrorist group. The trial court in the United Kingdom, which had jurisdiction to execute the arrest warrant, had approved the execution on the basis of Article 12-A of the Extradition Act of the United Kingdom. As part of the appeal brought against the trial judgment, the Administrative Court of the United Kingdom had held that Article 12-A of the UK Extradition Act requires that, when evidence to try a person can be examined in the UK, the court that issued the arrest warrant must determine why the warrant should be executed.

In this case, the Administrative Court of the United Kingdom had held that the Audiencia Nacional had not sufficiently explained the reasons why it had issued said arrest warrant.

The Audiencia Nacional stressed that these differences in interpretation of the UK Extradition Act, supported by various authorities of that State, made it difficult for the authorities of other Member States, planning to issue a European arrest warrant to the United Kingdom, to perform their task. In addition, it held that the interpretation adopted by the Administrative Court of the United Kingdom of said provision was contrary to the principle of mutual trust on which the European arrest warrant system is based. The Audiencia Nacional found that the courts of the United Kingdom should not be granted the option of reviewing the decisions on the European arrest warrant of a court of another Member State.

Finally, the Audiencia Nacional suggested that a preliminary referral to the Court of Justice of the EU, on the compatibility of said provision with EU law, could be considered by the courts of the United Kingdom.

Audiencia Nacional, Order of 07.08.15, (Recurso no. 1/2014),
www.poderjudicial.es

IA/33998-A

[GARCIAL]

Estonia

**** Brief***

Border controls, asylum and immigration - Detention for the purpose of expulsion within the meaning of Directive 2008/115/EC - Continued detention during the appeal procedure

The administrative chamber of the Supreme Court ruled on 15 September 2015, on the interpretation of the national law transposing Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. This is, in particular, with regard to the consequences of a suspension of enforcement of the return order (i.e. expulsion) due to a judicial review procedure brought by the applicant against this decision.

In this case, the Court of Appeal had overturned a detention order by basing its reasoning on the fact that a detention order is justified only for the purpose of expulsion. As long as the expulsion is suspended, according to the appeal court, the detention is no longer justified.

The Supreme Court considered that the detention measure was lawful, since the obligation to return was not repealed. The suspension of the expulsion is an interim measure in order to avoid said expulsion during the appeal procedure. However, this measure should not make the obligation to return non-executable, even more so if there is a risk of absconding or if the person is a threat to public order.

In addition, the Supreme Court cited points 3 and 57 of the judgment of 30 November 2009 of the Court of Justice (Kadzoev (Huchbarov) judgment, C-357/09, EU:C:2009:741) by which it held that "the period during which the execution of the order of forced deportation has been suspended because of a judicial review introduced by the applicant against that order is taken into account for calculating the detention period [...]". The Supreme Court concluded that the Court of Justice had not excluded detention during the suspension of the expulsion.

Accordingly, the Supreme Court, by repealing the order of the Court of Appeal, held that the suspension of enforcement of the return order did not involve a means to reassess the detention order.

Supreme Court, administrative chamber, order of 15.09.15, case no. 3-3-1-32-15, published on the website of the Supreme Court,

www.riigikohus.ee

IA/33728-A

[HUSSAAV]

France

Approximation of laws - Telecommunications sector - Electronic communications networks and services - Modification to the authorisation relating to financing terms - Transition from paid DTT to free DTT - Directives 2002/20/EC and 2002/77/EC - National legislation authorising an approval procedure without resorting to an open procedure - Compatibility

By two decisions of 17 June 2015, the Assemblée du Contentieux of the Council of State ruled on the compatibility of a provision introduced by the law of 15 November 2013 on the independence of public broadcasting, which allows the Conseil supérieur de l'audiovisuel (CSA) to give its approval to a change in financing terms, without resorting to an open procedure, with directive 2002/20/EC on the authorization of electronic communications networks and services and Directive 2002/77/EC on competition in the markets for electronic communications networks and services.

In both cases, the companies Métropole Télévision (M6), Paris Première and La Chaîne Info (LCI) asked the Council of State to repeal the decisions of the CSA by which their request for transition from paid digital terrestrial television (DTT) to free DTT were rejected.

To dismiss the argument that the CSA was required to reject the request for approval due to the absence of recourse to an open procedure, the Council of State reiterated that the second section of Article 5, paragraph 2 of Directive 2002/20/EC allows, in any event, the Member States, on an exceptional basis, to grant, without resorting to an open procedure, the rights to use radio frequencies for broadcasting television services when it is necessary to achieve a public interest objective defined in line with Union law. In this regard, the Council of State noted that, by allowing the CSA to approve modifications regarding the use of remuneration by users, the legislature took account of the failure of the paid distribution business model defined by the regulatory authority at the launch of DTT, and the benefit that may be associated, in view of the fundamental need for pluralism and public interest, in pursuing the dissemination of a service that opted for this model. Thus, when it receives a request for approval, it is up to the CSA to assess, by taking into account the risk of extinction of the service operated by the applicant, whether, owing to the lack of an available frequency, the need for pluralism and public interest justifies not resorting to an open procedure.

In such circumstances, the Council of State held that the modification of the authorisation must be regarded as necessary for the objective of public interest such that this change is within the scope of Article 2, paragraph 5 of Directive 2002/20/EC.

To judge in the absence of a violation of Article 4 of Directive 2002/77/EC, the Council of State noted that the approval procedure established by law, which concerns all DTT services that wish to change their financing terms, enables all stakeholders in the industry to provide their comments and that the granting or refusal of approval is based on objective criteria such that the procedure established is objective, transparent, non-discriminatory and proportionate. Thus, the modification of the authorisation that may be decided at the end of this procedure cannot be seen as granting the operator concerned special or exclusive rights.

Council State, Assemblée du contentieux, decision of 17.06.15, No. 385474, 384826, www.legifrance.gouv.fr

IA/33669-A

[WAGNELO] [WUACHEN]

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Social policy - Equal treatment as regards employment and work - Directive 2000/78/EC - Prohibition of discrimination based on age - Regulatory provision for compulsory retirement at age 56 - Request for requalification of the compulsory retirement as dismissal without just and serious cause - Rejection of said request on appeal - Failure by a law firm to invoke the plea alleging non-compliance with Directive 2000/78/EC, which can be allowed in appeal - Engagement of professional liability of the firm - Loss of opportunity to obtain the annulment of the judgment – Evaluation

An original case as regards the engagement of professional liability of a law firm on the basis of EU law deserves mention.

The case involved a former employee of the company Électricité de France (hereinafter the "applicant"), who had to take compulsory retirement at the age of 56, under the regulations applicable to the personnel of this company. The applicant had challenged this forced retirement and had taken action to re-qualify the retirement as dismissal without just and serious cause. After the court of appeal rejected his request, he had instructed a law firm to bring an appeal on points of law. The appeal had been disallowed. It is in this context that the applicant had referred the matter to the council of the Bar Association of the Council of State and the Court of Cassation for the recognition of the professional liability of the firm. After the Bar Association Council rejected his application, the applicant submitted the matter to the first civil chamber of the Court of Cassation, asking it to establish the professional liability of the law firm and seeking damages. The applicant complained that the firm had raised only one plea in its submission in support of the appeal. This plea criticised the Court of Appeal for not having considered whether the post concerned was or was not among the sedentary services exempt from the rules that had been applied to the applicant.

The latter felt that the firm should have also included in support of the appeal a plea alleging the non-compliance with Directive 2000/78/EC establishing a general framework for equal treatment in respect of employment and work, which prohibits discrimination based on age, which the firm itself had cited before the court of appeal and which the Court of Cassation had applied from 11 May 2010.

By a judgment of 15 May 2015, the first civil chamber of the Court of Cassation allowed the request for compensation brought by the applicant.

The Court of Cassation, at first, found that the law firm was at fault in failing to invoke the plea alleging non-compliance with Directive 2000/78/EC. Reiterating that the lawyer is bound to a duty of competence, it held that he could not ignore, especially in view of the applicant's appeal submissions, the primacy of EU law over national provisions and the need to comply with the principle of equal treatment prohibiting discrimination based on age, a general principle of EU law affirmed by Directive 2000/78/EC that came into force on 2 December 2000 and that the court [of the Union] applied since 2005, stating that any national provision contrary to this principle and the directive (see, in particular, the following rulings: Mangold, C-144/04, EU:C:2005:709, Félix Palacios de la Villa, C-411/05, EU:C:2007:604, Age Concern England, C-388/07, EU:C: 2009:128, Petersen, C-341/08, EU:C:2010:4, or Kücükdeveci, C-555/07, EU:C:2010:21) should be left unapplied. According to the Court of Cassation, the application of the directive, imposed by the required uniform implementation of EU law, which the Court itself had ensured from 11 May 2010, did not constitute a reversal or even an unpredictable expression of the case law. Therefore, by failing to invoke a plea likely to be accepted as being in line with the foreseeable evolution of the case law and to lead not only to the admission of the appeal but also the annulment of the referred ruling, the law firm had engaged its professional liability.

Secondly, the Court of Cassation evaluated the loss of opportunity suffered by the applicant at 80%, to account for both the very high probability of censorship of the decision referred to the Court of Cassation and the low possibility of seeing the court of appeal, ruling on referral, hold, on the basis of Article 6, paragraph 1 of Directive 2000/78/EC, that the discrimination resulting from the compulsory retirement of a fully active employee of Électricité de France, over 55 years of age, was justified by legitimate social policy objectives, such as those related to the employment policy, labour market policy or professional training policy.

An overall compensation of 59,000 euros has thus been awarded to the applicant.

Court of Cassation, 1st Civil Chamber, ruling dated 15.05.15, appeal no. 14-50.058 *http://www.legifrance.gouv.fr*

IA/33661-A

[CZUBIAN]

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**** News (France)***

Principle of equal treatment - Law on internal security stipulating a nationality requirement for the exercise of private security operations - Different treatment justified by public interest related to the protection of public order and safety of individuals and property – Admissibility

By a decision of 9 April 2015, 2015-463 QPC, the Constitutional Council ruled that the law on internal security that requires an individual to be a French national, a national of a member State of the European Union or a State party to the EEA to carry out in an individual capacity private security operations or to direct, manage or be a member of a legal entity involved in such operations, is consistent with the principle of equality guaranteed in Article 6 of the Declaration of Rights of Man and of the Citizen.

According to the applicants, whose request for renewal of authorisation as the manager of a private security company was rejected, the difference in treatment between, on the one hand, individuals of French nationality, a member State of the EU or the EEA and, on the other hand, nationals of other States constituted a violation of the principle of equality before the law.

Considering that the disputed provisions establish a difference in treatment, the Constitutional Council ruled that the disputed provisions must be declared compliant with the Constitution, on the ground that by providing for the disputed nationality requirement, the legislature relied on a public interest objective related to the protection of public order and safety of individuals and property, and that the difference in treatment resulting from this is based on a criterion that is directly related to the objective of the law.

Constitutional Council, decision of 09.04.15, 2015/463 QPC,
http://www.conseil-constitutionnel.fr/ conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-463-qpc/decision-n-2015-463-qpc-du-09-avril-2015.143543.html

IA/33670-A

[PAPADTH] [WAGNELO]

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Free movement of capital - Restrictions - Income tax - Taxation of dividends - Withholding tax on payment of dividends of French companies to non-resident charities fulfilling the conditions for exemption from taxation for charities established in France – Inadmissibility

In a judgment of 22 May 2015, the Council of State ruled on the compatibility of the withholding tax applied to the payment of dividends from French companies to a charity established as a “charitable trust” under UK Law, with free movement of capital guaranteed by Article 56 EC.

The Council of State held that, since the dividends from companies established in France, received by charities based in the country are not taxable, the withholding tax applied to the dividends of French companies received by charities established in another member State constitutes a restriction on the free movement of capital.

Since the exemption at issue is applicable to charities owing to the non-profit nature of their business and not to a duty of public interest imposed only on the French charities, this restriction on the freedom of movement of capital cannot be justified by the existence of an objective difference in situation between the French charities and those in another member State. Thus, the Council of State ruled that since a compelling reason of public interest cannot be established, this restriction ignores the provisions of Article 56 of the EC Treaty as it deprives all charities based in another member State the right to prove that they could benefit, if they were to be established in France, from the tax exemption on companies owing to the receipt of dividends from French companies.

Council of State, 9th/10th SSR, decision of 22.05.15, appeal no. 369819, www.legifrance.gouv.fr

IA/33668-A

[WAGNELO] [WUACHEN]

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Fundamental rights - Professional freedom - Freedom of entrepreneurship - Equal treatment - Principle of legality of criminal offences and penalties - Chauffeur-driven transport vehicles - Pricing rules - Obligation to return to base - Criminalisation of activities linking customers to non-professional drivers

By two decisions of 22 May and 22 September 2015, the Constitutional Council, hearing four priority questions on constitutionality referred by the Court of Cassation and raised by the company Uber, examined several articles of the code of transport, taken from the Thévenoud law of 1 October 2014, relating to taxis and chauffeur-driven transport vehicles (CDV).

The first decision of 22 May 2015 concerns the obligations provided for CDVs. The Constitutional Council declared as unconstitutional the prohibition on CDVs to implement certain pricing methods for determining the price of services, especially pricing based on kilometres per hour used by taxis which is based on the duration and distance of the trip. However, it invalidated neither the prohibition on informing a customer of both the location and availability of a vehicle on the roads (electronic marauding) nor the obligation to return, after the completion of the service and in the absence of a new reservation, to the establishment of the operator or to a parking lot.

The second decision of 22 September 2015 pertains to Uber Pop, a transport service with non-professional drivers. The Constitutional Council declared as constitutional the criminal penalty that sanctions a two-year imprisonment and a fine of 300,000 euros for implementing a system that connects customers to people who provide chargeable transport services without being legally authorised to undertake such activities. However, the Constitutional Council specified that the impugned provisions have neither the purpose nor the effect of prohibiting the systems that connect persons wishing to carpool.

Constitutional Council, decision no. 2015-468/469/472 of 22.05.15 (Official Gazette No. 0119 of 24.05.15)

IA/33665-A

Constitutional Council, decision no. 2015-484 of 22.09.15 (Official Gazette No. 0222 of 25.09.15) *http://www.conseil-constitutionnel.fr/*

IA/33666-A

[DUBOCPA]

Hungary

Reference for a preliminary ruling - Reference to the Court of Justice - Union law invoked by a party to the proceedings - Preliminary ruling request of a party to the proceedings - Refusal without reasons - No obligation for stating reasons in national law - Unconstitutionality

By its decision of 14 July 2015, the Constitutional Court ruled on the obligation of a preliminary ruling before the Court of Justice. On this occasion, the Constitutional Court found that, by failing to adopt measures imposing an obligation for the Hungarian courts to state reasons for the refusal of a preliminary ruling, the Hungarian National Assembly violated the Constitution by omission. The Constitutional Court therefore asked the National Assembly to adopt, no later than 31 December 2015, a law requiring courts to state reasons for the refusal to introduce a reference for a preliminary ruling.

This decision is taken in the context of proceedings in which an applicant asked the Constitutional Court to repeal a final judgment on grounds of unconstitutionality. The applicant claimed that the disputed judgment violated his right of access to courts and his right to a fair trial. According to her, the main proceedings pertained to the Union law, which needed to be interpreted by the Court of Justice for the national court to decide. However, the Hungarian court of last instance hearing the case had not referred the matter to the Court of Justice for a preliminary ruling and had no reasons for its refusal.

In its decision, the Constitutional Court analysed, in light of the case law of the Court of Justice, the extent and scope of the obligation under Article 267 of the TFEU. It arrived at the conclusion that the contested judgment was not unconstitutional to the extent that there was no obligation of reference for a preliminary ruling in this case.

However, the Constitutional Court took the opportunity to review, on its own initiative, the constitutionality of the applicable Hungarian regulations regarding the obligation of reference for a preliminary ruling. The Hungarian Code of Civil Procedure contains no provision concerning the obligation to state reasons for refusal of a request made by a party to the proceedings for a referral to the Court of Justice for a preliminary ruling. Examining *ex officio* the constitutionality of this regulation, the Constitutional Court found that the lack of provision relating to the obligation to state reasons for such a refusal is contrary to the right of the parties to a fair trial guaranteed by the Constitution.

This decision is of extreme significance given that there is no remedy against the violation of the obligation of reference for a preliminary ruling in Hungary. According to the established case law of the Constitutional Court, the violation of the preliminary reference obligation does not involve the violation of the right of access to courts *(Reflets No. 2/2014*, p. 30). Then, it is also clear from the Hungarian case law that a case that is definitively decided on, and whose ruling is against the subsequent case law of the Court of Justice on the interpretation of a rule of the Union, shall not be the subject of an application for review *(Reflets No. 3/2014*, p. 27).

Finally, as the Hungarian Supreme Court has repeatedly held that a final judgment cannot be the subject of an action for damages, notwithstanding the fact that it is contrary to EU law *(Reflets no. 2/2014*, p. 29).

Alkotmánybiroság, decision of 14.07.15, no. 26/2015. (VII. 21.),
www.alkotmanybirosag.hu

IA/33997-A

[VARGAZS]

Ireland

**** Briefs***

Environment - Conservation of natural habitats as well as wild fauna and flora - Directive 92/43/EEC - Violation - Criminal penalties – Necessity

By a decision of 28 August 2015, the High Court ruled on the legitimate nature of the criminal proceedings brought against the applicants owing to their grass-cutting activities using machines in a special area of conservation, as defined by Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, by holding that the introduction of criminal sanctions could be considered reasonably necessary for the transposition of this Directive.

The applicants, employees of agricultural services, argued, firstly, that the implementation of the directive did not require that Member States put in place a criminal law for its full and effective transposition. Secondly, they argued that the implementation of said act by means of a ministerial regulation of the Minister for Arts, Heritage and the Gaeltacht, was ultra vires in view of Article 15, paragraph 2 of the Irish Constitution, under which the parliament reserves the power to make laws. Finally, the applicants argued that the national legislature had not taken into consideration the effectiveness, deterrent effect and proportionality of the sentence imposed.

The defendants argued that Ireland, under Article 4, paragraph 3 of the EU Treaty, was required to take all necessary measures to guarantee the application and effectiveness of Directive 92/43/EEC, which also included the obligation to ensure that violations of EU law were subject to effective, proportionate and dissuasive penalties. Failure to take such action would amount to a violation of EU law.

The High Court, after examining the case law, concluded in favour of the defendants. More specifically, it found, firstly, that the introduction of criminal sanctions, even if it was 20 years after the entry into force of the directive, could reasonably be regarded as necessary for the proper transposition of this directive. It specified that the fact that the directive does not provide for criminal sanctions is not decisive, since, according to their nature, the guidelines give the Member States the choice of methods of implementation. Secondly, the High Court held that the regulation at issue was not contrary to the Constitution.

High Court, ruling dated 28.08.15, O'Connor & anor / The Director of Public Prosecutions & ors, [2015] IEHC 558,
www.courts.ie

IA/34315-A

[CARRKEI]

Border controls, asylum and immigration - Asylum policy - Deportation order - Decision by an official of the Ministry of Justice - Act to be considered as an act of the Minister

By decision of 31 July 2015, the Supreme Court unanimously confirmed that the decisions adopted by officials of the Department of Justice on deportation orders must be regarded as adopted on behalf of the minister and that their decisions are legally and constitutionally ministerial acts.

The Supreme Court ruled in an appeal against a decision of the High Court dismissing an application for judicial review concerning the deportation orders relating to a family of Nigerian nationals. Said orders were signed by an official on behalf of the Minister.

In this regard, the Supreme Court was asked to review the *Carltona* principle established by the case law in 1943, in the Carltona Ltd. v. Commissioners of Public Works case [1943] 2 All ER 560, according to which no express act is necessary for the delegation of tasks to officials acting on behalf of the Minister except as provided by law or when the need for such delegation is implied.

The Supreme Court, in considering whether the wording of the Immigration Act means that said *Carltona* principle had to be ruled out in this case, decided that the text of this act did not provide for an exception in this case. Therefore, the appeal was dismissed on the ground that the official in question had acted on behalf of the Minister, and, therefore, his decision represented an act of the Minister legally and constitutionally.

Supreme Court, ruling dated 31.07.15, WT & ors/Minister for Justice and Equality & ors, [2015] IESC 73, www.courts.ie

IA/34316-A

[CARRKEI]

Italy

Competition - EU rules - Obligations of Member States - National rules requiring freight carriers to ensure that the rates are not lower than the minimum operating costs - Defining of rates by a body consisting mainly of representatives of the economic operators concerned - Judgment of the Court of Justice on the existence of a restriction of competition - Effect on the pending proceedings before the Constitutional Court

By two separate orders for reference, introduced on 12 February 2013 and 26 July 2013 respectively, the judges of the Lucca and Trento courts raised two questions on constitutionality pertaining to the Italian regulations on the transportation of goods by road (article 83 bis, paragraphs 1, 2, 6, 7 and 8 of Decree-law no. 112 of 25 June 2008), arguing that such regulations were not compliant with Articles 3 (principle of equality) and 41 (principle of free enterprise) of the Constitution.

Said regulations state that the remuneration payable by the beneficiary of a transportation service cannot be lower than the minimum operating costs determined by industry agreements concluded between associations of carriers and associations of beneficiaries of transportation services and set by the observatory on road transport activities.

When the proceedings before the Constitutional Court were pending, the administrative court of Rome, as part of the review of a series of actions for annulment brought against the acts by which the observatory had set the minimum costs within the meaning of Article 83bis of Decree-Law no. 112/2008, referred a question on interpretation to the Court of Justice. This was to ensure that the Court rules on the compatibility of said Article 83bis with the EU principles of protection of free competition, free movement of companies, freedom of establishment and freedom to provide services.

In the API and others judgment (joined cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147), the Court, firstly, reiterated that while Article 101 of the TFEU concerns only the conduct of companies and does not pertain to laws or regulations emanating from Member States, the States cannot take measures that may eliminate the effectiveness of competition rules applicable to the companies. In particular, the Court had held that Article 101 of the TFEU, read in conjunction with Article 4, paragraph 3, TEU, must be interpreted as meaning that it is opposed to national regulations under which the cost of services for freight transport by road on behalf of others cannot be less than the minimum operating costs, which are fixed by a body consisting mainly of representatives of the economic operators concerned. The Constitutional Court considered the main reasons for this decision and noted that the Italian legislature passed a law (law no. 190/2014) to repeal the system of fixing minimum operating costs for road transport.

Furthermore, the Constitutional Court stated that "the principles set out by the Court of Justice relating to a regulation subject to a question on constitutionality are part of the national legal system as *ius superveniens* and determine the limits within which this regulation remains effective and must be applied by the national courts".

The Constitutional Court thus ruled that it is up to the referring court to assess the impact of the Court's judgment on the pending cases before them and to determine whether the question of constitutionality remains relevant as a result of judgment of the Court of Justice.

Accordingly, the Constitutional Court referred the cases to the national courts by reasoned order to allow them to re-evaluate the relevance of the question of constitutionality in light of the *ius superveniens.*

Constitutional Court, order of 13.05.15, No. 80,
www.cortecostituzionale.it

IA/34095-A

[LTER]

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Primacy of Union law - Inapplicability as of right of conflicting national standards - National regulations providing for a reduction of the limitation periods for VAT fraud - Interpretation of Article 325 of the TFEU provided by the Court of Justice in the Taricco ruling - Non-application of said national rule and application of the ordinary rules of limitation including an extension of the limitation period also to crimes already committed - Constitutional principle of legality of penalties prohibiting the retroactive application of a stricter rule - Question of constitutionality raised before the Italian Constitutional Court

By an order of 18 September 2015, the Court of Appeal of Milan referred to the Constitutional Court a question of constitutionality concerning Article 2 of law no. 130/2008, on ratification by Italy of the Lisbon Treaty, under Article 25, paragraph 2, of the Constitution, enshrining the principle of legality of penalties.

According to the court of appeal, said provision of the ratification law would be inconsistent with this principle insofar as it requires the Italian courts to apply Article 325, paragraphs 1 and 2 TFEU, as interpreted by the Court of justice in the Taricco judgment (C-105/14, Rec, EU:C:2015:555), by leaving unapplied Article 160, last section, and Article 161, paragraph 2, of the Italian penal code, which, in derogation from the rules for determining the ordinary limitation period, provide for a shorter period for the limitation of multiple offenses and, in particular, of those relating to value added tax (VAT).

The court of appeal noted that the non-application of said articles would lead to the unfavourable treatment of the defendants, resulting in the extension of the limitation period, in violation of the fundamental principle of legality of penalties, enshrined in Article 25, paragraph 2, of the Constitution, and would therefore imply a retroactive application in *malam partem* of common provisions on limitation of criminal offences. In particular, such non-application would result in the possibility of punishing criminal offences that have become non-punishable by the effect of an acquired limitation.

According to the established case law of the Italian Constitutional Court, the provisions on limitation of offences are an integral part of the substantive criminal law and are always subject to the principle of legality of penalties enshrined in Article 25, paragraph 2, of the Constitution, even if the limitation period is still ongoing.

In this regard, it is clear from the aforementioned Taricco judgement, that according to the Court, the limitation of criminal offences actually pertains to an aspect of procedural criminal law rather than substantive criminal law and would thus not be subject to compliance with the principle of legality.

Therefore, the Court of Appeal, noting the existence of a conflict between, on the one hand, the obligation of non-application of Article 160, last section, and Article 161, paragraph 2 of the Italian Criminal Code, under Article 325 TFEU, as interpreted by the Court of justice in the aforementioned Taricco judgement, and, on the other hand, Article 25, paragraph 2, of the Constitution, decided to refer a question on constitutionality to the Constitutional Court to know whether, in this case, it is possible to oppose the limitations of sovereignty imposed by the law ratifying the Lisbon Treaty and, more specifically, the obligation resulting from the aforementioned Taricco judgement, pursuant to the compliance with the fundamental principle of legality of penalties enshrined in the constitutional system of the Italian Republic.

According to the Italian constitutional case law, the provisions of the Treaty and the directly applicable acts of the institutions, have the effect, in their relation with the national law of the Member States, of making any existing contrary national provision automatically unenforceable, except for the circumstances in which the application of EU law would conflict with the fundamental principles established in the Constitution (“teoria dei controlimiti”).

Court of Appeal of Milan, second criminal section order for reference before the Constitutional Court of 18.09.15, No. 80, in case no. 6421/14, criminal proceedings against De Bortoli e.a.

IA/34096-A

[LTER]

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Parental responsibility - Regulation (EC) No. 2201/2003 - 1980 Hague Convention - Wrongful removal of the child - Decisions on custody and visiting rights on the child's return - Determination of competent court

Parental responsibility - 1980 Hague Convention - Wrongful removal of the child - Obligation of not leaving the country - Violation-sanction

In a judgment of 12 May 2015, the Supreme Court applied the rules of the 1980 Hague Convention on the civil aspects of international child abduction and regulation (EU) No. 2201/2003 concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.

In this case, a Polish national, married to an Italian, had decided to leave Italy with her daughter to return to Poland because of the domestic violence and infidelity of her husband. The latter had referred the matter, firstly, to the Juvenile Court of Florence to obtain sole custody of the daughter and, secondly, the Polish department of justice, to obtain the return of his daughter to Italy. However, the Polish court, hearing the case referred by said department, noting the existence of a genuine risk to the physical and psychological health of the child in case of a return to Italy, had rejected the application for return. Following this decision, the court of Florence had decided, for the same reasons, to reject the application for custody. After the appeal against that decision before the Florence Court of Appeal was dismissed, the child's father had brought an appeal for annulment in order to claim, inter alia, the violation of jurisdictional rules contained in the Hague Convention and in Regulation (EU) No. 2201/2003.

The Court of Cassation, asked to rule on the division of jurisdiction between the courts of Member States in matters of international child abduction and custody rights for a minor child, confirmed that, under the principle of proximity, the court of the place of the new residence of the minor has jurisdiction to rule on the application for return by one of its parents, even in the event of a wrongful removal. However, the court of the Member State where the child was habitually resident immediately before the wrongful removal retains jurisdiction to decide on custody, at least until the child has acquired a habitual residence in another member State.

In this regard, the Court of Cassation observed that the Italian court could rule on the child’s custody even if the Polish court had rejected the application for return and that the jurisdictional rules laid down by EU law had therefore been met. Furthermore, the other remedies were considered manifestly unfounded.

While affirming the jurisdiction for the future of the Polish court even with regard to the custody of the child, the Supreme Court dismissed the action in its entirety.

By another decision of 3 August 2015, the Supreme Court ruled on the legal consequences arising from the decision of a parent having custody of a child to change his residence without requesting for a modification of the court decision concerning the custody and without consulting the spouse, who has the right to visit said child.

In the main proceedings, a mother having custody of her children decided to change her habitual residence without asking for any authorisation or the spouse, who has the right to visit the children, or the judicial authority that had adopted the decision on custody. As a result of such conduct, she was sentenced for circumventing the court decision, a sentence against which she had lodged an appeal. The applicant claimed that the conviction was not compliant with the principle of free movement of persons and thus with the Hague Convention, which provides for the possibility for the parent having custody of the child to freely decide the place of residence of that child. According to the applicant, a court decision concerning the custody of the children containing an obligation of residence cannot be considered legitimate and, therefore, its violation shall not lead to a conviction for circumventing the court decision.

In this regard, the Court of Cassation stated that the possibility of conviction for such circumvention cannot be considered as an unlawful restriction on the freedom of establishment of the parent having custody of the child. It should rather be considered an instrument of guarantee of the visitation right of the other parent and the benefit to minors to maintain contact with both parents.

Moreover, the Court of Cassation reiterated its case law under which the existence of a circumvention of the obligation to enforce a court decision on child custody can be found in all actions or omissions that aim to prevent the exercise of visitation rights.

Court of Cassation, ruling dated 12.05.15, n. 9632

IA/34099-A

Court of Cassation, ruling dated 03.08.15, n. 33983,
www.dejure.it

IA/34100-A

[RUFFOSA]

**** Brief (Italy)***

Air transport - Compensation for passengers in the event of cancellation of a flight - Compensation for moral damage - Exclusion

In a judgment of 10 June 2015, the Court of Cassation ruled on compensation for moral damage suffered by passengers whose flight was cancelled.

This decision originated in an action for damages brought by the guardian of a person who had to spend an entire night at an airport due to the cancellation of the flight because of a strike. As the person did not receive any assistance from the airline, her guardian asked for compensation of the costs incurred as well as for moral damages suffered.

According to the Court of Cassation, passengers in such a situation have the right to compensation for costs incurred, as provided by 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. Under this regulation, the obligation to provide assistance is incumbent upon airlines also in the case of delays or cancellations even if the carrier is not responsible. However, regarding the moral damage suffered as a result of a violation of obligations to provide assistance, the Court of Cassation, relying on the Sousa Rodríguez and Others judgment of the Court of Justice (C-83/10, EU:C:2011:652) stated that such compensation does not find a basis in EU law. It specified that this compensation was excluded, because it was not provided for by national law and this type of damage could not be considered a violation of the inviolable rights of the person.

Court of Cassation, ruling dated 10.06.15, No. 12088,
www.dejure.it

IA/34090-A

[GLA]

Latvia

**** Brief***

Judicial cooperation in civil matters - Jurisdiction and enforcement of judgments in civil and commercial matters - Regulation (EC) No 44/2001 - Grounds for refusal - Service of judicial and extrajudicial documents - Regulation (EC) No 1393/2007 - Notification of an act in a language that is not an official language of a member State - Admissibility

On 20 May 2015, the Supreme Court upheld the order of the Court of Appeal of Riga, which had recognised the enforcement of a judgment of an Estonian court according to which the defendant had to pay the applicant a sum of 17,490.19 euros.

The Latvian courts decided not to accept the grounds for refusal provided for in Article 34 of Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters, invoked by the defendant.

The case also concerned the application and interpretation of Article 8 of Regulation (EC) No 1393/2007, on the service and notification in the Member States of judicial and extrajudicial documents in civil or commercial matters, which includes provisions on the refusal to accept the document. In this regard, the defendant had argued that the notification of the document from the Estonian court in Russian could constitute a violation of his right to defence.

The Supreme Court, found that, firstly, under Article 8, paragraph 1, of Regulation (EC) No 1393/2007, the language of correspondence can be a language that the recipient understands, but is not necessarily always an official language of a member State, and that, therefore, the defendant could not refuse the document given that the applicant and defendant had communicated in Russian prior to the dispute (during the transaction).

Moreover, as the documents were notified to the defendant under the provisions of Regulation No. 1393/2007, the provisions of Latvian laws on the official language and the legal force of the documents were not applicable.

Latvijas Republikas Augstākās tiesas Civillietu departamenta, ruling dated 20.05.15, SKC-2344/2015, www.at.gov.lv

IA/33729-A

[BORKOMA]

Netherlands

Citizenship of the Union - Right to move and reside freely within the territory of Member States - Directive 2004/38/EC - Limitation of the right of entry and residence for reasons of public order or public security - Automatic and permanent restriction on the right of entry and residence on the grounds of the applicability of Article 1(F) a) of the Geneva Convention relating to the status of refugees - Admissibility

In its judgment of 16 June 2015 concerning the interpretation of 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, the Council of State ruled that the fact that a third country national falls within the scope of Article 1 (F) a) of the Geneva Convention relating to the status of refugees is sufficient to conclude, in the context of the application of Article 27, paragraph 1, of the aforementioned directive, that it constitutes a genuine, current and sufficiently serious threat to the fundamental interests of society. According to Article 1 (F), a) mentioned above, the convention does not apply to persons in respect of whom there are serious reasons for considering that they have committed "a crime against peace, a war crime or a crime against humanity, as defined in international instruments drawn up to make provisions for these crimes".

In this case, it turns out that in 2007, the national in question had been declared undesirable in the Netherlands under Article 1 (F), a), of the aforementioned agreement, as he had been a member of the former military intelligence service of the communist regime in Afghanistan (KhAD/WAD). In 2009, the person concerned had settled in Belgium with his wife, who was a Dutch national, where he obtained a residence permit as a family member of an EU citizen. In 2011, he had asked the Dutch authorities to withdraw their decision declaring him as undesirable, for the purpose of settling in the Netherlands, a request that had been refused under Article 27, paragraph 1 of Directive 2004/38/EC.

In the first instance, it was held that the aforementioned authorities had to take a new decision, given that, while it was clear that the applicant was a genuine and sufficiently serious threat to the fundamental interests of society, it was nevertheless not clear from their decision why the person should be also regarded as constituting a current threat.

Hearing the case, the Council of State noted, referring to the judgment of the Court in joined cases B and D (C-57/09 and C-101/09, EU:C:2010:661), that the applicability of Article 1 (F), a), of the aforementioned agreement automatically implies the exclusion of refugee status. In its judgment, the Court held that the exclusion from refugee status under Article 12, paragraph 2, b) or c) of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted is not conditional on the fact that the person concerned represents a current threat to the host member State.

According to the Council of State, the threat to a fundamental interest of society posed by the presence of a person in respect of whom there are serious reasons to believe that he has committed crimes referred to in Article 1(F) a) of the aforementioned convention is, by nature, current. The competent authorities were therefore not required to consider the possible future behaviour of the applicant. In this regard, the Council of State has referred to the Court's judgment in the I ruling (C-348/09, EU:C:2012:300), in which the Court held that Article 27, paragraph 2, second section of Directive 2004/38/EC makes any expulsion measure subject to the fact that the behaviour of the person concerned is a genuine and current threat to a fundamental interest of society or of the host member State, a finding that implies, in general, for the individual concerned, the existence of a tendency to continue this behaviour in the future.

Raad van State, ruling dated 16.06.15, www.rechtspraak.nl, ECLI:NL:RVS:2015:2008,

IA/34088-A

[SJN]

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Environment - Air pollution - Directive 2003/87/EC - Purpose - Reduction of greenhouse gas emissions - Emissions to be reduced in 2020 by 25% compared to 1990 - Current measures leading to a reduction of only 17% - Inadmissibility

In its judgment of 24 June 2015, the Hague court of first instance ordered the Dutch State, for the first time, to reduce greenhouse gas emissions. This decision originated in an action brought by the Urgenda Foundation against the State.

The Urgenda Foundation is a platform consisting of members from several domains, such as business, educational institutions, public authorities and non-governmental organisations dedicated to environmental projects.

The case concerned the question of whether the Dutch State had violated its duty to have regard for the welfare of officials by not sufficiently reducing greenhouse gas emissions, such that it is alleged to have committed an illegal act.

In this regard, the Hague court noted, firstly, that it is likely that in a few decades, climate change will occur with irreversible consequences. Accordingly, measures to mitigate such changes are necessary, which was also recognised by the State. In addition, according to the court, since the State has the power to control the level of greenhouse gas emissions in the Netherlands, it has a duty to reduce such greenhouse gas emissions.

Then, the court found the existence of several international and European obligations regarding environmental protection. In this context, the court refers in particular to Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and 406/2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020.

In this regard, although the State argued that taking into account the greenhouse gas emission limit under Directive 2003/87/EC, a stricter reduction of greenhouse gas emissions was not permitted, the court dismissed the complaint finding that the European policy in this matter is not opposed to a stricter reduction.

Given the serious consequences of climate change, the fact that the State has the obligation to reduce greenhouse gas emissions, the fact that the effective control of gas emission levels of greenhouse gases in the national territory is incumbent upon the State and given that the costs of measures for the reduction of greenhouse gas emissions are not disproportionate, the court found that the State had acted unlawfully by implementing a policy that does not provide for a reduction in greenhouse gas emissions by at least 25%, which is less than in 1990.

According to the court, the State's discretionary power in this area is not limited to the extent of the 25% reduction is at the lower limit of what industrialised countries must achieve compared to the 1990 levels.

Rechtbank Den Haag, ruling dated 24.06.15, www.rechtspraak.nl, ECLI:NL:RBDHA:2015:7145 (see ECLI:NL:RBDHA:2015:7196 for the English translation),

IA/34089-A

[GRIMBRA]

Poland

Freedom to provide services - Healthcare - Patients' rights in cross-border healthcare - Directive 2011/24/EU - Application for reimbursement of health care costs incurred in another Member State - Jurisdiction of administrative authorities

By an order of 28 May 2015, the Sąd Najwyższy (Supreme Court, hereinafter the "SN") ruled on the application, at national level, of Article 9 of Directive 2011/24/EU of the European Parliament and the Council on patients' rights in cross-border healthcare. Said directive has been implemented into the Polish legal system more than a year after the expiry of the deadline for transposition of 25 October 2013, under Article 21; the transposition law came into force on 15 November 2014. Article 9 of the Directive, entitled "Administrative procedures regarding cross-border healthcare" only contains general rules on procedures related to access to cross-border healthcare and reimbursement of healthcare costs incurred in another member State, without specifying the competent authorities in the matter. Said transposition law specifies that the claims for reimbursement of healthcare costs incurred in another Member State falls within the jurisdiction of administrative authorities.

In this case, the applicant had submitted a request for reimbursement of healthcare costs incurred in another Member State before the entry into force of the provisions transposing the directive. He submitted the request before the administrative authority that has jurisdiction for healthcare. The latter had nevertheless rejected the request because of the absence, at the time, of procedural rules directly assigning it the jurisdiction to handle such requests.

The applicant had referred the matter to the civil courts and the district civil court had granted the request. However, the regional court, hearing an appeal of the defendant, had meanwhile expressed doubts as to the jurisdiction of the civil courts to handle the case in question, taking into account, inter alia, provisions transposing the directive that entered into force in the meantime.

Hearing a request for interpretation submitted by the regional court, the SN ruled that the claims for reimbursement of the healthcare costs incurred in another Member State, as defined by Article 9 of Directive 2011/24/EU, submitted after the date of entry into force of the directive and before the date of its transposition into the Polish legal system, had to be treated by the administrative authorities and not by the civil courts. The SN observed that, in general, the provisions of the transposition law are also applicable in relation to requests for medical treatment received between 25 October 2013 and 15 November 2014, including the one submitted by the applicant. However, they could not be applicable in relation to the latter's request to the extent that it had been submitted before the entry into force of the transposition law. The fact remains that, according to the SN, the wording of Article 9, paragraph 4, of the Directive suggests that requests that pertain thereto must be handled by the administrative authorities, since their decisions are subject to judicial review. Thus, even during the period before the transposition of the directive, the administrative authorities and not the civil courts had jurisdiction - in the absence of the transposition - to handle requests such as that at issue in this case.

The SN however stressed that the case in question should still be decided by the civil court. Under Article 199[1] of the Code of Civil Procedure, such a court cannot reject an appeal on the grounds of the exclusive jurisdiction of an administrative authority to handle it in cases where the latter has already declared that it does not have jurisdiction.

Sąd Najwyższy, order of 28.05.15, III CZP 26/15, http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20czp%2026-15.pdf

IA/33996-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 - Applicability of the national regulation in case of State liability based on a violation of the national civil law - Inapplicability of regulations in case of State responsibility based on violation of EU law

In its judgment of 9 July 2015, the Tribunal Constitucional (Constitutional Court) had to rule on the constitutionality of Article 13, paragraph 2 of law no. 67/2007 adopting the system of extra-contractual civil liability of the State and other public entities.
This provision provides that the right to compensation for the damage caused by the violations by a national court, including a court whose decisions are not subject to judicial remedy under domestic law, is subject to a

condition based on the prior cancellation of the court decision that caused the damage.

The Constitutional Court, hearing a request for constitutional review on the compliance of said provision with the constitution, in essence held that, when the court decision that caused the damage relates to the interpretation or application of a standard of national civil law, such a condition derived from the prior repeal of the court decision by the competent court is consistent with the Constitution. However, the relevant provision is not applicable in case of State liability for damage caused to individuals by a national court because of a violation of EU law. Noting that said provision of the national law finds its justification in considerations relating to the principles of res judicata and legal certainty, the Constitutional Court held that these considerations were capable of justifying that, when the right to compensation is based on a violation of the national civil law, this right to compensation is subject to the condition that the review of the assessment that was made by a judicial body adjudicating at last instance is performed in compliance with the remedies available for this purpose. However, the right to compensation based on a violation of the EU law attributable to a decision of a national court adjudicating at last instance cannot be subject to such a condition. As is clear from the case law of the Court of Justice (Köbler judgement, C-224/01, EU:C:2003:513), the principles of primacy and effectiveness of EU law and the inherent requirements in the protection of rights of individuals making use of EU law requires Member States to not create obstacles for the possibility for individuals to obtain before a national court compensation for damage caused by the violation of their rights owing to a decision of a court adjudicating at last instance.

This decision follows the judgment of the Supremo Tribunal de Justiça (Supreme Court) of 24 February 2015 (see *Reflets 2/2015*) by which this court had to rule on the controversial issue of the interpretation of the disputed provision from the point of view of the national doctrine. Moreover, since this judgment was delivered two months before the judgment of the Court of Justice, in the Ferreira da Silva e Brito e.a. case (C-160/14, EU: C: 2015: 565), the position of the Constitutional Court is of particular interest. Reiterating that, in its judgment, the Court of Justice ruled that EU law and, in particular, the principles laid down by the Court with regard to State liability for damage caused to individuals by a violation of EU law committed by a court whose decisions are not likely to be subject to judicial remedy under national law must be interpreted as being opposed to national laws which require, as a prerequisite, the decision causing the damage and given by that court to be repealed, even though such a repeal is, in practice, excluded.

Tribunal Constitucional, ruling dated 9 July 2015, available on: http://www.tribunalconstitucional.pt/tc/acordaos/20150363.html

IA/33733-A

[MHC]

United Kingdom

European Union law - Principles - Proportionality - Scope - Approach to be taken

by national courts in addressing issues under EU law

On 24 June 2015, the Supreme Court delivered an important judgment on the application of the principle of proportionality in a context of EU law and in doing so redefined the parameters of judicial review.

The applicants, "barristers" specialising in criminal matters, challenged the decision of the Legal Services Board approving the changes proposed by the Bar Standards Board to its regulatory framework in order to introduce an evaluation system for lawyers. This system, the Quality Assurance Scheme for Advocates (QASA), aimed to guarantee the quality of criminal pleading in England and Wales through an assessment of the parties' representatives made by the courts before which the trial is conducted.

At the heart of the case was a provision of the law transposing directive 2006/123/EC on services in the internal market, pursuant to which the competent authority can make access to an activity and the exercise thereof subject to an authorisation scheme unless certain conditions are met. These include the justification of said scheme by overriding reasons of public interest and the absence of a less restrictive measure to achieve the objective. Holding that this provision, which corresponds to Article 9, paragraph 1 of Directive 2006/123/EC, required a review of proportionality, the applicants invoked the illegality of the contested decision, on the grounds that the establishment of the QASA did not meet the conditions provided for in the transposition law.

Unsuccessful at first instance and on appeal, the applicants referred the matter to the Supreme Court. The latter conducted a detailed and thorough analysis of the scope of principle of proportionality in EU law. While stressing the variable scope of the principle according to the contested act, the Supreme Court emphasised the importance for national courts to understand the different contexts of its application and to identify the relevant case law in each case.

In this regard, the Supreme Court identified three main areas where the principle of proportionality is involved and the various roles it plays in these areas.

Firstly, with respect to acts of the Union adopted in the exercise of discretionary power, only a manifestly inappropriate measure can affect its legality.
Then, as regards national measures derogating from fundamental freedoms on the basis of an option offered by EU law, the approach must be that of the Gebhard ruling (C-55/94 EU:C:1995:411) and the court must review the justification for the restriction and whether there are other measures that are as effective but less restrictive. A less restrictive approach applies in cases where the integrity of the internal market is not in question, such as, for example, when the domain in question falls within the jurisdiction of Member States.

Finally, as regards national measures implementing EU law, insofar as the Union act involves political, social or economic choices from a national authority, the court will exercise control limited to the question of whether the measure is clearly disproportionate.

However, in the event that the Member State makes use of derogation or a right in a directive to restrict a fundamental freedom, the national measure will be subject to the same review as

that exercised for other types of national measures including restrictions on fundamental freedoms.

In light of these considerations, the Supreme Court disapproved the approach advocated by the Court of Appeal in the Sinclair Collis case *(Reflets No. 2/2011*, p. 28-29), under which the judicial review of a national measure restricting fundamental freedoms was limited to the review of its manifestly disproportionate nature. In this regard, instead of addressing the issue of proportionality in terms of an analysis limited to looking for the existence of a manifest error or a manifestly inappropriate review of the contested act, the competent national court must go further and draw their own conclusions, like the Court of justice in infringement proceedings.

In this case, the Supreme Court concluded that the Legal Services Board had not violated the principle of proportionality, insofar as the decision to set up a general system based on a precautionary approach, such as the QASA, was within the discretionary power of the competent authority to provide a level of protection to persons involved in criminal proceedings.

Supreme Court ruling dated f 24.06.15, R (on the application of Lumsdon and others) / Legal Services Board [2015] UKSC 41, www.bailii.org

IA/34314-A

[PE]

Slovakia

Approximation of laws - Retention of data generated or processed in connection with the provision of electronic communications services - Directive 2006/24/EC - Requirement for suppliers to retain certain data for possible transmission to authorities - Non-compliance of certain provisions of the Directive with fundamental rights

By judgment of 29 April 2015, the Ústavný súd Slovenskej republiky (Constitutional Court, hereinafter the "Ústavný súd") ruled as non-compliant with rights to privacy, respect for family life, secrecy of correspondence and communication and protection of personal data, the national provisions establishing the obligation for service providers of electronic communications services or a public communications network to retain data generated or processed by them for a specific period and those governing the provision of data to the competent bodies to adjudicate in criminal cases and to the authorities in the field of State security.

These include in particular certain provisions of the Criminal Procedure Code, the law on the police forces and the law on electronic communication. The latter transposed into national law directive 2006/24/EC on the retention of data generated or processed in connection with the provision of electronic communications services available to the public or of public communications networks.

The decision comes in the wake of the judgment of the Court of Justice in the Digital Rights

Ireland case (C-293/12 and C-594/12, EU:C:2014:238), declaring Directive 2006/24/EC as invalid.

The Ústavný súd concluded that since the relevant provisions of the law on electronic communications are not necessary and proportionate to the aim pursued, they constitute a breach of the right to privacy. This regulation did not provide all the necessary guarantees to ensure the effective protection of data retained against misuse or against unauthorised or unlawful access.

As regards the relevant provisions of criminal law, the Ústavný súd considered as decisive that, firstly, they did not condition the demand to provide communication traffic data on the requirement of necessity, secondly, they did not provide effective means of control for the protection of rights of the persons concerned, and thirdly, they attached no importance to the nature or seriousness of the offence in a specific case. Since these criteria are, according to the Ústavný súd, essential when balancing public interest in the prevention and prosecution of criminal offences with the right to digital self-determination, said provisions of the criminal law were, therefore, contrary to the principle of proportionality.

As a result of this judgment, the provisions in question shall cease to have effect and the body that has applied them is required to remedy the situation within six months from the date of the judgment. Otherwise, the provisions will become invalid ex lege at the end of the period.

Ústavný súd, ruling dated 29.04.15, PL. ÚS 10/2014, http://portal.concourt.sk/pages/viewpage.action?pageId=1277961

IA/33933-A-2

[VMAG]

**** Brief (Slovakia)***

Border controls, asylum and immigration - Asylum procedure - Distribution of the burden of proof

In a judgment of 13 January 2015, the Najvyšší súd Slovenskej republiky (Supreme Court, hereinafter the "Najvyšší súd") specified the principles governing the distribution of the burden of proof during the asylum procedure. In this regard, it admitted that, as part of this procedure, the principle of material truth has its own specificities as regards the assessment of the credibility of the allegations of an asylum seeker. The latter is not required, according to the Najvyšší súd, to demonstrate acts of persecution using any means other than his authentic statement. However, it is for the competent bodies to collect all the evidence to support or refute this statement with, at least, a degree of probability not raising fundamental doubts. In this context, the competent body is responsible for duly noting the realities of the country of origin. Clearly, the burden of proof should not weigh on the asylum seeker. In the absence of other elements, the applicant's testimony is the only evidence and, therefore, the assessment of its credibility will be a determining factor when examining the asylum application. In this regard, the Najvyšší súd has reaffirmed the principle of “benefit of the doubt”.

Najvyšší súd, ruling dated 13.01.15, 1Sža/48/2014, http://www.supcourt.gov.sk/rozhodnutia/

IA/33730-A

[VMAG]

Slovenia

Free movement of workers - Magistrates - National legislation providing for termination of service of a magistrate - Magistrate having concluded a temporary contract (lawyer-linguist) with the Court of Justice of the European Union - Violation of the principles of equal treatment and proportionality - Absence

In a judgment delivered on 29 May 2015, the Supreme Court ruled on the conditions under which the performance of duties of a magistrate may be terminated if he provides his services as temporary staff in the Court of justice. This decision is part of an appeal brought against the judgment delivered by the Administrative Court which declared the action for annulment brought against a decision of the High Council of Judges and Prosecutors concerning the applicant, as unfounded.

In this case, the applicant claimed the violation of the principles of proportionality and equal treatment under Article 45 of the TFEU for the annulment of said decision of the High Council of Judges and Prosecutors. Since the applicant, in his capacity as a national magistrate, concluded a temporary contract (lawyer-linguist) with the Court of Justice of the European Union, the performance of his judicial functions had been terminated on the basis of Article 74, sixth section, of the law on the exercise of judicial functions. According to this provision concerning the incompatibility of the judicial function with other functions, a magistrate shall not commit to any other working relationship.

The Supreme Court held, firstly, that the applicant was not entitled to invoke the principle of proportionality within the meaning of Article 45 of the TFEU. It stressed that, under the principle of conferral of powers, laid down in Article 5 of the TFEU, the European Union only exercises the powers that have been conferred on it by its Member States. However, the powers relating to the appointment and termination of office of a magistrate were never vested with the European Union. The Supreme Court also noted that, on the one hand, the provisions of Article 45 of the TFEU do not apply to "employment in the public administration" (Article 45, paragraph 4, TFEU) and, on the other hand, this derogation applies, in particular with regard to the Reyners ruling (judgment of 21 June 1974, 2/74), to the exercise of judicial functions. In this case, it stressed that it was essential to consider that the concept of "employment in the public administration" under Article 45 of the TFEU also pertains to the termination of office of a magistrate under national regulations.

Moreover, the Supreme Court held that the applicant was not entitled to invoke the principle of equal treatment within the meaning of Article 45 of the TFEU. In this regard, it held that the national regulations regarding the termination of office of a magistrate applies to both magistrates who have committed, during the course of their work, to a working relationship on national territory as well as in another member State, such that it makes no unjustified discrimination in this regard.

Finally, the Supreme Court rejected, on the basis of the acte clair doctrine, the proposal of the applicant to ask the Court of Justice preliminary questions on the interpretation of Article 45 of the TFEU.

According to the Supreme Court, the interpretation of this provision leaves no reasonable doubt, neither for the courts of the

Member States or for the Court of Justice. It is clear from the various language versions of paragraph 4 of Article 45 of the TFEU that the freedom of movement of workers does not apply to the exercise of the function of a national magistrate. Moreover, the concept of public administration has already been interpreted by the Court of Justice and it appears that the exercise of judicial functions also falls within the scope of said concept. Therefore, the Supreme Court concluded that it was not necessary to ask the Court of Justice preliminary questions on the interpretation of the provision in question.

Therefore, according to the Supreme Court, Article 45 of the TFEU cannot invalidate the decision of the Administrative Court upholding, under national regulations, the decision of the High Council of Judges and Prosecutors on the termination of office of a national magistrate who signed a temporary contract (lawyer-linguist) with the Court of justice of the European Union.

Vrhovno sodišče Republike Slovenije, ruling dated 29.05.15, Sodba X-Ips-217/2013, www.sodnapraksa.si

IA/33731-A

[SAS]

2. Other countries

Russia

International rights - ECHR - Constitutional Court of the Russian Federation - Relations between the national and the international legal systems - Potential conflicts between the ECHR and the Constitution - Enforcement of judgments of the ECtHR in the national legal system - Compatibility with the Constitution of the provisions of national laws relating to the conditions of such enforcement

The judgment of the Constitutional Court of the Russian Federation dated 14 July 2015 concerning the compatibility with the Constitution of certain provisions of Russian laws on the application of rules of international treaties, particularly the ECHR, in the Russian legal system. These provisions state, in particular, the obligation for national courts to apply the rules of international treaties in the event of conflict with a national law and the possibility of reopening of proceedings before a national court in the event that the ECtHR would find a violation of the provisions of the ECHR.

The applicants, members of the parliament of the Russian Federation, considered such provisions to be contrary to the Constitution, namely paragraphs 1, 2 and 4 of Article 15 and Article 79 of this text, the last stating that the Russian Federation may be party to international organisations and delegate authority to the extent that this delegation does not contradict the basic principles of the constitutional rule. According to the applicants, the provisions of the above Russian law provided for the unconditional enforcement of judgments of the ECtHR by the national bodies, even if such enforcement is inconsistent with the Constitution.

The Russian Constitutional Court, by ruling that the provisions of national laws are compatible with the Constitution, referred to the judgments of the supreme courts of several Member States of the Union, namely, Germany, Italy, Austria and the United Kingdom, and concluded that it

was possible to rule out the enforcement of a judgment of the ECtHR in exceptional cases, particularly where such enforcement is contrary to constitutional values. If the national bodies see such potential incompatibility, they are required to apply to the Constitutional Court, which has jurisdiction to interpret the Constitution. Although the Constitutional Court stands ready to find a compromise to ensure the effectiveness of the system established by the ECHR, limits to this compromise, however, are determined by the Constitution.

Constitutional Court of the Russian Federation, ruling dated 14.07.15, No. 21-П / 2015, http://doc.ksrf.ru/decision/KSRFDecision201896.pdf

IA/34098-A

[BORKOMA]

Turkey

International law - Constitutional Court of Turkey - Reform of the High Council of Judges and Prosecutors - Violation of the principle of separation of powers - Unconstitutionality - Partial repeal

By its judgment of 10 April 2014, the Turkish Constitutional Court repealed a part of the judicial reform initiated by the Prime Minister at the time, Recep Tayyip Erdoğan, aiming to strengthen its control over the judiciary.

Adopted on 26 February 2014, law no. 6524 granted new powers to the Minister of Justice over the High Council of Judges and Prosecutors (Hakimler ve Savcılar Yüksek Kurulu) (HSYK), an institution that monitors the career development of magistrates. The HSYK, which represents the judiciary as a whole, is responsible for access to the profession as well as the appointment, promotion and discipline of judges and prosecutors. Law no. 6524 revised, in particular, the organisation and jurisdiction of the HSYK, by transferring some of its key powers to the Minister of Justice, including the powers to appoint judges, select the administrative staff of the Supreme Court, decide on the initiation of disciplinary proceedings against judges and prosecutors, set the agenda for meetings of the HSYK and determine the schedule of the Academy which is responsible for training all legal professionals.

The matter was referred to the Constitutional Court by the opposition party, the Republican People's Party, which argued that certain provisions of law no. 6524 were incompatible with the Turkish Constitution, in particular the principle of separation of powers. In its judgment, the Constitutional Court repealed nineteen provisions of the law, including the powers of the Minister of Justice to divide the members of the HSYK into three chambers, institute disciplinary proceedings and appoint members of the governing board of the HSYK and judges. The Constitutional Court based its argument on Article 159 of the Constitution on the composition of the HSYK, which allows the Minister of Justice to manage certain aspects of the HSYK, such as the appointment of judges, public prosecutors, judicial inspectors and internal auditors to temporary or permanent positions in the institutions of the Ministry of Justice.

The Turkish high court held, in that regard, that the powers granted to the legislator in Article 159 of the Constitution should be interpreted in the light of the wording of the first paragraph,

under which the HSYK is required operate in accordance with the principles of independence of courts and with the guarantees of the tenure of the judges. However, even if the HSYK has an administrative status, there is no hierarchical relationship between it and the central public administration. It must thus work in accordance with said principles of independence and said guarantees of tenure, which is not a privilege but a natural consequence of Article 159 itself. A considerable number of changes made by law no. 6524 were therefore repealed on the grounds that they violated the principle of separation of powers.

Turkish Constitutional Court, ruling dated 10.04.14, 2014/81,
http://www.resmigazete.gov.tr/eskiler/2014/05/20140514-21.pdf

IA/34317-A

[HURSITU] [PE]

B. National legislations

Member States

Cyprus

Law on the establishment and operation of an administrative court

Following the eighth amendment of the Cypriot Constitution, the Parliament adopted, on 21 July 2015, law no. 131(I)/2015 on the establishment and operation of an Administrative Court. This is a key development in the Cypriot administrative law, as before, under the Constitution (as amended following the events that occurred between 1963 and 1974), it was the Supreme Court that exercised, among others, the jurisdiction of an administrative court of first instance. The creation of the new administrative court will thus relieve the Supreme Court from its work overload and contribute to more effective access to justice.

Under the provisions of the new law, the administrative court is established in Nicosia with the exclusive jurisdiction of ruling on all administrative proceedings of first instance brought under Article 146 of the Constitution. The new law makes no changes as regards the substantive provisions and the administrative law will continue to be governed by the provisions of Article 146 of the Constitution and the existing secondary law.

It should be emphasized that, with its Article 11, the new law transposes the provisions of Article 46 (right to an effective remedy) of directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on the common procedures for granting and withdrawing international protection and Article 26 (remedies) of directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Specifically, the new law establishes the jurisdiction of the Administrative Court to rule on an administrative appeal regarding a decision to grant or reject a request for international protection.

The provisions of Article 11, paragraph 2, of said law describes the jurisdiction of the Administrative Court during the proceedings, in accordance with the provisions of directive 2013/32/EU and Directive 2013/33/EU, in particular to uphold, modify or repeal (in whole or part) such a decision. Article 11, paragraph 3, of the law also guarantees an effective remedy

involving a full review of the facts, post or prior to the date of the decision, which have not been taken into account when said decision was adopted. Furthermore, this provision allows the administrative court to ask the competent authorities questions during the proceedings in a more timely manner.

The Administrative Court will begin to exercise jurisdiction at the end of 2015. Until then, the Supreme Court will continue to exercise the jurisdiction of an administrative court of first instance.

Law nos. 130(I)/2015 on the eighth amendment of the Constitution and no. 131(I)/2015 on the establishment and functioning of an administrative court of the Republic of Cyprus (Official Journal, Annexe 1, part 1, no. 4526 and 4526, pages 1106 - 1112), 21.07.15, http://www.mof.gov.cy/mof/gpo/gpo.nsf/All/CF8442ED84FB89EDC2257E8900428567/$file/4526%2021%207%202015%20PARARTIMA%201o%20MEROS%20I.pdf

[LOIZOMI]

Spain

Amendment of the Organic Law relating to the judiciary

Organic Law No. 6/1985, dated 1 July 1985, on the judiciary ("OLJ") was recently amended by Organic Law no. 7/2015, of 21 July 2015 amending the OLJ. Among the many changes made, there were provisions on certain procedural aspects of a "preliminary ruling reference". These provisions are contained in the new paragraph 'bis' of Article 4 and are intended to codify a common judicial practice of introduction of the references.

So far, there were no legal or regulatory provisions focussing on the procedure for the introduction of a preliminary ruling reference by a Spanish court, before the Court of Justice. Since the entry into force of the aforementioned article, all preliminary ruling references must, firstly, be presented in accordance with the existing case law of the Court of Justice and, secondly, be introduced in the form of an order.

It is also expected that the parties concerned must first be heard. As is clear from the case law of the Spanish Supreme Court, even if the national court is the only authority that can rule on the relevance of a preliminary question, this exclusive jurisdiction cannot be challenged by the provision of a hearing giving the parties an opportunity to comment on the relevance of the preliminary question for the main proceedings.

Artículo 4 bis de la LOPJ 6/1985, de 1 de julio, introducido por la modificación operada por la Ley Orgánica 7/2015, de 21 de julio, http://www.poderjudicial.es

[NUNEZMA]

France

Law adapting the criminal procedure to EU law

Law No. 2015-993 of 17 August 2015, adapting the criminal procedure to EU law, which was adopted as part of the accelerated procedure,

constituted an opportunity for the French legislature, presented with a draft law of the government, to transpose several EU texts relating to the area of freedom, security and justice: the framework decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, the framework decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, the framework decision No. 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

While the initial draft law provided for the insertion of an article intended to transpose directive 2011/95/EU concerning standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, this article was removed during the first reading in the Senate. The provisions of this article have been incorporated into Article 28 of law no. 2015-925 of 29 July 2015 on the reform of the asylum law.

However, following a government amendment, an article was inserted to ensure the transposition of directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime.

As part of the proceedings, about twenty provisions that were not associated with the EU law have been added. The adopted text was referred to the Constitutional Council by some senators, in particular because several amendments adopted during the proceedings before the National Assembly relating to the French criminal law, were not related, even indirectly, to the purpose of the law 2015-993 intended to adapt the French criminal procedure to the rules of the European Union, and are therefore unconstitutional "legislative riders".

By a decision of 13 August 2015, no. 2015-719 DC, the Constitutional Council declared, firstly, that the provisions referred to by the applicants have no connection with the purpose of the law and have been adopted by a procedure contrary to the Constitution, and are therefore unconstitutional. Secondly, the Constitutional Council reviewed without consultation an article on the provisional enforcement of imprisonment as part of criminal coercion. The constitutional courts also stated that this provision is unconstitutional for the same reasons.

Law no. 2015-993 of 17.08.15 published in O.J. No. 189 of 18.08.15,

Constitutional council, decision of 13.08.15, 2015-719-DC, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031045937&categorieLien=id

http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-719-dc/decision-n-2015-719-dc-du-13-août-2015.144289.html

IA/33671-A

[PAPDTH][WAGNELO]

**** Brief (France)***

The law on the reform of asylum law was enacted on 30 July 2015. However, to ensure its implementation, regulatory measures must be adopted.

This reform seemed necessary, firstly, because of shortcomings in the existing system and changes in the number of asylum seekers which has almost doubled in seven years and, secondly, for the purposes of transposition of "asylum package" directives, namely directives 2011/95/EU, also called "Qualification directive", 2013/32/EU, also called "Procedure directive", and 2013/33/EU, also called "Reception conditions directive". However, on 23 September 2015, France received two letters of formal notice from the Commission for failure to notify measures transposing directives 2013/32/EU and 2013/33/EU, mentioned above.

Three new features can be highlighted.

First, the new law establishes procedural guarantees at all stages of the proceedings. Thus, the asylum seeker can now benefit from the assistance of a lawyer or a representative of an association during the personal interview with a protection officer. In addition, vulnerabilities are given more attention and the suspensive effect of appeals against decisions refusing asylum is generalised.

Second, the law aims to reduce the review time for asylum applications (from two years on average to nine months). It also helps dismiss unfounded requests more easily. In this context, the possibility of an accelerated procedure has been created.

Finally, a binding accommodation system is introduced. An asylum seeker may be assigned to a region other than where he has applied. If he refuses, he risks losing his right to benefits.

Law no. 2015-925 of 29.07.15 on the reform of the asylum law (Official Journal no. 0174 of 30.07.15), http://www.legifrance.gouv.fr/eli/loi/2015/7/29/INTX1412525L/jo

[DUBOCPA]

Poland

The new law on the Constitutional Court

The law of 25 June 2015 on the Constitutional Court (O.J. 2015, position 1064) came into force on 30 August 2015. By adopting the law, the legislature decided not to make further amendments to the applicable law, which has already been amended eight times, but to adopt a new regulation on the organisation of such courts. The law aims to speed up the proceedings before the Constitutional Court and to restore order in the system in force since 1997, i.e. since the entry into force of the Constitution and the previous law on the Constitutional Court. It contains several provisions codifying a well-established case law of the Constitutional Court regarding its procedural rules, including rules concerning components of the request and determination of the framework of the dispute.

One of the most significant innovations is the change in the principle of discontinuation, under which the Court was required to classify any proceedings initiated by members of Parliament in case the legislative term ends. Now, in the latter case, the proceedings before the Court will be suspended *ex lege* for a 6-month period; its resumption during this period shall be contingent upon a request in support of the initial request made by members of the new Parliament. In addition, the Polish legislature has significantly expanded the possibility for the Constitutional Court to hear requests in chambers and not in court; this solution was hitherto planned only for exceptional cases. The new law also assigns to the Court the jurisdiction to dismiss an action due to the absence of a legal issue requiring its interpretation. The new system should, according to the legislator, contribute to the optimisation of the proceedings before the Constitutional Court and the reduction of the average duration taken for handling cases.

Law of 25.06.15 on the Constitutional Court (O.J. 2015, position 1064), http://isap.sejm.gov.pl/DetailsServlet?id=WDU20150001064

[PBK]

Romania

Government ordinance amending and supplementing the order relating to the environmental stamp duty for motor vehicles

Government ordinance no. 40/2015 was published on 31 August 2015. This ordinance amended and supplemented ordinance no. 9/2013 concerning the environmental stamp duty for motor vehicles. The ordinance is part of a major Romanian dispute concerning taxes on polluting emissions of motor vehicles and illustrates the reaction of the legislature to the recent case law of the Court of Justice.

In this regard, in the Manea case (C-76/14, Rec, EU:C:2015:216), the Court held that Article 110 of the TFEU does not preclude a Member State from establishing a tax on motor vehicles, which is applicable to imported used vehicles during their first registration in that member State and the vehicles already registered in said member State during the first transcription of the ownership thereof in said State. However, it ruled that this article does preclude a member State from exempting from said tax the vehicles that are already registered and for which a tax that was previously in effect and was deemed incompatible with EU law has been paid.

The Court thus ruled on the compatibility with EU law of the Romanian regulations concerning taxes on polluting emissions from motor vehicles which insisted on exempting from said tax the motor vehicles that were already taxed, for which no repayment through the legal process had been required.

While the internal regulation at issue in the Manea case, namely law no. 9/2012 concerning the tax on polluting emissions from motor vehicles, was repealed by emergency government ordinance No. 9/2013, it should be noted that the latter included, in essence, the provisions of the previous regulations.

Under the terms of the new ordinance no. 40/2015, the obligation to pay the environmental stamp duty also arises during the transcription of the ownership of the used motor vehicle for which a decision to refund the overpaid tax was taken.

Henceforth, the refund of the taxes plus interest will be made on request addressed to the tax authorities. The refund covers all taxes, including those for which the right to seek recovery through a legal process was prescribed. A court action may be brought before the administrative court only if the final decision delivered by the tax authorities is challenged.

Notwithstanding this progress, the ordinance maintains a phased arrangement for the refund of the tax on polluting emissions from motor vehicles over a five-year period, each instalment being equal to 20% of the claimed value.

The legal issue with the phased arrangement has provoked further questions as to its conformity with the principles of equivalence and effectiveness. These questions are the subject of two cases currently pending before the Court, namely C-200/14 (Câmpean) and C-288/14 (CIUP).

Ordonanţa Guvernului României nr. 40/2015 pentru modificare şi completarea Ordonanţei de urgenţă a Guvernului nr. 9/2013 privind timbrul de mediu pentru autovehicule, publicată în Monitorul Oficial nr. 655 din 31.08.15, http://www.legalis.ro

[CLU]

United Kingdom

Reforms in the law on consumer protection

In order to remedy the complexity of the consumer protection act in the United Kingdom, the Parliament passed a law in order to consolidate and simplify the existing regulation, including some texts implementing EU law. The new law came into force on 1 October 2015.

The act is divided into three distinct parts: the first part concerns contracts for supply of goods, digital content and services, the second part deals with unfair terms and the last part includes various provisions, including those concerning the powers of competent authorities.

As regards the first part, a number of amendments were made to the previous law. Firstly, the concept of consumer has been expanded to cover all persons acting for both private and commercial purposes. Then, a discrepancy was rectified by subjecting the sale of digital products, such as multimedia content sold online, to a protection system similar to that which applies to products on traditional media. Finally, the rights of the consumer against defective products have been modified to provide a period of 30 days during which consumers have the right to return said products.

Regarding the second part, the law merges the two systems that previously governed unfair terms, the first resulting from the transposition of Directive 93/13/EEC on unfair terms in contracts concluded with consumers, and the other implemented by an act of 1977. This has three important consequences.

First, the court can now exercise control over clauses contained in all contracts concluded between a supplier and a consumer, regardless of whether the contract terms have been individually negotiated. Then, as regards the exclusion from the assessment of the unfairness of the clauses pertaining to the definition of the main purpose of the contract or to the price, the law goes beyond the wording of Article 4, paragraph 2 of Directive 93/13/EEC, by making the exclusion subject to the condition that these terms shall be in plain and comprehensible language and that they must not be inconspicuous. It is understood from this latter requirement that the clause is brought to the attention of the consumer in such a way that the average customer would have read it. Finally, the new law establishes the obligation resulting from the case law of the Court (see, in this regard, the Pannon ruling C-243/08, EU:C:2009:350), according to which the court must assess, as appropriate and without consultation, the unfairness of a clause, provided it has sufficient information on the facts and the legal framework.

The last part of the law contains provisions making it easier for individuals and corporations who feel aggrieved by a violation of competition rules to initiate group actions. It enshrines, in this respect, the "opt out" class action model, common in the United States, which by default includes in the group of applicants all potential victims; the latter retain the right to opt out if they do not wish to be party to the proceedings initiated. Such appeals must be submitted before the Competition Appeal Tribunal, which has acquired new powers, including the authority to approve amicable dispute settlements if it considers that the terms are fair and reasonable.

Consumer Rights Act 2015, www.legislation.gov.uk

[PE]

2. Other countries

Turkey

Adoption of an action plan on human rights

On 24 February 2014, the relevant department of the Turkish government for issues relating to human rights adopted an action plan on the prevention of violations of the ECHR (Avrupa İnsan Hakları Sözleşmesi İhlallerinin Önlenmesine İlişkin Eylem Planı). The plan, the adoption of which had been advocated by the Committee of Ministers of the Council of Europe, is a significant attempt to correct the structural problems that could result in violations of human rights in Turkey.

The plan recognises, firstly, that Turkey is among the States parties to the ECHR that has contributed to the highest number of judgments finding a violation of the ECHR. In this regard, the plan specifies the areas in which reforms are needed to make national law consistent with the ECHR law and sets out a number of measures to be implemented. In this context, it lists fourteen general objectives, including the prevention of violations of the rights to life, prevention of torture and ill treatment, effective investigations for violations of the prohibition of torture and cases of ill treatment, prevention of violations of the right to liberty and security, establishment of an effective right of access to justice and effective enforcement of judicial decisions.

In pursuing these objectives, the action plan identifies 46 specific measures and specifies the institutions responsible for ensuring their implementation. The plan shall not be binding, but its implementation will be subject to an annual report prepared by the Ministry of Justice and submitted to the Prime Minister.

The adoption of the action plan was welcomed by the European Parliament in its report on the progress made by Turkey in 2014. The European Parliament has observed that it is an important step towards aligning the Turkish legal framework with the case law of the ECHR.

Action plan on the prevention of violations of the ECHR: http://www.coe.int/t/commissioner/source/NAP/Turkey-National-Action-Plan-on-Human-Rights.pdf

[HURSITU] [PE]

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Increased control of the Internet by the State

On March 27, 2015, the Grand National Assembly of Turkey approved omnibus legislation (law no. 6639) authorising the government telecommunications authority (TIB) to block websites it deems necessary for the protection of property or public health, national security or crime prevention. While the blocking of a website takes effect without a court order, the TIB is nevertheless required to validate its decision by a justice of the peace within twenty-four hours following its adoption. The justice of the peace, who must make his decision within forty-eight hours, can either approve the measure or order its dismissal. The Internet service providers are required to implement the decisions of the TIB, in order to avoid an imposition of an administrative fine of up to 500,000 TRY (i.e. 156,120 EUR).

Turkey's first law governing access to the Internet (law no. 5651) was established in May 2007 and was designed to determine the liability of online content providers in civil and criminal matters. The law conferred a wide discretionary power to the TIB and the national courts to block access to certain websites when there was merely 'reasonable suspicion' of the existence of one of eight offences, including crimes discrediting the reputation of Atatürk. This law has been amended several times and on each occasion the blocking powers were expanded. On 6 February 2014, under the insertion of Article 9/A, the TIB acquired the power to block access to content without prior judicial review, in case of a complaint against a publication that violated the right to privacy of an individual. This provision thus allowed individuals and corporations to request the TIB to block access to certain Internet content arguing that their rights had been violated. In cases where a blockage was ordered, the Internet service providers had to take necessary measures within four hours following the notification of the decision. In addition, the hosting providers had to store all data related to their hosting activities for a certain period and make these data available to the TIB in case the latter requested it.

Another important amendment to law no. 5651 was adopted by the Parliament on 10 September 2014, when law no. 6552 expanded the grounds on which the TIB could block websites, by adding cases of threat to national security, protection of public order and crime prevention. The amendment had also allowed the TIB to collect Internet connection data, regardless of any legal proceedings, and reduced the maximum time given to ISPs to comply with an order.

These amendments were repealed by the Constitutional Court, which ruled, in a judgment of 2 October 2014, that the TIB, as the intermediate authority, has neither the authority to assess the requirements of national security, public order or crime prevention, nor the authority to store data. However, the decrease in the period granted to ISPs was declared constitutional. It is in this context that law no. 6639 was passed to provide for an alternative procedure for certain grounds cited for blocking content covered by law no. 6552.

Law no. 6639: Law providing for amendments to certain laws and concerning court decisions, http://www.resmigazete.gov.tr/eskiler/2015/04/20150415-1.htm

[HURSITU] [PE]

C. Doctrinal echoes

On the 2/13 opinion of the Court of Justice declaring the incompatibility of the agreement on accession of the European Union to the ECHR with EU treaties and TEEC (EU:C:2014:2454)

By its opinion 2/13 of 18 December 2014, the plenary session of the Court of Justice ruled that the agreement on accession of the EU to the ECHR was incompatible with Article 6, paragraph 2, TEU, and with the protocol (no. 8) relating to Article 6, paragraph 2 of the Treaty on European Union on the accession of the Union to the ECHR.

"The judicial darling, if there is one today, is Strasbourg, not Luxembourg" [1]. For many authors, the rejection of the proposed accession of the EU to the ECHR by the Court of Justice was difficult to digest. According to **Jacqué,** "the reading of the ruling gives the reader the impression that the Court of Justice is like a besieged fortress" [2]. The court "unfortunately gives the impression of an institution that does not trust the internal discipline of the Union and seeks to obtain protection in an agreement concluded by the Union whereas normally compliance with these rules should be ensured by EU institutions without the need for external protection".[3]

[1] HALBERSTAM, D., "'It's the Autonomy, Stupid!' - A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", German Law Journal, vol. 16, nº 1, 2015, p. 105-146, p. 105.

[2] JACQUÉ, J.-P., "*Pride and/or Prejudice*? Les lectures possibles de l'Avis 2/13 de la Cour de justice", Cahiers de droit européen, nº 1, 2015, p. 19-45, p. 22.

[3] JACQUÉ, J.-P., "CJUE - CEDH : 2-0", Revue trimestrielle de droit européen, nº 4, 2014, p. 823-831, p. 827.

In this regard, **Petit** and **Pilorge-Vrancken** warn that "the Court of Justice appears to deny the ECtHR any interpretative jurisdiction for the Luxembourg case law" [4]. Similarly, for **Schorkopf,** it is clear from the opinion that the Court held that "er selbst –und nicht der EGMR in Straßburg– [die] maßgebende Rechtsprechungsinstanz ist" [5]. **Nanopoulos** shares this sense of concern, since in his view "by distancing itself from its European counterpart in Strasbourg, the [CJEU] is not necessarily safeguarding the distinctiveness of the EU's identity but risks losing an important ally in [building] a genuine European polity"[6].

In the same spirit, **Eeckhout** highlights that opinion 2/13 "reveals a fundamental disagreement between the CJEU and the EU Member States as authors of the Lisbon Treaty, regarding the desirability of EU accession to the Convention" [7]. In addition, **Labayle** and **Sudre** observe: "Preservation", the word used five times by the Court of Justice is significant but indicative of its defensive approach" [8]. Nevertheless, the rather reserved reactions are not unanimously supported within the doctrine. **Halberstam,** for example, says that the opinion "warrants far more serious attention than its numerous critics suggest"[9]. He considers that the doctrine "rushed to embrace Strasbourg while forgetting about the constitutional dimension of EU governance along the way. This singular focus on international human rights regimes can be misleading. Participation in international human rights regimes should be encouraged […] but signing on to a particular rights regime ought not to come at the expense of the constitutional nature of the EU's legal order, which is geared to vindicating all three constitutional values, including rights"[10]. Several authors explore the possible motivations of the Court of Justice [11], particularly regarding the preservation of the autonomy of EU law and its constitutional role. **Eeckhout** notes that "accession is about subjecting the EU and its institutions to external control [and while the] CJEU accepts this in principle, [it] considers that the particular arrangements for accession […] undermine, in essence, the autonomy of EU law" [12].

[4] PETIT, N., et PILORGE-VRANCKEN, J., "Avis 2/13 de la CJUE : l'obsession du contrôle ?", Revue des affaires européennes - Law & European Affairs, nº 4, 2014, p. 815-830, p. 827 ; see also ACKERMANN, T. *et al*., "Editorial Comments – The EU's Accession to ECHR - a 'NO' from ECJ!", Common Market Law Review, vol. 52, 2015, nº 1, p. 1-15, p. 1.

[5] SCHORKOPF, F., "EuGH, 18.12.2014, Gutachten 2/13: Anmerkung", Juristenzeitung, nº 15-16, 2015, p. 781-784, p. 781.

[6] NANOPOULOS, E., "Killing two birds with one stone? The Court of Justice's opinion on the EU's accession to the ECHR", Cambridge Law Journal, nº 2, 2015, p. 185-188, p. 187.

[7] EECKHOUT, P., "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?", Fordham International Law Journal, vol. 38, nº 4, 2015, p. 955-992, p. 989; see also ŁAZOWSKI A., and WESSEL R.A., "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR", German Law Journal, vol. 16, nº 1, 2015, p. 179-212, p. 207.

[8] LABAYLE, H., et SUDRE, F., "L'avis 2/13 de la Cour de justice sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme : pavane pour une adhésion défunte ?", Revue française de droit administratif, nº 1, 2015, p. 3-22, p. 4.

[9] HALBERSTAM, D., cit. *supra* note 1, p. 106.

[10] HALBERSTAM, D., cit. *supra* note 1, p 107-108; see also JACQUÉ, J.-P., cit. *supra* note 2, p. 32.

[11] See, for example, THYM, D., "Das EMRK-Gutachten des EuGH", Europäische Zeitschrift für Wirtschaftsrecht, nº 5, 2015 p. 180.

[12] EECKHOUT, P., cit. *supra* note 7, p. 961; see also LEBECK, C., "Accession of the EU to the ECHR and the autonomy of EU law: opinion 2/13 of the ECJ", European Law Reporter, nº 2, 2015, p. 30-42, p. 39.

For his part, **Krenn** observes that "this overprotective attitude […] has contributed to making the EU what it is and has put the Court at the heart of the process of EU constitutionalisation"[13].

On the relationship between art. 53 of the ECHR and art. 53 of the Charter

In this regard, **Simon** acknowledges that "the draft agreement did not provide for a co-ordination mechanism in the event that the rights guaranteed by both the ECHR and the Charter would be subject to protection by nationals rights which would call into question the consistency and primacy of EU law. It is true that the issue is delicate and difficult to resolve"[14]. **Eeckhout** argues that in this regard "the CJEU implicitly adopts a wide notion of potential conflict between EU primary law and the Convention […] [and, however], such a wide notion of conflict cannot operate as a benchmark for reviewing whether an international agreement which the EU intends to conclude is compatible with the EU Treaties" [15]. However, **Berger** and **Rauchegger** point out that the Court "does not demand that the level of protection of the Charter is given priority over the level of the ECHR […]. The level of protection can […] never be lower than the level guaranteed by the ECHR as interpreted by the ECtHR"[16].

A part of the doctrine suggests, in this context, that the Court of Justice seeks to preserve its interpretation of Article 53 of the Charter, as established by the Melloni ruling (C-339/11, EU:C:2013:107). According to **Halberstam**, "*Opinion 2/13* expresses the worry that the Member States might now use Article 53 [ECHR] to resurrect fundamental rights standards in defiance of *Melloni*. […] There, one Member State sought to resist the application of EU law by invoking an idiosyncratic constitutional right in conjunction with Article 53 [of the Charter]. Such a case, then, might well arise under the Convention as well"[17]. In this regard, **Jacqué** notes that "in application of Article 53 of the Charter as interpreted by the Melloni case law, there are cases where EU law [disallows the States] to grant higher level of protection top to allow the primacy. It is therefore not possible that a higher protection that EU law prohibited the Member State from granting would be invoked in Strasbourg. The fears of the Court of Justice are unfounded and the coordination mechanism required by it superfluous"[18].

[13] KRENN, C., "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13", German Law Journal, vol. 16, nº 1, 2015, p. 147-168, p. 148.

[14] SIMON, D., "Deuxième (ou second et dernier ?) coup d'arrêt à l'adhésion de l'Union à la CEDH : étrange avis 2/13", Europe, nº 2, 2015, p. 4-9, p. 6.

[15] EECKHOUT, P., cit. *supra* note 7, p. 967.

[16] BERGER, M. and RAUCHEGGER, C, "Opinion 2/13: Multiple Obstacles to the Accession of the EU to the ECHR", European Yearbook on Human Rights, Intersentia, 2015, p. 61-75, p. 65-66.

[17] HALBERSTAM, D., cit. *supra* note 1, p. 125.

[18] JACQUÉ, J.-P., cit. *supra* note 2, p. 33; see also TOMUSCHAT, C., "Der Streit um die Auslegungshoheit: Die Autonomie der EU als Heiliger Gral - Das EuGH-Gutachten gegen den Beitritt der EU zur EMRK", Europäische Grundrechte-Zeitschrift, nº 5-8, 2015 p. 133-139, p. 138.

On the preservation of the principle of mutual trust

Eeckhout observes that "the Court's approach seeks to cordon off parts of EU law that would need to be protected from control by the ECtHR. That is not a good starting point for a proper judicial dialogue. Nor is it consonant with the principle that the purpose of accession is to subject the EU to Strasbourg control"[19]. **Labayle** and **Sudre** concede that "the ECJ rightly points out that the principle of mutual trust [...] is of fundamental importance," but reiterate that "its proclamation by the Constitutional Treaty has not been reflected in the Lisbon Treaty" [20]. For **Spaventa**, "the reason for the Court's closure can be easily explained having regard to the peculiarities of some of the legislation adopted in the [AFSJ, where the CJEU] wants to avoid the full application of the Convention"[21]. **Halberstam** notes that "the CJEU seems to be concerned that […] Member States will increasingly invoke the ECHR to disregard their EU obligations of interstate cooperation on account of individual […] rights violations"[22].

However, **Petit** insists that "EU accession to the ECHR, far from undermining the principle of mutual trust, is essential to help the States out of an inextricable position, between the hammer of the EU law and the anvil of the obligations under the ECHR".[23] **Halberstam** examines this issue from a broader perspective: "I am tempted to abuse an idiom and say [that accession] would be a 'win-win-win' situation. By taking responsibility for the violation, the EU will shield the Member State in question. Thus, the EU will be responsible for fixing the human rights problem; Member State high courts can cheerfully continue to defer to the CJEU under the *Solange* compromise; and mutual trust will be preserved as well. […] Plain accession, then, solves the mutual trust problem the Court seems so concerned about"[24].

On the question of Protocol No. 16 of the ECHR

According to **Spaventa,** the fear of the Court in finding that the draft agreement contained no connection between the mechanism established by Protocol no. 16, allowing national courts to refer the matter to the ECtHR for an advisory opinion, and the preliminary reference procedure under Article 267 of the TFEU, is that "national courts might be tempted to require an opinion from the ECtHR rather than a preliminary ruling from the [CJEU]".[25] While recognizing that this would be possible, some authors argue that the Court of Justice could, in this case, intervene by way of the prior involvement procedure under the accession agreement[26].

[19] EECKHOUT, P., cit. *supra* note 7, p. 969.

[20] LABAYLE, H., and SUDRE, F., cit. *supra* note 8, p. 6.

[21] SPAVENTA, E., "A very fearful court? The Protection of Fundamental Rights in the European Union after Opinion 2/13", Maastricht Journal of European and Comparative Law, vol. 22, nº 1, 2015, p. 35-56, p. 49-50.

[22] HALBERSTAM, D., cit. *supra* note 1, p. 130.

[23] PETIT, N., and PILORGE-VRANCKEN, J., cit. *supra* note 4, p. 820; see also ZANGHÌ, C., "La mancata adesione dell'Unione europea alla CEDU nel parere negativo della Corte di giustizia UE", Ordine internazionale e diritti umani, nº 1, 2015, p. 129-157, p. 138.

[24] HALBERSTAM, D., cit. *supra* note 1, p. 135.

[25] SPAVENTA, E., cit. *supra* note 21, p. 47; see also KRENN, C., cit. *supra* note 13, p. 155-156.

[26] However, CHERUBINI, F., "In merito al parere 2/13 della Corte di giustizia dell'UE: qualche considerazione critica e uno sguardo *de jure condendo*", Osservatorio Costituzionale, nº 2, 2015, p. 1-28, p. 22-23, points out that this possibility would be ruled out under the draft agreement.

Nevertheless, **Halberstam** points out that "the fact that Strasbourg might involve Luxembourg in answering this question via the prior involvement procedure adds insult to injury from the CJEU's perspective because the entire proceeding should be in Luxembourg, subject to the jurisdiction of the CJEU"[27]. Other authors are not as understanding: for example, **Eeckhout** believes that "it is difficult to understand the Court's concern. Why would a second European preliminary rulings system affect the autonomy and effectiveness of the EU one? Are preliminary rulings to be conceived as some type of EU intellectual property, which may not be duplicated?"[28].

In addition, **Weber** warns that the question arises even in the absence of EU accession to the ECHR: "die Gerichte der Mitgliedstaaten, die das Prot. Nr. 16 ratifiziert haben, [können sich] auch ohne den geplanten Beitritt der EU mit Grundrechtsfragen an den EGMR wenden"[29]. From this point of view, **Jacqué** questions whether the national supreme courts might be tempted to circumvent the preliminary question: "To the extent that the [ECHR] is applicable to them and that the refusal to apply it exposes the State to infringement proceedings, what need would they feel to check the compliance of EU law with the Convention before attempting to do it in relation to the Charter?"[30].

On Article 344 of the TFEU

As regards the settlement of disputes concerning the interpretation or application of the treaties, **Eeckhout** concedes that "the Court's initial starting-point is correct: once the ECHR forms an integral part of EU law, […] Member States ought not to take these disputes to the ECtHR"[31]; however, he highlights that, "[t]he Court's analysis […] reveals that the EU's membership of the WTO violates the EU Treaties. […] [A]t least in theory, an intra-EU case could be brought before a WTO panel"[32]. Similarly, other authors, such as **Simon,** reiterate that "many international agreements concluded by the Union do not [contain] any exclusion clause [vis-à-vis recourse to an external mode of dispute settlement]"[33].

As for the solution to this question, **Johansen** holds that "[f]or the negotiators that will now attempt to amend the Accession Agreement […] it should be relatively simple to […] exclude intra-EU disputes from the jurisdiction of the ECtHR"[34].

[27] HALBERSTAM, D., cit. *supra* note 1, p. 122.

[28] EECKHOUT, P., cit. *supra* note 7, p. 971; see also POPOV, A., "L'avis 2/13 de la CJUE complique l'adhésion de l'Union européennes à la CEDH", La Revue des droits de l'homme, Actualités Droits-Libertés, 24 February 2015, available on *http://revdh.revues.org/pdf/1065*, p. 1-10, p. 6.

[29] WEBER, M., "Vereinbarkeit des EMRK-Beitritts der EU mit dem Unionsrecht - Besprechung von EuGH 18.12.2014, Gutachten 2/13", Newsletter Menschenrechte, nº 1, 2015, p. 3-11, p. 7; see also LAMBRECHT, S., "The Sting is in the Tail: CJEU *Opinion 2/13* objects to draft agreement on accession of the EU to the European Convention on Human Rights", European Human Rights Law Review, nº 2, 2015, p. 185-198, p. 188, and SIMON, D., cit. *supra* note 14, p. 7, and CHERUBINI, F., cit. *supra* note 26, p. 21.

[30] JACQUÉ, J.-P., cit. *supra* note 2, p. 26.

[31] EECKHOUT, P., cit. *supra* note 7, p. 974-975.

[32] EECKHOUT, P., cit. *supra* note 7, p. 978-979.

[33] SIMON, D., cit. *supra* note 14, p. 7; see also POPOV, A., cit. *supra* note 28, p. 6, and JOHANSEN, S. Ø., "The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences", German Law Journal, vol. 16, nº 1, 2015, p. 169-178, p. 175.

[34] JOHANSEN, S. Ø., cit. *supra* note 33, p. 177-178.

On the contrary, **Sauron** stresses that "to avoid this difficulty, it is better to either amend Article 33 of the European Convention [...] or Article 344 of the TFEU [...]. Which means it is impossible"[35].

On the co-defendant mechanism

Many authors emphasise that the concerns of the Court with respect to the co-defendant mechanism are well founded [36]. For example, **Halberstam** observes that "[f]rom the perspective of EU law, determining the responsibility for a violation and the competence to provide a remedy are […] both strictly questions of EU law"[37]. **Labayle** and **Sudre** find that "access to the status of co-defendant is problematic. Becoming a co-defendant, for the Union as for a State party, may initially result from a direct invitation from the [ECtHR]. It is not binding and the Court of Justice approves it [...]. A second scenario is also possible: becoming a co-defendant following a decision of the [ECtHR] by requesting for it in advance, that is to say by arguing about access to the procedure to allow the [ECtHR] to decide. That is where the problem arises"[38].

On the prior involvement procedure of the Court

Several authors positively welcome the arguments of the Court concerning the prior involvement procedure. **Labayle** and **Sudre** emphasise that "[t]he question of whether the [ECJ] has already ruled on the same legal question that is the subject of the proceedings before the [ECtHR] can be resolved only by the competent institution of the Union, the Court of justice [...]. To reason otherwise would result in attributing "jurisdiction to interpret the case law of the Union" to the [ECtHR]."[39] In this regard, according to **Simon,** "while there is a principle of mutual trust between Member States, it is not certain that there is a principle of mutual trust between courts, which could lead us to believe that the [ECtHR] can exercise *self-restraint* in the situations envisaged"[40].

However, **Eeckhout** highlights that "[n]ot all observers are convinced that the prior involvement procedure is required" and that "there may be benefits for the CJEU in not having ruled on a point of EU law, before a case reaches Strasbourg, in particular as the lack of a relevant CJEU judgment is the responsibility of the Member State"[41].

On the limited jurisdiction of the Court in the area of CFSP

A part of the doctrine criticises the considerations of the Court on its limited jurisdiction in matters of the CFSP [42].

[35] SAURON, J.-L., "L'avis 2/13 de la Cour de justice de l'Union européenne : la fin d'une idée anachronique ?", Gazette du Palais, nº 16-17, 16 and 17 January 2015, p. 4-6, p. 6.

[36] See, for example, JACQUÉ, J.-P., cit. *supra* note 3, p. 828, POPOV, A., cit. *supra* note 28, p. 3, PETIT, N., and PILORGE-VRANCKEN, J., cit. *supra* note 4, p. 824, ACKERMANN, T. *et al*., cit. *supra* note 4, p. 12, and FANCIULLO, D., "Osservazioni a prima lettura sul parere 2/13 della Corte di giustizia dell'Unione europea", 16 February 2015, available on https://diritti-cedu.unipg.it, p. 1-19, p. 11-12.

[37] HALBERSTAM, D., cit. *supra* note 1, p. 115-116.

[38] LABAYLE, H., et SUDRE, F., cit. *supra* note 8, p. 9.

[39] LABAYLE, H., et SUDRE, F., cit. *supra* note 8, p. 10; see also, KRENN, C., cit. *supra* note 13, p. 154, and CHERUBINI, F., cit. *supra* note 26, p. 26.

[40] SIMON, D., cit. *supra* note 14, p. 8.

[41] EECKHOUT, P., cit. *supra* note 7, p. 985-986.

[42] See, for example, TOMUSCHAT, C., cit. *supra* note 18, p. 137-138, WEBER, M., cit. *supra* note 29, p. 10-11, NEUWAHL, N., "Editorial Comment: Opinion 2/13 on the Accession of the European Union to the European Convention on Human Rights - Foreign Policy Implications", European Foreign Affairs Review, vol. 20, nº 2, 2015, p. 155-158, p. 157 and EECKHOUT, P., cit. *supra* note 7, p. 987-988.

Thus, **Ackermann** *et al*., after observing that "the [CJEU] has now expounded the principle (as a 'specific characteristic' of EU law) that the EU, in an international agreement, cannot confer jurisdiction to an international court with regard to matters in which the ECJ itself has no power of judicial review", note that the approach of the Court "will appear as somewhat surprising for all those who have argued in favour of the accession of the EU to the ECHR precisely with regard to the 'enormous lacuna' in the protection of human rights in the EU. The recognition of jurisdiction of the ECtHR in CFSP matters would only strengthen the effectiveness of the legal protection for individuals – as compared to the present situation!" [43] . In the same vein, **Wendel** highlights that "[g]enau dort, wo der Beitritt aus Individualperspektive also einen substanziellen Zugewinn richterlicher Kontrolle mit sich brächte, optiert der EuGH für einen umfassenden Ausschluss" [44] . Moreover, according to **Jacqué,** "to exclude the CFSP from the scope of the agreement leads to the matter being referred to the Member States. [...] The Court will not achieve the objective sought since the CFSP will in any case be the subject of an exclusively external control, but without the EU being able to participate in the proceedings"[45]. However, several authors believe that this issue lends itself to a clear solution: **Krenn** proposes that "[t]he way to go is straightforward: granting the CJEU full jurisdiction in this field"[46].

On the judicial dialogue and the relationship between EU law and international law

Several authors have used the opportunity to address some issues with a broader scope, particularly regarding judicial dialogue or the relationship between EU law and international law. Thus, **Eeckhout** notes the importance of ensuring the existence of a genuine dialogue between the ECJ and the ECtHR: according to him, if on the one hand, "the ECtHR must be able to look into EU law, and to make statements about how it understands that law to function, in order to exercise its control function", on the other hand, "the external control by the ECtHR will work better if the CJEU is in a position to construe the Convention, and analyse in its case law in what ways the EU ensures respect for the Convention" [47] . On a more general note, **Fernández Rozas** believes that a possible EU accession to the ECHR would serve to strengthen - rather than weaken - the dialogue between the two courts and, therefore, the protection of fundamental rights in Europe [48].

[43] ACKERMANN, T. *et al*., cit. *supra* note 4, p. 13.

[44] WENDEL, M., "Der EMRK-Beitritt als Unionsrechtsverstoß - Zur völkerrechtlichen Öffnung der EU und ihren Grenzen", Neue Juristische Wochenschrift, 2015 p. 921-926, p. 926; see also PEERS, S., "The EU's Accession to the ECHR: The Dream Becomes a Nightmare", German Law Journal, vol. 16, nº 1, 2015, p. 213-222, p. 220, SPAVENTA, E., cit. *supra* note 21, p. 52-53, FANCIULLO, D., cit. *supra* note 36, p. 14, and ZANGHÌ, C., cit. *supra* note 23, p. 152.

[45] JACQUÉ, J.-P., cit. *supra* note 3, p. 829.

[46] KRENN, C., cit. *supra* note 13, p. 166; see also ACKERMANN, T. *et al*., cit. *supra* note 4, p. 14, SCHORKOPF, F., cit. *supra* note 5, p. 783, and CHERUBINI, F., cit. *supra* note 26, p. 26.

[47] EECKHOUT, P., cit. *supra* note 7, p. 961.

[48] FERNÁNDEZ ROZAS, J.C., "La compleja adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos y las secuelas del Dictamen 2/2013 del Tribunal de Justicia", La Ley Unión Europea, nº 23, 2015, p. 40-56, p. 51.

Finally, some authors warn that the opinion could have an indirect negative effect on the dialogue between the Court of Justice and Constitutional Courts of the Member States[49].

In respect of the relationship between EU law and international law (particularly the ECHR), some authors interpret opinion 2/13 as concurring with a design that is close to the idea of radical pluralism, to the extent that the Court of Justice would underline its exclusive jurisdiction of EU law [50], while other authors read the opinion as being closer to a more nuanced design illustrating the idea of constitutional pluralism [51]. In addition, **Labayle** and **Sudre** noted that the accession as envisaged until now "indicates almost mechanically a vertical or hierarchical connection with regard to the relationship between the legal system of the European Union and that of the Convention which seems hardly consistent with a modern design of the relationship between legal systems and, above all, is out of step with the flexible connection that is embodied by the criterion of equal protection of the "Bosphorus case" [...]. The accession places the ECtHR at the top of the structure and makes the ECJ subordinate"[52].

Conclusions: the future of EU accession to the ECHR

The doctrinal reactions have been, especially at first, rather reserved vis-à-vis the approach taken by the Court. With greater insight, a number of authors have, however, expressed more nuanced judgments, particularly regarding the future of the EU accession to the ECHR. Thus, **Krenn** highlights that the opinion "might […] not be the dramatic blow to ECHR accession as perceived by many, but rather an important element in a reflection process on how to interlock supranational human rights protection in Europe. The CJEU might be overly protective but its concerns are not spurious. They can be accommodated in a manner to reflect the notion that autonomy and effectiveness are not EU *sui generis*, but constitutional concerns common to all ECHR Contracting Parties" [53]. **Simon** concedes that "many objections put forth by the Court of Justice are legally sound and politically legitimate", although he regrets "that the declaration of incompatibility was as comprehensive and leaves little possibility for the draft agreement to be adopted" [54]. Other authors are surprised in relation to the critical reactions of most commentators. For example **Tesauro**, who defends the need to preserve the specificity of EU law, particularly in view of the growing importance of fundamental rights in the case law of the Court of Justice [55].

[49] ACKERMANN, T. *et al*., cit. *supra* note 4, p. 14-15; see also GONZÁLEZ VEGA, J., "La «teoría del big bang» o la creciente distancia entre Luxemburgo y Estrasburgo", La Ley Unión Europea, nº 25, 2015, pp. 17-50, p. 34.

[50] EECKHOUT, P., cit. *supra* note 7, p. 989.

[51] HALBERSTAM, D., cit. *supra* note 1, p. 108.

[52] LABAYLE, H., and SUDRE, F., cit. *supra* note 8, p. 17.

[53] KRENN, C., cit. *supra* note 13, p. 167.

[54] SIMON, D., cit. *supra* note 14, p. 8.

[55] TESAURO, G., "Bocciatura del progetto di accordo sull'adesione dell'Unione europea alla Cedu: nessuna sorpresa, nessun rammarico", Il foro italiano, nº 2, 2015, p. 77-87, p. 85-87.

In any event, a significant number of commentators believe that, after the opinion, the accession remains perfectly possible.[56]

Nevertheless, for the accession to take place, the vast majority of the doctrine stresses the need to respond to concerns raised by the Court in its opinion. While, for some commentators, the solution could involve a reopening of negotiations in the Council of Europe, such as **Krenn**, who believes that "[t]he prospects of such re-negotiations should be favourable"[57], the majority opinion is to seek solutions within the framework of the Union. As noted by **Tomuschat** , it may be difficult to obtain the agreement from the Member States of the Council of Europe which are not part of the Union, since "[d]ie weitreichenden Forderungen des EuGH […] darauf hinauslaufen, den EGMR eines erheblichen Teils seiner Schutzfunktion zu entkleiden"[58].

Be that as it may, a part of the doctrine considers that all or most of the objections raised by the 2/13 opinion can be overcome, in some cases by adopting the solutions suggested by the Court of Justice itself.[59] In this context, some authors, like **Jacqué**, note that only "a certain number of conditions can be easily met as regards the technicalities with an amendment to the agreement," while for other issues, such as the CFSP and the mutual trust between Member States, the solution is not easy[60]. Therefore, according to several commentators, a revision of the treaties would be necessary[61].

Finally, some authors are considering a more political rather than legal solution, such as **Spaventa**, who proposes that the political institutions of the Union and the Member States "make a clear and unambiguous commitment to fundamental rights, without entering in a direct collision course with the CJEU. […] The three political institutions could therefore issue a joint declaration restating their commitment to fundamental rights, and clarifying that they would consider a finding by the ECtHR of incompatibility between an act of the EU institutions and the Convention as binding […]. Furthermore, a declaration of all Member States could undertake to do the same in relation to a potential conflict between a provision of primary law and the Convention"[62].

[OROMACR] [LOIZOMI]

[GARCIAL]

[56] See, for example, PETIT, N., et PILORGE-VRANCKEN, J., cit. *supra* note 4, p. 830, KRENN, C., cit. *supra* note 13, p. 166-167, FERNÁNDEZ ROZAS, J.C., cit. *supra* note 48, p. 49, or LLOPIS NADAL, P., "La necesidad procesal de la adhesión de la Unión Europea al CEDH: un asunto que continúa pendiente tras el Dictamen 2/13 del TJUE", Revista Electrónica de Estudios Internacionales, nº 29, 2015, p. 1-39, p. 12-14.

[57] KRENN, C., cit. *supra* note 13, p. 164.

[58] TOMUSCHAT, C., cit. *supra* note 18, p. 133.

[59] HALBERSTAM, D., cit. *supra* note 1, p. 146; see also FERNÁNDEZ ROZAS, J.C., cit. *supra* note 48, p. 50.

[60] JACQUÉ, J.-P., cit. *supra* note 2, p. 42.

[61] ALONSO GARCÍA R., "Sobre la adhesión de la UE al CEDH (o sobre cómo del dicho al hecho, hay un gran trecho)", Revista Española de Derecho Europeo, nº 53, 2015, p. 11-16, p. 16; see also SIMON, D., cit. *supra* note 14, p. 9, BESSELINK, L., CLAES M., amd REESTMAN, J., "A Constitutional Moment: Acceding to the ECHR (or not)", European Constitutional Law Review, 2015, p. 2-12, p. 5-7, HALBERSTAM, D., cit. *supra* note 1, p. 144, et GRABENWARTER, C., "Das EMRK-Gutachten des EuGH", Europäische Zeitschrift für Wirtschaftsrecht, nº 5, 2015 p. 180.

[62] SPAVENTA, E., cit. *supra* note 21, p. 55-56; see also PETITE, M., "The battle over Strasbourg: The protection of human rights across Europe has suffered a setback, thanks to the Court of Justice of the European Union", Competition Law Insight, vol. 14, nº 2, 2015, p. 10-11, p. 11.

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