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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. 1/2016* includes, in particular, a ruling of the ECtHR clarifying the right to freedom of religion in the workplace, in the light of Article 9 of the ECHR (p.6). It will also cover a ruling of the German Constitutional Court concerning the possibility for the legislator to derogate from an international convention enshrining the primacy of a subsequent federal law over international law (practice of "treaty override") (p. 10). The edition then highlights a ruling of the Czech Constitutional Court concerning the constitutionality of the electoral threshold of 5% provided for by national regulations governing elections to the European Parliament. Furthermore, the edition will focus, firstly, on the amendment of the law on the Constitutional Court in Poland (p. 48) and, secondly, on the law providing for a referendum on keeping the United Kingdom in the European Union (p. 49). And finally, the doctrinal echoes (p.51) pertain to the comments on the Court's rulings in flyLAL-Lithuanian Airlines case (C-302/13, EU:C:2014:2319) and CDC Hydrogen Peroxide case (C-352/13, EU:C:2015:335) concerning the application of the jurisdictional rules of (EC) Regulation No. 44/2001 to actions for damages resulting from violations of the competition law of the Union.

Note that the Reflets bulletin is temporarily available in the "À la Une" section of the Court of Justice intranet, as well as, permanently, on the Curia website (www.curia.europa.eu/jcms/jcms/Jo2_7063).

The bulletin is also available in English on the website of the Association of Councils of State and the Administrative Jurisdictions (ACA) (http://www.aca-europe.eu/index.php/en/).

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A. Case law

I. European and international jurisdictions

European Court of Human Rights

ECHR - The right to freedom of religion - Refusal of a social worker working in a public hospital to refrain from wearing a veil - Non-renewal of her employment contract - Violation of Article 9 of the ECHR - Absence

In a ruling dated 26 November 2015, the ECtHR has elaborated on the right to freedom of religion, in the event of non-renewal of the employment contract of a social worker working in a public hospital France, on the grounds of refusing to refrain from wearing the veil. The ECtHR found no violation of Article 9.

According to the ECtHR, the disciplinary measure in question constituted interference in the right of the applicant to manifest her religion. However, the ECtHR first noted that this interference was prescribed by law, particularly by Article I of the Constitution, which states that France is a secular Republic ensuring equality before the law for all citizens, and by the case law of the Council of State and the Constitutional Council, according to which neutrality is a fundamental principle of public service and constitutes an element of State secularism.

The ECtHR then held that said interference pursued the legitimate purpose of protecting the rights and freedoms of others. It entailed, in particular, preserving respect for all religious beliefs of the patients, beneficiaries of the public service and recipients of the neutrality requirement imposed on the applicant, by ensuring strict equality for them. In addition, the ECtHR reiterated that safeguarding the principle of secularism is an objective that is in line with the underlying values of the ECHR.

On the question of whether the interference was necessary in a democratic society, the ECtHR found that the national courts had held that the principle of neutrality of the employees applied to all public services, and not just educational services. It also noted that the neutrality requirement imposed on the applicant was all the more imperative since she was dealing with patients who are mentally fragile and dependent and that wearing a veil was considered an ostentatious demonstration of religion, incompatible with the obligation of neutrality of public employees in the exercise of their duties. In this regard, the ECtHR noted that it had already accepted that States could invoke the principles of secularism and neutrality to justify restrictions on the wearing of religious symbols by public servants, especially teachers working in public establishments. It further stated that it also could accept it in the circumstances of this case, since the neutrality of the public healthcare service can be considered related to the attitude of its officials and demands that patients not be able to doubt their impartiality.

Finally, as regards the review of the principle of proportionality, firstly, the ECtHR noted that regulating the wearing of religious clothes or symbols in the workplace was not harmonised and that States enjoyed a large degree of discretion in this area, a degree of discretion that is all the greater in healthcare institutions. Secondly, the ECtHR analysed the specificity of the French approach and noted that the principle of secularism and neutrality was a founding principle of the State and that the State's neutrality was required to be followed by officials who represent it. According to the ECtHR, it was not the Court’s responsibility to assess, as such, the legality of the French model and it was the administrative court that was required to ensure that the administration does not interfere disproportionately with the freedom of conscience of public officials. It is an assessment that had been made in this case. Thus, the ECtHR held that in the circumstances of the case, the national authorities had not exceeded

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their degree of discretion in finding no possible reconciliation between the religious convictions of the applicant and the obligation not to manifest them, and in thus deciding to uphold the State's requirement of neutrality and impartiality.

This ruling resulted in two separate opinions from judges O'Leary and Gaetano.

European Court of Human Rights, ruling dated 26.11.15, Ebrahimian / France (request no. 64846/11),
www.echr.coe.int

IA/34153-A

[DUBOCPA]

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ECHR - Right to life - Prohibition of inhuman or degrading treatment - Right to liberty and security - Order to deport Syrian nationals to their country of origin - Detention of such nationals pending deportation - Violation of Articles 2, 3, 5 § 1 f), 5 § 4 and 34 of the ECHR - Application of Article 46 of the ECHR

In a Grand Chamber ruling dated 15 October 2015, the ECtHR ruled, for the first time, on the issue of return of Syrian refugees to their countries of origin, in the current context of conflict.

The applicants, two Syrian nationals and one stateless Palestinian from Syria, had been arrested in Russia for violation of rules on residence of foreigners and for working without a permit. Following this arrest, they were ordered to be deported to Syria and, pending the execution of the measure, they had been detained. Moreover, their applications for refugee status or temporary asylum, submitted before or after their arrest, had been classified or rejected. The ECtHR held, unanimously, that the applicants' deportation to Syria would lead to the violation of Article 2 (right to life) and/or Article 3 (prohibition of torture and inhuman or degrading treatment) of the ECHR. It analysed the actual risk that would result from such a measure, in view, firstly, of the current situation in Syria and secondly, of the personal situation of the applicants. In this regard, the ECtHR noted in particular that international reports on the Syrian crisis revealed incidents of extreme violence and that the applicants were from cities where the fighting was particularly intense (Aleppo and Damascus). It therefore concluded that they were entitled to assert that a return to Syria would pose a genuine risk to their lives and personal safety.

Furthermore, the ECtHR stressed the unprecedented nature of this case, due to the fact that most European countries had suspended deportations to Syria; these were moratoria that the United Nations High Commissioner for Refugees (UNHCR) had approved. It also noted certain inefficiency in judicial practices in Russia, with regard to the rejection of the applicants' requests for asylum. Firstly, the Federal Migration Service and court bailiffs had clarified in the circulars that temporary asylum should be granted to people who fear being exposed to inhuman treatment and who are unable to return to Syria safely, and that, given the fact that the entry into Syria had become impossible, there would be problems for the enforcement of the deportation measures. Moreover, national courts, including the Supreme Court, had found it necessary to revoke the deportation measures in comparable situations.

The case also involved deprivation of liberty of the applicants pending deportation. The ECtHR found a violation of Article 5, paragraph 1, f) (right to liberty and security) and Article 5, paragraph 4 (right to an examination of the lawfulness of the detention by a judge within a short time) of the ECHR, owing to the absence in domestic law of any provision for obtaining judicial review of measures ordering such deprivation of liberty. It reiterated that, for this reason, it had already found a violation of Article 5, paragraph 4, in several cases against Russia.

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The ECtHR also stated that Russia had hindered the applicants' right to refer the matter to it, by violating Article 34 (right of individual recourse) of the ECHR, in particular, by restricting the possibility for the applicants to communicate with their lawyers and their representatives.

In addition, the ECtHR considered it necessary to take individual measures to implement the ruling, pursuant to Article 46 of the ECHR, and ordered Russia to secure the release of the applicants, two of whom were still detained.

European Court of Human Rights, ruling dated 15.10.15, LM e.a. / Russia (request nos. 40081/14, 40088/14 and 40127/14), www.echr.coe.int

IA/34155-A

[DUBOCPA]

* ***Briefs (ECHR)***

ECHR - Freedom of expression - Measure blocking access to a website - Violation of Article 10 of the ECHR

By its ruling of 1 December 2015, the ECtHR ruled on the measure blocking access to YouTube, a website that allows users to send, watch and share videos, for a period of more than two years, ordered by a Turkish court on the grounds that this site contained a dozen videos insulting to the memory of Atatürk, under the law on publications and infringements on the Internet. The applicants, working in academic positions in various Turkish universities had brought opposition proceedings against this measure in the national courts, which had been rejected, with those courts having declared the blocking measure compliant with the law. The ECtHR found a violation of Article 10 (freedom of expression) of the ECHR.

The ECtHR found that the applicants had been for a long time unable to access YouTube and that in the capacity of active users, in the circumstances of the case, they could legitimately claim that the blocking measure had affected their right to receive and communicate information and ideas.

Furthermore, the Court observed that YouTube is a unique platform for the dissemination of information of special interest, especially in political and social matters, as well as for the emergence of citizen journalism.

The Court also held that the law did not allow the national court to completely block access to the Internet and, specifically, to YouTube due to a part of its contents.

European Court of Human Rights, ruling dated 01.12.15, Cengiz and Others / Turkey (request nos. 48226/10 and 14027/11), www.echr.coe.int

IA/34161-A

[NICOLLO]

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ECHR - Right to privacy - Hungarian law of 2011 relating to covert operations of anti-terrorist surveillance - Violation of Article 8 of the ECHR

By its ruling of 12 January 2016, the ECtHR ruled on the Hungarian law on covert anti-terrorist surveillance, introduced in 2011, which laid down the powers of a special task force within the police department. The ECtHR found a violation of Article 8 (right to privacy) of the ECHR.

Firstly, the ECtHR noted that the applicants, employees of a non-governmental organisation, were entitled to claim the status of victims, to the extent that said law directly affected all users of communications systems and all homes.

Secondly, it considered that the interference in question pursued a legitimate aim, i.e.

ensuring national security and the prevention of any disorder or crime. The ECtHR thus admitted that the forms taken by terrorism have resulted in the possibility of governments using massive communications surveillance techniques. However, it held that the Hungarian law did not provide for sufficient safeguards against misuse, with regard to taking and implementing such surveillance measures, and the possible compensation for damages resulting from their implementation. It noted in particular that, potentially, any person could be subjected to covert surveillance, that the task force did not provide evidence in support of a request for interception of communications that the duration of the surveillance mandate was not clear from the law and that judicial supervision was not provided. The ECtHR reiterated that any covert surveillance measure must be strictly necessary for the preservation of democratic institutions or for obtaining vital information in the context of a given operation.

Furthermore, the ECtHR referred repeatedly to the analysis of the Court of Justice in the Digital Rights Ireland ruling (C-293/12 and C-594/12, EU:C:2014:238) , in which it ruled on the validity of 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.

European Court of Human Rights, ruling dated 12.01.16, Szabó and Vissy / Hungary (request no. 37138/14),

www.echr.coe.int

IA/34154-A

[DUBOCPA]

EFTA Court

European Economic Area - Environment - Assessment of the impact of certain projects on the environment -

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Directive 2011/92 - Right of appeal against an authorisation decision - National legislation precluding the possibility for a non-governmental organisation to challenge some aspects of the assessment of the impact of a project on the environment - Inadmissibility - Consequences

The EFTA Court received a request for an advisory opinion on the interpretation of Directive 2011/92/EU concerning the assessment of the impact of certain public and private projects on the environment (hereinafter "Directive"). In essence, the request raised two main issues. First, the question of whether a restriction on the right of appeal of the environmental organisations under Article 11 of the Directive may become illegal if a government takes a general decision on the environmental compatibility of a project but makes the resolution of fundamental issues relating to the environmental compatibility of the project subject to subsequent authorisation procedures, under specific laws. Secondly, the question of whether Article 11 of the Directive has direct effect with regard to the environmental impact assessment procedure notwithstanding the fact that the Directive was transposed into national law only after completion of said procedure. In addition, the request also pertained to the question of the legal consequence of a violation of the right of appeal provided for by the Directive.

In this respect, as regards the first question, the EFTA Court held that:

"It is not compatible with Article 11 of Directive to adopt a general environmental impact assessment decision, while deferring the resolution of crucial issues relating to the project's environmental effects such as those set out in Article 5(3) of Directive to subsequent authorisation procedures with no access for non-governmental organisations promoting environmental protection to a review procedure before a judicial body. Whether

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crucial issues are at stake in this case is for the national court to decide."

It noted, in this regard, that:

"(…) Article 11 of the Directive aims at ensuring that the public concerned, including environmental [non-governmental organisations], has wide access to justice with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health (see, for comparison, Case C-72/12 Gemeinde Altrip and Others, paragraph 28).

Article 11(2) of the Directive leaves the EEA States a margin of discretion to choose at what stage an [environmental impact assessment] decision may be challenged. However, the measures adopted by an EEA State must not render practically impossible or excessively difficult the exercise of rights conferred by the Directive (see Case E-24/13 Casino Admiral, paragraph 69 and case law cited).

Reserving the resolution of crucial environmental issues such as those set out in Article 5(3) of the Directive to subsequent procedures, under which there is no access to judicial review for environmental NGOs cannot be reconciled with Article 11 of the Directive, as it would deprive them of their right of challenge.

A development consent may be subject to conditions, as is provided for in Article 9(1) of the Directive. However, such conditions cannot undermine or substitute for the public participation objective of the Directive. Crucial issues relating to a project's environmental effects cannot be deferred to subsequent procedures, as long as those procedures exclude environmental NGOs from the rights under the Directive. The imposition of strict conditions in this context is therefore inadequate (…)." (points 62-64)

Then, as regards the legal consequences of a violation of the right of appeal, the second question, the EFTA Court held that:

"EEA law does not require that non-implemented EEA rules can be relied on directly before national courts in the EFTA States. However, it follows from EEA law that when interpreting national rules the national court is bound to apply, as far as possible, the methods of interpretation recognised by national law in order to achieve the result sought by Directive. This obligation arises on the day the respective legal act is made part of the EEA Agreement."

Finally, with regard to the last question, the EFTA Court held that:

"It is for the referring court, in the light of the principles of equivalence and effectiveness, to determine the remedies that are available for an infringement of Article 11 of Directive."

EFTA COURT, Judgment of 02.10.15, E-3/15,

Liechtensteinische Gesellschaft für Umweltschutz / Gemeinde Vaduz, www.eftacourt.int

IA/34151-A

[LSA]

II. National courts

1. Member States

Germany

Relation between national law and international law - Primacy of a subsequent federal law - "Treaty override" - Eligibility under constitutional law

The Bundesverfassungsgericht (Federal Constitutional Court) admitted, in the light of German constitutional law, the possibility for the federal legislator to waive an international convention enshrining the primacy of a subsequent Federal Law over international law (practice of "treaty override").

In this case, the Bundesverfassungsgericht was hearing a matter on constitutionality pertaining to a national provision

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that subjected the benefit of a tax exemption to certain conditions. However, that provision was contrary to a preventive bilateral convention on double taxation concluded before the adoption of said provision. Accordingly, the Bundesfinanzhof (Federal Finance Court) was convinced of its unconstitutionality.

Noting that under the German Constitution any international convention is only deemed a simple Federal Law, the Bundesverfassungsgericht held that the German legislature must, under the principles of democracy and parliamentary discontinuity, be able to override an earlier international convention. Therefore, the conflict arising from the incompatibility between an international convention and a subsequent Federal Law shall be resolved by the application of general rules of primacy of the lex posterior and lex specialis, irrespective of the possible violation of international law, which may engage the State's responsibility.

The Bundesverfassungsgericht stressed that such an approach is contrary neither to the spirit of openness and support to international law which characterises the German Constitution (Völkerrechtsfreundlichkeit des Grundgesetzes), nor to the principle of rule of law, which does not imply the general primacy of international law.

Bundesverfassungsgericht, Order of 15.12.15, 2 BvL 1/12, www.bundesverfassungsgericht.de

IA/34143-A

[KAUFMSV]

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Primacy of Union law - Limits under national law - Respect for the constitutional identity - Human dignity and the principle of culpability - Grounds for refusal to execute a European arrest warrant

In this decision, the Bundesverfassungsgericht (Federal Constitutional Court) applied its doctrine of respect for constitutional identity that it has established, as well as that of the control of ultra vires acts, which was the core issue in the Gauweiler and others case (C-62/14, EU:C:2015:400), returned by the same court, to limit the principle of the primacy of Union law.

In this case, the Bundesverfassungsgericht upheld the appeal of an American citizen against the decision of a German court that had ordered the release of the applicant to Italy for the execution of a European arrest warrant. Noting, firstly, that the applicant had been sentenced in absentia and, secondly, that under Italian law, he would not have the option of requesting for adequate investigative measures in case of dispute concerning such conviction before the Italian courts, the Bundesverfassungsgericht held that the execution of the European arrest warrant in question is not in line with the principle of human dignity and, more specifically, the principle of culpability, guaranteed by the German constitution. However, as this element falls under the German constitutional identity, the execution of the warrant had to be refused notwithstanding the principle of the primacy of Union law and the existence of the Framework Decision 2002/584/JAI on the European arrest warrant and the surrender procedures between Member States.

However, the Bundesverfassungsgericht put the immediate enforceability of this decision into perspective, stressing that the obligation of the court hearing the request for execution of the European arrest warrant to refuse to act on it also stemmed from the framework decision itself, more particularly from a broad interpretation of Article 4 bis, paragraph 1, d), i), of the latter, read in conjunction with the Charter of Fundamental Rights, and that there was therefore no need, in this case, to set aside said framework decision in accordance with the mechanism for control of constitutional identity. The fact remains that it refused to make a preliminary ruling on this point, noting in this regard that “the EU law is not opposed to the obligation of the German court

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to ensure the safeguarding of the applicant's rights and, therefore, to refuse to execute the arrest warrant".

The exact scope of that decision remains uncertain, but it could be a step towards a "Solange 3" doctrine insofar as it can be interpreted in the sense that the Bundesverfassungsgericht ensured a (European) level of protection of fundamental rights alongside the Court of Justice and the ECtHR.

Bundesverfassungsgericht, Order of 15.12.15, 2 BvR 2735/14,

www.bundesverfassungsgericht.de

IA/34142-A

[KAUFMSV]

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Community Code on the rules governing the movement of persons across the border (Schengen Borders Code) - National regulations allowing preventive identity checks in border areas - Inadmissibility

With this decision, an administrative court of first instance has, in the light of the Melki and Abdeli (C-188/10 and C-189/10, EU:C:2010:206) and Adil (C-278/12 PPU, EU:C:2012:508) rulings, found several provisions of the law on federal police (Bundespolizeigesetz) allowing the latter to carry out identity checks in an area of thirty kilometres from the border, which are incompatible with Article 21 of the (EC) Regulation no. 562/2006 establishing a Community code on the rules governing the movement of persons across the border (Schengen Borders Code). Under this provision, the abolition of internal border controls does not affect the exercise of police powers by the competent authorities of the Member State under national law, insofar as the exercise of these powers does not have an effect equivalent to that of border checks.

Noting in particular that said provisions allow preventive checks without providing for any indication of their intensity and frequency, the court, since Germany has not temporarily reinstated border controls in accordance with the Schengen Borders Code, ruled out the national provisions in question and, therefore, found illegal the checking of a German citizen of Afghan origin, conducted aboard a train in the region bordering France. The decision is currently under appeal.

This case fits in the context of the pending case A, C-9/16, which raises the same issue. It must also be noted that on 16 October 2014, the Commission, in accordance with Article 258 of the TFEU, sent Germany a formal notice on the matter (No. 20144130).

Verwaltungsgericht Stuttgart, ruling dated 22.10.15 1 K 5060/13,
Juris

IA/34144-A

[KAUFMSV] [LERCHAL]

Austria

Environment - Assessment of the impact of certain public and private projects on the environment - Directive 2011/92 - Right of appeal of the public concerned - National regulations denying people living near the site concerned this right - Inadmissibility

On 5 November 2015, the Verwaltungsgerichtshof (Administrative Court, hereinafter the "VwGH"), delivered its judgment in a case in the context of which it had earlier heard an appeal brought by persons living in the vicinity of a site that underwent interventions that may affect the environment. They had acted as members of the "public concerned" within the meaning of Article 1, § 2, d) of Directive 2011/92/EU on the assessment of the impact of certain public and private projects on the environment. The VwGH addressed the question of the extent to which the applicants could assert

their interests in a situation in which the applicable provisions did not give them a party status in an administrative procedure to determine whether a project requires an environmental impact assessment (EIA).

Through several administrative decisions, the regional authority of Styria (Steiermärkische Landesregierung) had authorised a Formula 1 racetrack project in accordance with the regional law on festive events in Styria (Steiermärkisches Veranstaltungsgesetz, hereinafter "StVAG"), by repeatedly increasing the number of authorised spectators from 25,000 to 95,000 people. The persons living in the vicinity, affected by this project in many ways, had requested authorities to assess whether an EIA procedure was required. The competent authority, stating that the applicants did not enjoy party status under the applicable provisions, dismissed that application as inadmissible for lack of standing. Neither the StVAG nor the Austrian law on EIA (Umweltverträglichkeitsprüfungsgesetz 2000), transposing Directive 2011/92/EU provide for a party status for persons living in the vicinity of an affected site in an administrative procedure to determine whether a project requires an EIA.

Hearing the dispute as the final court of appeal, the VwGH found, taking into account the relevant case law of the Court, particularly the Peterbroek (C-312/93; EU:C:1995:437) and Trianel (C-115/09, EU:C:2011:289) rulings and, more particularly, the Gruber ruling (C-570/13, EU:C:2015:231), that the purpose of Directive 2011/92/EU to grant the "public concerned" wide access to justice was not ensured in this case, since those living in the vicinity of the site were not able to exercise their right in any administrative procedure, which was contrary to the principle of effectiveness of the EU law.

Based on the case law of the Court, the VwGH decided not to refer the matter to the Court for a preliminary ruling. Accordingly, it left unenforced Article 25 of the StVAG concerning the party status, to grant the applicants party status in accordance with the provisions of Directive 2011/92/EU, having direct effect, in order to give them the possibility of invoking the need for an EIA procedure in a proceeding according to the StVAG.

Verwaltungsgerichtshof, ruling dated 05.11.15, 2014/06/0078,

https://www.vwgh.gv.at

IA/34146-A

[LEEBCOR]

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Social security - Migrant workers - Family allowances - Allowance for child care - National law making the benefit of a family allowance subject to the completion of insurance periods in the country - Obligation to take into account insurance periods completed on the territory of another member State

In its ruling of 22 October 2015, the Oberster Gerichtshof (Supreme Court, hereinafter the "OGH") ruled on the conformity of a provision of the law on the allowance for childcare (Kinderbetreuungsgeldgesetz) with the EU law, in particular Regulation No. 883/2004/EC on the coordination of social security systems.

The dispute was between an Austrian family living in Austria and the competent national authority. The father was a frontier worker in Germany since 1999 and had not been in paid employment in Austria during the six months preceding the request for the childcare allowance in question. The request for payment of this allowance for the period of his parental leave had been rejected by the competent Austrian authority on the basis of Article 24 of the law on child care allowance. This provision states in paragraph 2 that only salaried employment on Austrian territory during the six months preceding the request are considered to grant such an allowance.

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Hearing the dispute as the final court of appeal, the OGH decided to not first refer the matter to the Court for a preliminary ruling. Taking into account the case law of the Court, including the Dodl and Oberhollenzer (C-543/03, EU:C:2005:364), Wiering (C-347/12, EU:2014:300) and Stewart (C-503/09, EU:2011:500) rulings, the OGH found that the child care allowance in question is a family allowance within the meaning of Article 1, z), of Regulation No 883/2004. The OGH held that the rules of priority in cases of overlapping under Article 68 of Regulation No. 883/2004 could be applied, since the parental leave of the mother could be classified under salaried employment within the meaning of said Regulation. According to Article 68, paragraph 1 b), point i of Regulation no. 883/2004, the Austrian institution (child's place of residence) was therefore the competent authority for the family allowances in the case.

As regards compliance with EU law, the OGH held that the principle of equal treatment enshrined in Article 4 of Regulation no. 883/2004 was contrary to the refusal to take into account, for granting the child care allowance, the period during which a comparable allowance was collected in another member State in the same way as if it had been completed in his own territory. Consequently, the OGH described Article 24 of the law on childcare allowance, referring to the Klöppel ruling (C-507/06, EU:C:2008:110) of indirect discrimination, as contrary to EU law. Therefore, owing to the primacy of Union law, the OGH disapplied this provision in the case.

Oberster Gerichtshof, ruling dated 22.10.15, 10 ObS 148/14h,
https://www.ogh.gv.at

IA/34149-A

[LEEBCOR]

Bulgaria

EU law - Rights granted to individuals - Violation by a Member State arising from the application of a national legislation contrary to EU law - Obligation to compensate for the damage

In a ruling of 26 November 2015, the Yambolski okrazhen sad (Yambol Regional Court) ruled on violation of the EU law attributable to the national parliament, the Varhoven kasatsionen sad (Supreme Court of Cassation) as well as the national agency for privatisation, resulting from the application of a national legislation contrary to said law.

The applicant is a company named “Zavod za kauchukovi uplatniteli AD” and brought before the court of first instance (Starozagorski okrazhen sad) an action for annulment of a security provided on the assets of said company on the basis of paragraph 8 of the transitional and final provisions of the law on control of privatisation and post privatisation. This appeal had been upheld. The National Agency for Privatisation had appealed this ruling before the Plovdiv appellate court (court of second instance), which revoked it. The company in question therefore appealed in cassation to the Supreme Court of Cassation. The applicant had asked the court of second instance and the court of cassation to refer the matter to the Court of Justice for a preliminary ruling so that the latter rules on the conformity of the aforementioned national provision in the EU law. However, by its order of 28 June 2010, the Varhoven kasatsionnen sad had ended the dispute.

Following this decision, the applicant brought an action for damages against the national parliament, the Supreme Court of Cassation and the National Agency for Privatisation, for purposes of compensation for damage arising from the application of paragraph 8 of the transitional and final provisions of the law on control of privatisation and post privatisation.

As part of this action, the applicant relied on two pleas. Firstly, it argued that, through the adoption and implementation of the aforementioned national provision, the Bulgarian authorities (the National Parliament and the National Agency for

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Privatisation) had infringed Article 63 of the TFEU on the prohibition of restrictions on movement of capital between Member States and between Member States and other countries. Secondly, the applicant company argued that, in this case, the Supreme Court of Cassation had failed in its duty to refer questions on interpretation to the Court of Justice within the meaning of Article 267, section 3 of the TFEU.

Insofar as the Bulgarian law contains no rules on the action for damages relating to compensation for damage caused to individuals by the violation of EU law arising from the application of a national legislation that is not in conformity with EU law, the Yambolski okrazhen sad ruled admissible the action on the basis of Article 4, paragraph 3 of the TFEU, which requires in particular that Member States refrain from any measure that could jeopardise the attainment of the Union's objectives. When providing grounds for its judgement, the national court also relied on the case law of the Court of Justice under which each Member State is obligated to compensate for the damage caused to individuals by violations of EU law that are attributable to them, particularly when the violation results from a national legislation contrary to EU law (see Brasserie du pêcheur et Factortame, C- 46/93 et C-48/93, EU:C:1996:79, Köbler, (C-224/01, EU:C:2003:513) and Francovich rulings (combined cases C-6/90 and C-9/90, EU:C:1991:428)).

Basing its ruling on Article 4 of the TFEU, the Yambolski okrazhen sad concluded that Parliament had violated the EU law in a "characterised" manner by failing to take urgent measures to revoke said paragraph 8 that contradicts the rules of EU law. The court also made this argument by pointing out the infringement procedure no. 2012/4002 initiated by the Commission against Bulgaria so that urgent measures to revoke the legislation contrary to the EU law are taken. It is to be noted that the said infringement procedure was the basis for the revocation of the paragraph in question by the legislative authority.

Therefore, the Yambolski okrazhen sad condemned the Supreme Court of Cassation, the National Agency for Privatisation and the National Parliament to pay a sum of 702 028 leva (about 350,000 euros) to the applicant seeking compensation for damages suffered by it.

Okrazhen sad Yambol, ruling dated 26.11.15, http://www.osyambol.org/ser/final/2015/11/0063d814/407b0415.htm

IA/33677-A

[NTOD]

Spain

EU law - Primacy - National court ignoring the case law of the Court of Justice - Violation of the fundamental right to judicial protection guaranteed by the Constitution

In a ruling of 5 November 2015, the plenary session of the Constitutional Court declared for the first time that the ignorance by a Spanish court of the case law of the Court of Justice, implies a violation of the Spanish Constitution, particularly the fundamental right to judicial protection guaranteed by Article 24 thereof.

The applicant, a teacher employed as an interim public service employee in a public secondary school had sent to the competent authority a request for obtaining a six-year premium for continuing education. This request had been rejected particularly on the basis of a decision of the Council of Ministers of 11 October 1991, which reserved the collection of this premium only to teachers employed as statutory public service employees. The applicant had appealed against the decision rejecting his appeal, citing two rulings and an order of the Court of Justice in which the Court had declared that the Spanish legislation in question was incompatible with Clause 4, point 1 of the framework agreement on fixed-term work concluded on 18 March 1999, which is provided in the Annexe to the Directive 1999/70/EC of the Council of 28 June 1999

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concerning the framework agreement ETUC, UNICE and CEEP on fixed-term work. These were the Del Cerro Alonso, (C-307/05, EU:C:2007:509) and Gavieiro Gavieiro and Iglesias Torres (C-444/09 and C- 456/09, EU:C:2010:819) rulings as well as the Lorenzo Martínez order (C-556/11, EU:C:2012:67).

As the action was dismissed on appeal by the Superior Court of Justice of Madrid, the applicant had brought an action for infringement of fundamental rights and freedoms ("recurso de amparo") before the Constitutional Court, which it upheld. Firstly, the Constitutional Court stressed that the incompatibility of the Spanish legislation with Directive 1999/70/EC had been recognised repeatedly by the Court of Justice and, in particular, that the case that resulted in the Lorenzo Martínez order cited above, had a factual framework identical to that of the main proceedings. Subsequently, the Constitutional Court noted that although this case law of the Court of Justice had been expressly invoked by the applicant in the proceedings before the Superior Court of Justice of Madrid, the Court had neither cited this case law nor examined its applicability in this case. In these circumstances, the Constitutional Court ruled that disregarding a case law applicable to the case, especially when the applicant has invoked it, causes, other than a violation of the principle of primacy of EU law, a violation of the fundamental right to judicial protection guaranteed by Article 24 of the Spanish Constitution. It therefore repealed the ruling of the Superior Court of Justice of Madrid.

Tribunal Constitucional (Constitutional Court) (Pleno), ruling dated 05.11.15, no. 232/2015 (Recurso No. 1709-2013),
http://hj.tribunalconstitucional.es/en/Resolucion/Show/24698

IA/33735-A

[OROMACR]

**** Briefs (Spain)***

Border controls, asylum and immigration - Immigration policy - Status of third-country nationals who are long-term residents - Directive 2003/109 - Annulment of a decision to deport a third-country national who was a long-term resident and had committed an offence

The Superior Court of Justice of the Autonomous Community of Madrid revoked the decision of the Spanish government's delegate approving the expulsion of a citizen of a third country following the commission of a crime by said citizen. Said decision had been taken on the basis of Article 57, paragraph 2, of the Organic Law 4/2000, concerning the rights and freedoms of foreigners in Spain and their social integration, stressing that that said provision does not mention the criterion of the degree of integration of third country nationals in Spanish society as one of the criteria to be taken into account to decide whether or not the nationals must be deported, including cases where they have children of Spanish nationality residing in Spain.

The Superior Court of Justice of the Autonomous Community of Madrid reiterated the case law of the Spanish Constitutional and Supreme Courts ruling that Article 57, paragraph 2, of the Organic Law 4/2000 must be interpreted in the light of Article 12 of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, by taking into account the personal circumstances of the nationals concerned, and revoked the decision to deport considering that it would prejudice the right to family life of the children of Spanish nationality residing in Spain of the citizen concerned, as enshrined in the Spanish Constitution and the ECHR.

Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso administrativo, ruling dated 28.07.15, no. 526/2015 (Recurso no. 384/2015),
www.poderjudicial.es

IA/33740-A

[GARCIAL]

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Protection of personal data - Directive 95/46/EC - Right to be forgotten on the Internet - Search engine of a periodical

By the ruling of 15 October 2015, the Supreme Court ruled for the first time on the right to be forgotten.

The applicants brought an action against the publisher of a daily widely circulated in Spain, claiming that, when a web user enters their name into a search engine like Google or Yahoo, the first result to be displayed among the list of results is a link to the website of the daily. However, the latter indicated that the applicants had been convicted of drug trafficking in the 80s. Given that this information was published in the paper version of the daily, the applicants maintained that the dissemination via the website of the publisher constituted a violation of the right to honour and privacy. They had therefore requested the removal of this information from said site.

The trial judge had granted the request. Following the decision of the Court of Appeal confirming the decision at first instance, the publisher appealed to the Supreme Court.

In its judgment, the Supreme Court, referring to the Court's Google Spain ruling (C-131/12, EU: C:2014:317) points out, firstly, that the website publishers have the option of informing search engine operators that they want a particular piece of information published on their website excluded from the index of these engines. Accordingly, it held that in this case, the publisher was responsible for processing the data published on its website.

In addition, the Supreme Court, citing the ruling of the ECtHR, Times Newspapers Ltd / United Kingdom (judgment of 10 March 2009, request nos. 3002/03 and 23676/03), noted that the press fulfils an accessory function by creating archives from published information and putting them at the disposal of the public. Thus, freedom of information in this case is of less importance.

Then, the Court specified that, while the personal data in question were accurate, they were nevertheless inadequate, irrelevant or excessive in relation to the purpose of their processing.

In conclusion, firstly, the Court demanded the publisher to use certain tools and codes to prevent search engines from indexing its website and therefore using the data contained therein. Secondly, it found that under the principle of proportionality, it was not necessary to exclude the personal published data from the publisher's website. In this regard, the Supreme Court noted that such a measure would be detrimental to the right to freedom of information, also stating that the right to be forgotten cannot constitute censorship of information that is already published.

Tribunal Supremo, Sala de lo Civil, ruling dated 15.10.15, no. 545/2015 (Recurso nº 2772/2013), http://www.poderjudicial.es

IA/34160-A

[GARCICR]

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Environmental protection - Greenhouse gas - Emissions - Qualification of criminal activity - Sentence for a term of imprisonment

In an unprecedented decision, the Supreme Court sentenced two contractors to 2.5 years in prison for greenhouse gas emissions.

The Court held that this was a criminal activity negatively impacting the environment and natural resources because of the harmful effects of the emissions on the ozone layer. Such emissions involved a risk of damaging the

ecosystem on account of their long duration in time.

The convicts had crushed over 2,000 refrigerators, some taken from recycling centres, releasing the equivalent of more than 3,000 tonnes of CO2 without prior authorisation.

The refrigeration systems act as cooling apparatus and as such use gases made of substances derived from chlorine, which, as pointed out by the Supreme Court, deplete the ozone layer, as indicated in Regulations (EC) 2037/2000 and 1005/2009 on substances that deplete the ozone layer.

The Supreme Court reiterated its previous case law according to which "contamination by dumping of toxic waste does not require the existence of an intentional act but only the mere knowledge of the elements involved and the willingness to perform the action". The Court had already rejected the qualification of recklessness in the case of a contractor knowing the toxicity of the substance transported, the obligation of an administrative authorisation and the origin and quantity of the waste involved. In this situation, even if it was not possible to deduce intent to damage the environment or create a risk, logic and experience helped conclude that this person was aware of the situation and had, in spite of this, decided to execute his action (see, to that effect, STS 1538/2002, 24 September 2002).

However, the Court rejected the application of the aggravating factor of the sentence for the exercise of illegal activity on the ground that the contractors had a municipal license for executing a professional activity.

Tribunal Supremo, Sala de lo Penal, ruling dated 13.10.15, no. 521/2015, Recurso no. 144/2015; ECLI :ES :TS :2015 :4342, http://www.poderjudicial.es/cgpj/es/Poder_Judicial

IA/34152-A

[NUNEZMA]

Estonia

**** Brief***

Procurement contracts - Bidder having obtained State aid - Possibility to reject its bid - Conditions

Hearing an appeal for annulment, the administrative chamber of the Supreme Court ruled, in a judgment dated 2 December 2015 on the conditions under which the contracting authority, by administering the procedures for public procurement, may reject the bid of a bidder having obtained State aid. In this case, the applicant had argued that the contracting authority was not entitled to award a public contract to a bidder who obtained State aid to present its bid.

Firstly, the Supreme Court, relying on case law of the Court (see, for example, the France/Commission ruling, C-482/99, EU:C:2002:294), unlike the administrative courts, claimed that the mere fact that the aid comes from resources of a private company does not rule them out from being described as State resources within the meaning of Article 107 of the TFEU if, as in this case, said company, owned by the State, remains constantly under public control.

Regarding the possibility for the contracting authority to reject the bid of a bidder having obtained State aid, it will be useful, according to the Supreme Court, to examine the national provisions corresponding to Article 55 of Directive 2004/18/EC on the coordination of procedures for the award of contracts for public works, supply and services and Article 57 of Directive 2004/17/EC coordinating the procurement procedures of in the fields of water, energy, transport and postal services. In this regard, the Supreme Court noted, referring, among others, to the judgment of the Court in the Data Medical Service case (C-568/13, EU:C:2014:2466), that neither the EU legislature nor the national legislature provided any options

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other than to reject the bid of a bidder having obtained state aid when, firstly, there are reasons to suspect that the bid was abnormally low because of the aid sought and, secondly, said bidder was not able to demonstrate, in an adequate timeframe fixed by the contracting authority, that the aid in question was granted legally or that it did not have any effect on the bid. If this is the case, it is up to the contracting authority to consider the possibility of rejecting this bid.

By admitting the existence of a broad discretionary power of the contracting authorities to determine the method of calculation of an anomaly threshold of an "abnormally low bid" (see, to that effect, combined cases of Impresa Lombardini, C-285/99 and C-286/99, EU:C:2001:640), the Supreme Court approved the findings of the administrative courts according to which, in this case, the contracting authority had no reason to suspect that the bidder having obtained State aid submitted an "abnormally low bid". It therefore dismissed the action in its entirety.

Supreme Court, Administrative Chamber, ruling dated 02.12.15, case no. 3-3-1-50-15, published on the website of the Supreme Court, www.riigikohus.ee

IA/34209-A

[HUSSAAV]

France

Border controls, asylum and immigration - Asylum policy - Criteria and mechanisms for determining the Member State responsible for examining a request for asylum - Transfer of an asylum seeker to the Member State responsible for examining his request - Right to be informed - Procedure for granting refugee status in the Member States - Review of the request - Right to be heard

In two rulings, dated 21 October and 9 November, the Council of State provided details on the lack of rights for asylum seekers, firstly, to be informed of the extension of the deadline for their transfer to the Member State responsible for examining their request and, secondly, to be systematically heard in the case of a review of their request.

In the first case, an asylum seeker had to be transferred to Poland, Member State responsible for examining his request, pursuant to Regulation (EC) No 343/2003. According to Article 20, paragraph 2 of said Regulation, a transfer must normally take place within six months, which however may be increased to twelve or eighteen months (due to imprisonment or flight). In this case, the transfer timeframe had been extended following the flight of an asylum seeker who was then held in detention pending his surrender to the Polish authorities. He had then sought reversal of this detention on the grounds that the extension of the transfer timeframe resulted in a new decision to surrender, which had to be notified to him to be invoked against him and be able to base a detention measure. Unlike the court of first instance and court of appeal, the Council of State held that the extension of the transfer timeframe resulted in maintaining in force the initial decision to surrender to the authorities of the State responsible. Therefore, at the time of notification of the initial decision to surrender, it is entirely up to the competent authorities to inform the applicant about cases and conditions under which the transfer timeframe can be extended to twelve or eighteen months, when this decision to surrender is the basis, after extension, of a detention measure, as well as about the existence, date and reasons of the extension. This information can, in this case, be included in the grounds of the detention measure.

In the second case, an asylum seeker had requested a review of his request. This new request had been rejected as manifestly unfounded, in that it contained no new elements, without a personal interview with the applicant having taken place. The Council of State ruled that the code of entry and residence of foreigners

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and the right to asylum was not contrary to article 12, paragraph 2 and article 28, paragraph 2 of Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing the refugee status in Member States. It reiterated that the case law of the Court specifies that if the right to be heard is an integral part of respect for the rights of defence, a general principle of EU Law, it is up to Member States, within their procedural autonomy, to determine the conditions under which respect for this right is ensured. However, according to the Council of State, the right to be heard cannot be interpreted as meaning that the competent national authority required, in any case, to hear the person concerned, when the latter has already had the opportunity to present his views on the decision in question in a useful and effective manner. In addition, the Council of State noted that the foreign national could produce, in support of his request and at any time of the investigation, all written observations and any additional elements. In addition, to dismiss the plea alleging breach of Article 41 of the Charter of Fundamental Rights invoked in this case, the Council of State reiterated that the case law of the Court of Justice specifies that said Article is applicable not to the Member States but only to the institutions, bodies and associations of the Union (Mukarubega ruling, C-166/13, EU:C:2014:2336).

Council of State, ruling dated 21.10.15, 7th and 2nd combined sub-sections, No. 391375, Council of State, ruling dated 09.11.15, 9th and 10th combined sub-sections, No. 381171, www.legifrance.gouv.fr

IA/33675-A
IA/33676-A

[DUBOCPA]

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Social security for migrant workers - Applicable legislation - Regulations (EEC) No 1408/71 and 574/72 - Scope and probative value of E 101 certificates in respect of social security institutions and courts of the host Member State

In three judgments delivered on 6 November 2015, two judgments in cassation and a preliminary ruling, the Court of Cassation ruled on the enforceable value attached to the E 101 certificate issued by a Member State pursuant to (EEC) Regulation no. 574/72 fixing the procedure for implementing Regulation (EEC) no. 1408/71 on the application of social security schemes for salaried employees, non-salaried employees and their family members who move within the European Union. The E 101 certificate provides evidence of the law that is applicable, in case of social security, to a worker who is not affiliated in the host Member State.

The first two cases (nos. 14-10.182 and 14-10.193) pertained to a French company that had entrusted a part of its business to a Portuguese company. The latter had been the subject of statements of offence for clandestine work, thus triggering the implementation of the financial solidarity of the French company, for the payment of social security contributions. The Court of Cassation had been asked about the interpretation of the provision of the Labour Code establishing the list of documents that a client must collect from its subcontractor, which is established or domiciled abroad, to be regarded as having carried out the checks prescribed by the law and prevent its financial responsibility from being engaged. These documents include a document certifying the regularity of the social situation of the co-contracting party under Regulation (EEC) no. 1408/71. While the Court of Appeal had considered that any relevant documents was enough, the Court of Cassation ruled that the document referred to in said article of the Labour Code was the E 101 certificate. Thus, it was the only document that could prove the regularity of the social situation of the Contractor, established or domiciled abroad, in respect of its employees within the meaning of Regulation (EEC) No 1408/71.

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The third case involved workers on board the river cruise liners for a German company with a branch in Switzerland (similar to a Member State for the purposes of the application of Regulation (EEC) No 1408/71), who carried out their activity on French territory, such that the conditions for application of the special arrangements provided for in Regulation (EEC) No 1408/71 were clearly not met. The German company, to challenge a remedial measure for social security contributions, based on the application of French law to these workers, availed itself of E 101 certificates attesting to the their affiliation to Swiss law. After reiterating the case law of the Court of Justice on the binding nature of the E 101 certificate, noting that, as long as it has not been withdrawn or declared invalid by the institution that issued it, the certificate is binding on the competent authority and the courts of the member State in which the employee works (see, in particular, Barry Bank ruling, C-178/97, EU:C:2000:169, Fitzwilliam Executive Search ruling, C-202/97, EU:C:2000:75, and Herbosch Kiere, C-2/05, EU:C:2006:69), the Court of Cassation nevertheless interrogated the Court of Justice on whether the enforceable value attached to the E 101 certificate remained in the specific case of clear fraud. The Court of Cassation emphasised the repetitive nature of this issue related to tax and social optimisation strategies, and the risk posed to the principles of free movement of workers, freedom to provide services and to competition in the internal market.

Court of Cassation, plenary session, rulings of 06.11.15, no. 13-25.467, no. 14-10.182, no. 14-10.193, www.legifrance.gouv.fr

IA/33672-A
IA/33673-A
IA/33674-A

[MANTZIS] [DUBOCPA]

**** Briefs (France)***

Tax system of parent companies - Reverse discrimination - Principles of equality before the law and public burdens – Violation

By a decision of 3 February 2016, the Constitutional Council, hearing a priority preliminary ruling on constitutionality, declared the provisions of Article 145, 6-b ter of the General Tax Code as unconstitutional. The provisions of this article, as applicable to the main proceedings, stated that the benefit of the tax system for parent companies was not applicable to income from securities to which voting rights are not associated.

The Constitutional Council found that these provisions, as interpreted consistently by the Council of State, indicated a difference of treatment between companies benefitting from the tax system for parent companies according to which the income from investments to which voting rights are not associated were either paid by a subsidiary established in France or in a third country or by a subsidiary established in a member State of the Union. The non-application of said provisions for the income from investments of subsidiaries established in a member State of the Union other than France resulted from clear and unconditional provisions of Directive 90/435/EC of 23 July 1990 on the common system of taxation applicable to parent companies and subsidiaries in different Member States, which did not provide for such exclusion of income from securities without voting rights.

Given this difference in treatment constituting reverse discrimination, the Constitutional Council having found that, firstly, these companies are, given the purpose of the tax system, namely to encourage the involvement of parent companies in the economic development of their subsidiaries, in the same situation and that, secondly, the difference in treatment, based on the geographical location of the subsidiaries is irrelevant to the objective pursued by the legislature, it found a breach of the principles of equality before the law and before public burdens.

Constitutional Council, decision of 03.02.16, Metro Holding France, QPC 2015-520, www.legifrance.gouv.fr/

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IA/33682-A

[CSN]

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Lawyers - Professional regulations - Website - Domain Name

In two judgments of 9 November 2015 and 23 December 2015, the Council of State ruled on the legality of the provisions of the internal national rules adopted by the National Council of Bars (NCB) relating to the terms according to which a lawyer may choose a domain name for his website.

Firstly, the Council of State ruled that the NCB is competent, under the regulatory powers vested in it by law, to enact the rules challenged. Secondly, it considered that as the information relating to domain names does not constitute a commercial communication, as defined in paragraph 12 of Article 4 of Directive 2006/123/EC on services in the internal market, the professional rules governing the naming of websites of persons or companies under regulated professions falls outside the scope of said Directive.

Accordingly, finding that the challenged rules, firstly, pursue the objectives of general interest of protecting the integrity of the legal profession and constitute no disproportionate interference with either the proprietary right of lawyers or their freedom of communication or freedom of entrepreneurship and, secondly, do not prevent lawyers from member States of the European Union from making a reference of their professional title in the domain name they choose, the Council of State decided, in both cases, to reject the request.

Council of State, subsections 1 and 6 combined, decision of 09.11.15, appeal No. 384728, www.legifrance.gouv.fr/

IA/33680-A

Council of State, sub-section 6, decision of 23.12.15, appeal No. 390792, www.legifrance.gouv.fr/

IA/33681-A

[CSN]

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Air transport - Regulation No. 1107/2006 - Rights of disabled persons and persons with reduced mobility when travelling by air - Prohibition to refuse to transport - Refusal to board of disabled passengers travelling without an accompanying person - Discrimination on grounds of disability

An airline had refused to board passengers with disabilities on the grounds that they were not allowed to travel alone in the aircraft of that company, even though they frequently travelled without anyone with other airlines. Sentenced by the criminal court on account of the refusal to provide a service, the airline filed an appeal for the judgment, which was thereafter confirmed.

By its judgment of 15 December 2015, the Criminal Chamber of the Court of Cassation endorsed this sentencing by holding, firstly, that the refusal to board due to a disability violates Regulation (EC) no. 1107 / 2006 concerning the rights of disabled persons and persons with reduced mobility when they travel by air. Article 3 of that regulation establishes the principle that prohibits airlines, bound by an obligation of assistance and staff training, from refusing service to a disabled person or a person with reduced mobility. The derogation, provided for in Article 4 of said regulation and authorising the company to require that such person be assisted, can only be based on security reasons justified and required by law. The derogation, provided for in Article 4 of said regulation and authorising the company to require that such person be assisted, can only be based on security reasons justified and required by law.

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In this case, the high court found that the airline could not use this derogation for two reasons. Firstly, it provided no evidence to demonstrate that its refusal to board the persons concerned was justified by security reasons and required by the law. Secondly, the airline deliberately

decided, unlike other airlines, not to train its staff in the provision of assistance to disabled persons according to their specific requirements. The Court of Cassation thus upheld the appeal court's decision to characterise the offence of discrimination provided for in Article 225-2, paragraph 4, of the Criminal Code.

Court of Cassation, Criminal Division, judgment of 15.12.15, No. 13-81.586, www.legifrance.gouv.fr

IA/33678-A

[CZUBIAN]

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Free movement of goods - Prohibition of quantitative restrictions and measures having equivalent effect - Conditions for acquisition of artworks - Exceptions - Protection of national treasures

By this judgment, the Council of State rejected the request of a Dutch collector to refer to the Court of Justice the question of whether Article L.123-1 of the Heritage Code, which provides for an exercise by the State of pre-emption rights on any public sale of artworks or any private sale of artworks, was compatible with Articles 34 and 35 of the TFEU.

In its judgment, the Council of State noted that this pre-emption right, by which the State is subrogated to a bidder or a buyer, is only a condition for acquiring artworks, with no impact on the free movement of works within the European Union. Thus, it does not constitute a quantitative restriction on imports or exports or a measure having an effect equivalent to such a restriction, prohibited by Articles 34 and 35 of the TFEU. The Council of State also pointed out that the contested pre-emption is, in any event, not contrary to Articles 34 and 35 of the TFEU, since the work to which it relates has the status of a

"national treasure" under the derogating provisions of Article 36 of the TFEU.

Council of State, sub-section 10 and 9 combined, 18.12.15, No. 363163,

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031649088&fastReqId=1416049218&fastPos=1

IA/33679-A

[WAGNELO] [BENSIJO]

Greece

Excise duties - Directive 92/12/EEC - Charter of Fundamental Rights - Article 50 - Ne bis in idem principle - Concurrent criminal and administrative sanctions for the same misconduct - Smuggling - Violation of said principle - Absence

A few days after the judgment of the ECtHR in the Kapetanios e.a. / Greece case, by which it found a violation of the principle *of ne bis in idem* for the accumulation of a criminal penalty with an administrative, tax and customs penalty (ECtHR judgment of 30 April 2015, Kapetanios and others / Greece, request nos. 3453/12, 42941/12 and 9028/13), the plenary session of the Simvoulio tis Epikrateias (Council of State, hereinafter the "SE"), in its judgment of 8 May 2015, ruled on the interpretation of the principle of *ne bis in idem* enshrined in Article 4 of Protocol no. 7 of the ECHR and Article 50 of the Charter of Fundamental Rights. Hearing an appeal in cassation, the SE had the opportunity to rule on whether the national legislation that authorises the accumulation of customs and criminal penalties in case of smuggling of excise goods is compatible with the principle of *ne bis in idem*.

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After recalling that in the absence of harmonisation of EU legislation in the field of customs offences, the Member States are authorised to choose the penalties that seem appropriate to them (Commission/Greece ruling, C-210/91, EU:C:1992:525 and Siesse/Director da Alfândega de Alcântara ruling, C-36/94, EU:C:1995:351), the SE finds that law 2127/1994, transposing Directive 92/12/EEC on the general arrangements for, and the holding, movement and monitoring of products subject to excise duty, had specified that all persons who commit or attempt to commit customs offences referred to in Article 89 of the Customs code will be required to pay increased taxes.

Referring to the case law of the Court (Åkerberg Fransson ruling, C-617/10, EU:C:2013:105, Commission/Greece ruling, mentioned above, Siesse/Director da Alfândega de Alcântara ruling, mentioned above, de Andrade, C-213/99, EU:C:2000:678, Louloudakis, C-262/99, EU:C:2001:407, Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski, C-188/09, EU:C:2010:454, Urbán, C-210/10, EU:C:2012:64), the SE finds that the provisions of the Customs Code and the Law 2127/1994, which transposed Directive 92/12/EEC, implement the Union law. Therefore, the Charter of Fundamental Rights is applicable.

The SE, after presenting the case law of the Court concerning the principle of *ne bis in idem* (SGL Carbon/Commission ruling, C-308/04 P, EU:C:2006:433 and Limburgse Vinyl Maatschappij e.a./Commission ruling, C-238/99 P, EU:C:2002:582), reiterated, firstly, that it does not prevent a member State from imposing successively, for the same acts of smuggling, a customs penalty and a criminal penalty insofar as the first penalty is not of a criminal nature. By applying the criteria adopted in the Engel judgment of the ECtHR, the SE concluded that the increased tax as provided by the Customs Code is not of a criminal nature. It is not a penalty involving deprivation of liberty and it does not express social disapproval required for this type of penalty. As a result, when the customs penalty is not criminal in nature, the principle of *ne bis in idem* is not applicable.

However, according to the minority opinion within the SE, the customs penalty is of a criminal nature, given the nature of the offense itself and the degree of severity of the penalty that the person concerned may be subject to. According to this minority opinion, the increased tax can go from double to tenfold of the excise duty and other fees due in respect of the object of the offence and is intended for both preventive and repressive purposes.

Symvoulio tis Epikrateias, plenary session, decision of 08.05.15, no. 1741/2015, NOMOS database

IA/34156-A

[PANTEEI]

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Competition - Association of undertakings - Concept - Association of dentists with a public law status

By the judgment of 21 January 2015, the Simvoulio tis Epikrateias (Council of State, hereinafter “SE”), sitting in plenary session, ruled on the application of competition rules to professional activities. In particular, the SE rejected an appeal for annulment filed by the associations of dentists brought against a judgment of the Dioikitiko Efeteio Athinon (Administrative Court of Appeal of Athens) which confirmed the decision of the Competition Commission. In that decision, the Competition Commission had found that the associations of dentists had restricted competition by setting minimum compulsory tariffs for all their members.

The applicants argued that the associations of dentists, which are legal persons according to public law and are entrusted with a public service mission, are exempt from the application of Article 101 of the TFEU. Referring to the established case law of the Court (in particular the Pavlov e.a. judgment, C-180/98 to C-184/98, EU:C:2000:428, Arduino, C-35/99, EU:C:2002:97, Commission/Italy judgement, C-35/96, EU:C:1998:303, Wouters e.a. judgement, C-309/99, EU:C:2002:98; judgment of 30 March

2000, Consiglio Nazionale degli Spedizionieri Doganali / Commission, T-513/93, EU:T: 2000: 91), the SE rejected that argument.

This is the first time that the SE, interpreting the provisions of Law 703/1977 in the light of European competition law, held that *the association of*

dentists can be considered an "association of undertakings" within the meaning of this law as well as Article 101 of the TFEU. This assessment was retained regardless of the association's status of legal person according to public law, as well as the exercise on it of a supervisory authority of the State (Articles 43, 74, 76 of Law 1026/1980) and its objective of protecting public health (Article 3 of law 1026/1980). The high court further ruled that *dentists* provide dental services against remuneration and assume the financial risks associated with this activity. As a result, these persons perform an economic activity and therefore constitute "undertakings" within the meaning of competition law, without the fact that this is a regulated profession altering this conclusion.

Symvoulio tis Epikrateias, plenary session, decision of 21.01.15, no. 150/2015, NOMOS database

IA/34157-A

[PANTEEI]

Hungary

Police and judicial co-operation in criminal matters - Framework Decision on the European arrest warrant and the surrender procedures between Member States - Rule of specialty - Warrant issued for prosecution - Conviction for an offence that caused the surrender - Worsening of the penalty for recidivism - Enforcement of a custodial sentence suspended due to this conviction which has occurred during the order of respite of the execution for another offence

The Supreme Court recently adopted a general ruling on the interpretation of the rule of specialty concerning the European arrest warrant. Criminal Decision no. 1/2015 titled "decision in the interest of the unification of the case law" is binding on the lower courts that, until now, had divergent views on the question of whether the consent of the judicial authority of the State of enforcement is necessary

for the execution by deprivation of liberty suspended when the surrender of the person sought is motivated by another offense committed during the stay of execution of this prison sentence.

Firstly, the Supreme Court reiterated the purpose and history of the European arrest warrant and the European legal instruments adopted in this matter. Then, it interpreted the rule of specialty, enshrined in Article 27, paragraph 2, of the Framework Decision 2002/584, as amended by Framework Decision 2009/299. This rule is repeated almost in the same words in the Hungarian regulations. According to the rule of specialty, which is a guarantee of the extradition law, a person who has been surrendered cannot be prosecuted, sentenced or deprived of liberty for an offence committed before his surrender and other than that which was the cause of said surrender.

The Supreme Court then found that the rules governing police and judicial co-operation in criminal matters between the Member States do not contain provisions on the applicable criminal penalties. Similarly, no rules limit the power of the national court to aggravate the punishment because of a subsequent offence. These matters, according to the Supreme Court, fall under the scope of the national law.

Thus, as defined in the Framework Decision, when a person is surrendered to Hungary, following an arrest warrant issued by the Hungarian authorities for prosecution, the rule of specialty does not prevent the Hungarian court from drawing all the consequences of the subsequent offence when determining the penalty for the offence that caused the surrender. Also, the rule of specialty does not prevent the Hungarian court from ordering, without the consent of the judicial authority of the State that surrenders the person sought, the execution of a suspended sentence involving deprivation of liberty, due to the commission of a

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new offence during the suspension of execution of that previous penalty. provides that a person must not be surrendered if they did not appear in person during the proceedings leading to the sentence or the detention order in respect of which the European arrest warrant was issued. Specifically, the person sought argued that they were arrested in Italy and was represented by a lawyer at the time of the arrest. They were released without charges and had left Italy without being informed of any proceedings. They stated further that they did not know the lawyer acting on his behalf in such proceedings and therefore could not have given him the authorisation to represent them.

His lawyer argued that, in order to comply with Article 45 of the national law, the absence of a wanted person at their trial should be specified in the European Arrest Warrant.

The High Court decided that the surrender was contrary to Article 45 of the European Arrest Warrant Act 2003. Despite the Minister's position according to which the fact that the arrest warrant was not presented in the correct format is irrelevant as long as the Court is convinced that the information contained in the entire warrant considered with the additional documentation sent by the Italian court is able to meet the conditions set out in Article 45, the High Court, referring to the recital 6 of the framework decision, concluded that it is the responsibility of the issuing authority to ensure that the requirements, in the present case, have been respected.

Therefore, the surrender of the person sought was refused.

High Court, ruling dated 08.02.16, Minister for Justice and Equality / Ahmed [2016] IEHC 83, www.courts.iee

IA/34324-A

[CARRKEI]

**** Briefs (Ireland)***

Border controls, asylum and immigration - Asylum procedure - Directive 2004/83/EC - Asylum seeker required to show that his

Kúria, decision of 28.09.15, no 1/2015.BJE, http://www.lb.hu/hu/joghat/12015-szamu-bje-hatarozat

IA/33734-A

[VARGAZS] [HEVESIRE]

Ireland

Police and judicial co-operation in criminal matters - Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States - Surrender requested by Italy - Request dismissed

On 8 February 2016, the High Court dismissed a request from Italy concerning the surrender of a person subject to a European arrest warrant issued in 2012.

The warrant stated that the person had been convicted in absentia in 2005. The conviction was upheld on appeal in 2009 and concerned the application of a prison term of 20 years for that person, following their participation in an association aimed at committing crimes involving the import, sale, distribution, trade and possession of illegal narcotic substances. The individual concerned was arrested in Ireland in 2014 and released on bail after a certain period in custody.

The person sought opposed their surrender, arguing, among other things, that their surrender to Italy would be contrary to Article 45 of the European Arrest Warrant Act 2003, namely the national law transposing the framework decision 2002/584/JHA. Article 45 of the national law

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home State has manifestly failed to protect its people

By a decision of 12 January 2016, the High Court dismissed the appeal brought against the judicial review of a decision of the Refugee Appeals Tribunal refusing to grant refugee status to a Bolivian mother and her two children, who feared the abusive behaviour of her husband / their

father, on the grounds that they could rely on State protection in Bolivia.

The applicant, who suffered from domestic abuse, demanded refugee status, arguing that she would not be protected in Bolivia, given the close links that her husband shared with the government and national police forces.

The High Court dismissed the request holding that, given the special circumstances of the mother and her children, the State protection in Bolivia would be available to them if they wished to use it. It confirmed the relevant previous case law relating to Article 7, paragraph 2 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, reiterating that an asylum seeker must show that the national authorities are manifestly failing to protect its people.

Finally, the High Court confirmed that the applicant's request was rejected on the grounds that the Refugee Appeals Tribunal had ruled that the Bolivian state would provide protection to asylum seekers, because of their special situation.

High Court, ruling dated 12.01.16, L.A.A. (Bolivia)/ Refugee Appeals Tribunal, [2016] IEHC 12, www.courts.ie

IA/34322-A

[CARRKEI] [LEECATH]

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Border controls, asylum and immigration - Asylum procedure - Directive 2004/83/EC - Membership of a particular social group as defined by Article 10 of the Directive

By judgment of 26 February 2016, the Court of Appeal considered that a couple of asylum

seekers who violated the one-child policy in China and who might therefore be subject to persecution, could be considered as members of a "particular social group" as defined by Article 10 of Directive 2004/83/EC.

The couple concerned had left China in 2000 after the birth of a second child, which violated the one-child policy of the Chinese regime. In addition, following this birth, the mother was forced to undergo permanent sterilisation. Regarding their request for asylum, the applicants argued that, if they returned to China, the authorities would make them an example, in that they would be subjected to negative treatment and be ostracised by society. They also argued that after his return, the husband would be forced to undergo permanent sterilisation and that their children would be affected by the adverse consequences of their return to China.

After their request for asylum was rejected by the Refugee Tribunal, an appeal was filed before the High Court. The latter repealed the decision of said Tribunal on the basis of the finding that the applicants could be considered part of a particular social group as defined by Article 10 of the Directive, to the extent that the birth of a second child gave them a characteristic that could not be altered. However, given that this issue was of particular importance, the High Court upheld an appeal of the Irish State.

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The appeal before the Court of Appeal revolved around the question of whether the couple could actually be considered as belonging to a particular social group as defined by Article 10 of Directive 2004/83/EC. The court held that, two following conditions: either the common context of the group members cannot be changed or the group is perceived as such by society.

In this regard, the Court of Appeal, referring to the case law of other countries vis-à-vis common law, stressed that it is impossible to comply with a strict and narrow definition of "particular social group". In fact, the Court of Appeal held that Article 10 of the Directive is not intended to be restrictive. Thus, even if the one-child policy is a general rule, it is in violation of the fundamental rights of the persons concerned. Specifically, it held that the appeal should be rejected, since the concept of "particular social group" may be understood as including persons who break an unjust law and, accordingly, are subject to penalties or exclusion from society.

Court of Appeal, ruling dated 26.02.16, SJL & Anor. / Refugee Appeals Tribunal & Ors, [2016] IECA 47, www.courts.ie

IA/34323-A

[CARRKEI] [LEECATH]

Italy

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

By judgment of 20 January 2016, the Court of Cassation held that in matters of serious VAT fraud, the specific rules contained in Article 160, last part of the third section and Article 161, paragraph 2 of the criminal code, providing for, notwithstanding the rules for determining of the standard limitation period, a shorter period for the limitation as regards VAT, do not apply.

This decision, in the context of the implications of the Taricco and others ruling (C-105/14, EU:C:2015:555), deserves to be mentioned because of its motivation diverging from that contained in the decision of 18 September 2015 of the Court of Appeal of Milan in which the Constitutional Court was hearing a question on the constitutionality of the national law ratifying the Lisbon Treaty under Article 25 of the Constitution enshrining the principle of legality of penalties (see *Reflets No. 3/2015* , p.37).

The Court of Cassation recognised the principle of primacy of Union law, with the effect that the Italian courts have the obligation not to apply the cited provisions when they consider that their application prevents the Italian State from effectively fulfilling its obligation of protecting the financial interests of the Union, imposed by Article 325 of the TFEU, as interpreted by the Court of justice in the Taricco ruling mentioned above.

Unlike the Court of Appeal of Milan, the Court of Cassation, noting that all the conditions set out in the aforementioned Taricco ruling were met in this case and referring to the case law of firstly, the fact that a certain number of people face the risk of persecution does not alone qualify them as members of a particular social group. With reference to Directive 2004/83/EC, it reiterated that the applicant must meet one of

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the Constitutional Court (in particular on decision 236 of 2011), held that the case did not involve a constitutional issue, since the rule contained in the Article 160, last part of the third section and Article 161, paragraph 2, of the criminal code, is outside the scope of the principle of legality provided for in Article 25 of the Constitution.

The ongoing debate within the doctrine, pending the decision of the Constitutional Court (the hearing was set for 18.10.16), is very lively.

Court of Cassation, ruling dated 15.09.15, no. 2210/16, http://www.giurcost.org/cronache/index.html

IA/34210-A

[RUFFOSA]

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International agreements - ECHR - Relation between national law and ECHR - Obligation for the national courts to provide a compatible interpretation of the domestic law vis-à-vis the ECHR in accordance with the Constitution - Duty to apply a rule set by the ECtHR only in the presence of a consolidated case law - Decision of the ECtHR in the Varvara/Italy case - Confiscation that cannot be imposed in the absence of a conviction for the offense of unfair subdivision - Absence of a consolidated case law

By this judgment, the Court of Cassation confirmed the principle that the Constitutional Court expressed in its decision of 1 April 2015, No. 49/2015 (see *Reflets No. 2/2015*).

The Constitutional Court was, in the case at the origin of this decision, called upon to rule on the constitutionality of Article 44, paragraph 2 of the D.P.R. 6 June 2001, no. 38, which provides for in case of unfair subdivision, the confiscation of property, even in cases where the offence was subject to limitation by lapse of time and, consequently, even in the absence of a criminal conviction of the accused. The Constitutional Court upheld two principles. Firstly, it clarified that it is only in the presence of a consolidated case law of the ECtHR that the Italian court is obliged to apply the rule laid down by said Court and, therefore, give the Italian law a meaning consistent with this rule. Secondly, the Constitutional Court stated that the duty of the ordinary courts to interpret domestic law in accordance with the ECHR remains subordinate to the duty to adopt a constitutionally oriented reading since such an approach reflects the predominance of the Constitution over the ECHR.

By this judgment, the Court of Cassation confirmed that the national court is obliged to comply with the interpretation of the ECHR provided by the ECtHR when the case law of said Court is well-consolidated.

In this case, the Supreme Court was asked to rule on an appeal challenging the legality of a mandatory confiscation order adopted on the basis of Article 174 of the legislative decree 42/2004, against a defendant suspected of having transferred artistic and historical assets abroad without authorisation of free movement. In his appeal, the defendant had challenged the court's decision to confirm said confiscation in the absence of a criminal conviction since an order for termination of proceedings for limitation had been adopted in his favour.

The Court of Cassation, in dismissing the appeal, found that the mandatory confiscation of cultural property is an administrative measure also applicable when the criminal responsibility of the person who transferred said property abroad has not been established and that such a conclusion cannot be called into question on the basis of the principle contained in the Varvara/Italy judgment (request no. 17475/09), which is not a consolidated principle.

Corte di Cassazione, Sezione penale, judgment of 10.06.15, No. 42458,

IA/34410-A

[LTER]

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European Union - Police and judicial cooperation in criminal matters - Framework decision on the European arrest warrant and the surrender procedures between Member States - European arrest warrant issued following an alert in the Schengen Information System - Decision restricting personal freedom - Obligation to state reasons

In a judgment of 3 December 2015, the Court of Cassation ruled on the obligation to state reasons for an "act restricting personal freedom" adopted following a request for execution of a European arrest warrant (hereinafter "EAW").

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The facts at issue originated in an appeal by an Italian citizen against the order of the Court of Appeal of Salerno enabling his surrender to the Maltese authorities due to the fact that the reasons for the restriction of personal freedom did not appear in said order.

An EAW submitted to the Italian authorities by the Maltese authorities through the Schengen Information System (hereinafter the "SIS"), had been issued against said Italian citizen accused of producing and selling narcotic substances.

According to the Court of Appeal, as defined by Article 11 of the law of 22 April 2005 no. 69 transposing the framework decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, as a result of an SIS alert, the authorities of the executing State arrest the wanted person. In addition, the arrested person must be, immediately or within twenty-four hours after the SIS alert, handed over to the President of the Court of Appeal in whose district the person was arrested and the Minister of Justice must be informed.

The Court of Cassation confirmed that the SIS alert corresponds to a request for provisional arrest and that the arrest is thus mandatory. In addition, it held that the national authorities must ensure that the alert is entered by a competent authority of a Member State in accordance with the necessary formalities.

However, according to the Court of Cassation, the restriction of personal freedom does not result from the regulation of the EAW. The decision on provisional measures and that leading to the surrender of a person to the authorities of another Member State are separate. Therefore, the restrictive measure must be justified. Finally, the Court of Cassation stated that the temporary detention cannot be applied automatically for each surrender to a foreign country, as the risk of flight needs to be checked and justified each time.

Accordingly, the Court of Cassation quashed the decision of the Court of Appeal by finding that the order allowing the surrender of a person to the authorities of another Member State must contain the reasons based on which personal freedom was restricted, even if the EAW is sent by the Italian authorities by initiating an alert in the Schengen information system.

Court of Cassation, ruling dated 03.12.15, No. 47995, www.dejure.it

IA/34407-A

[GLA]

**** Brief (Italy)***

Community law - Community law and international law - Crimes against humanity - Actions for compensation - Jurisdiction of foreign ***and national courts***

In two judgments of 28 and 29 October 2015, the Court of Cassation again ruled on immunity of States for war crimes.

In the first judgement, the Court stated that, based on the case law of the Constitutional Court, jurisdictional immunity of States cannot be applied when a State has committed an act of international terrorism. However, the decision of a court of another State cannot be executed in Italy when the foreign court does have international jurisdiction.

In the case that resulted in this judgment, the Court of Cassation was referred a matter by the parents of a US citizen who was a victim of an attack, following the refusal of the Court of Appeal of Rome to issue an exequatur for the American judgment to compensate the parents.

The Court of Cassation, unlike the Court of Appeal, which had applied the rule of international law on jurisdictional immunity of States, excluded the application of this rule on the basis of the judgment of the Constitutional Court of 22 October 2014, No. 238 (see *Reflets No. 3/2014*). However, the Court of Cassation upheld the decision of second instance due to the fact that the US judgement had been delivered by a court that did not have jurisdiction.

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In the second judgment, the Court of Cassation did not recognise the jurisdictional immunity of Serbia, by requiring it to compensate the plaintiffs, after a Serbian military force member shot down a helicopter of the European Community during the conflict in former Yugoslavia.

Firstly, the Court of Cassation determined that it had jurisdiction to rule on the compensation taking into account the importance of fundamental rights in the Italian legal system.

Furthermore, the Court confirmed that the conduct of the military force member in question should be imputed to Serbia and that such conduct should be described as a war crime. Thus, owing to the seriousness of the crime committed, the Court did not recognize the jurisdictional immunity of Serbia and authorised compensation for the plaintiffs.

Corte di Cassazione, rulings dated 29.10.15, no. 43696 and 28.10.15, no. 21946, www.dejure.it

IA/34408-A
IA/34409-A

[GLA]

Latvia

** Brief*

Approximation of laws - Enforcement of intellectual property rights - Directive 2004/48/EC - Principle of interpretation compliant in case of late transposition of the Directive

In a judgment of 9 December 2015, the Supreme Court ruled on the appeal brought by the holder of an intellectual property right to obtain damages because of the illegal use of such rights by others.

The case has raised the question of the delayed transposition into Latvian law of Directive 2004/48/EC on the enforcement of intellectual property rights. The timeframe for the transposition of said Directive had not been complied with, the latter having been transposed on 1 March 2007. Before that date, the Latvian law did not provide for, in the case of infringing activity, the same protection as that provided for by Article 13 of the Directive in case of infringement of the rights of a holder of an intellectual property right, namely, the payment of damages adapted to the prejudice that he has actually suffered because of the infringement.

The Supreme Court, based on the case law of the Court, particularly the Kücükdeveci ruling, C-555/07 (EU:C:2010:21), Pfeiffer e.a. ruling, C-397/01 (EU:C:2004:584), and Impact ruling, C-268/06 (EU:C:2008:223), considered that the provisions of the Latvian law on trademarks and geographical indications must be interpreted in accordance with the provisions of the Directive, even in a dispute between two private persons. The Supreme Court noted that the provision of Latvian law applicable in this case should be interpreted in the context of the content and purpose of the Directive in order to achieve the result envisaged by the latter.

Augstākās tiesas Civillietu departaments, ruling dated 09.12.15, case no. SKC-96/2015,

IA/33742-A

[BORKOMA]

The Netherlands

EU law - Rights conferred on individuals - Violation by a Member State - Obligation to compensate for damage caused to individuals - Conditions in the event of maintenance in force of a national law contrary to EU law - Need for sufficiently serious breach of EU law - Absence

In a judgment of 18 September 2015, the Supreme Court ruled for the first time, that when a Directive has not been correctly transposed

into national law, the State commits an unlawful act as defined by Article 6:162 of the Civil Code and is, thus, liable to compensate the damages suffered by people due to this unlawful act. The Supreme Court found that it was not necessary for it to respond, in this case, to the question of whether the incorrect transposition constituted a 'sufficiently' serious violation of a rule of law of the Union and whether said incorrect transposition was itself an illegality within the meaning of Article 6:162 of the civil code.

This decision originated in an action brought by a worker against the State. Following the Court's judgment in the Schultz-Hoff and Others cases (C-350/06 and C-520/06, EU:C:2009:18), the worker claimed damages on the grounds that the State had not correctly transposed Article 7 of Directive 2003/88/EC concerning certain aspects of the organisation of working time. He had, therefore, not received compensation for paid annual leave not taken.

At first instance, it was found that the State had acted unlawfully to the extent that the three conditions set by the Court in its Brasserie du pêcheur judgment (C-46/93 and C-48/93, EU:C:1996:79) were met. The State manifestly and gravely disregarded the limits imposed on its discretionary power, which is why the condition of a 'sufficiently serious breach' had been considered to be fulfilled in this case.

The Hague Court of Appeal had then dismissed the appeal brought before it by the State against the first decision, holding that the State had committed an unlawful act within the meaning of Article 6:162 of the Civil Code. This provision states that whoever commits an unlawful act towards another person is required to compensate for the damage. According to the court of appeal, the State was, therefore, required to compensate for the damage that the worker had suffered due to the incorrect transposition of Article 7 of Directive 2003/88/EC.

Hearing an appeal for annulment filed by the State, the Supreme Court upheld this judgment of the Court of Appeal. In this context, the Supreme Court referred in particular to its judgement of 9 May 1986, in which it had held that under Article 94 of the Constitution, read with Article 6:162 of the Civil Code, the State is said to have committed an unlawful act under this provision when the State enacts and/or maintains in force a national law contrary to the superior rules of law. According to the Supreme Court, this applies, under the principle of equivalence, also when the State enacts and maintains in force national law contrary to EU law. Thus, it considered that it was not necessary to examine in this case whether the conditions and, in particular, the condition of a sufficiently serious breach, established by the Brasserie du Pêcheur ruling cited above, are met.

Hoge Raad, ruling dated 18.09.15, ECLI:HR:2015:2722, www.rechtspraak.nl,

IA/34148-A

[GRIMBRA]

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Border controls, asylum and immigration - Immigration policy - Return of third-country nationals staying illegally - Directive 2008/115/EC - Prohibition on entry for a period of ten years - Reasons based on the sole ground of the nature of the offences - Insufficient reasons - Need to demonstrate a real and present danger to public order

In a judgment of 17 November 2015, delivered in a criminal case involving a third-country national, the Amsterdam Court of Appeal acquitted the latter, to the extent that the 10-year entry ban imposed against him for having committed several offences was contrary to Directive 2008/115/EC on common standards and procedures applicable in Member States for returning third-country nationals staying illegally.

The national was accused of having stayed twice in The Netherlands, while he was the subject of an entry ban.

In the first instance, the alleged offence was declared to be proved.

Hearing the case, the Amsterdam Court of Appeal overturned the first instance judgment and held that the reasoning of the Court of

Justice in the Zh. and O. Case (C-554/13, EU:C:2015:377) concerning the interpretation of Article 7, paragraph 4, of the aforementioned Directive must be applied mutatis mutandis in this case, under the application of Article 11, paragraph 2, of said Directive.

The court of appeal noted, firstly, that the Court of Justice had held in said case that Article 7, paragraph 4, of the Directive must be interpreted as precluding a national practice according to which a third-country national, who is staying illegally in the territory of a member State, is deemed to constitute a danger to public order within the meaning of that provision, on the sole ground that that national is suspected of having committed a punishable offence or crime under national law or has been the subject of a criminal conviction for such an act. However, according to the Court of Justice, a Member State is required to assess the danger to public order, within the meaning of that provision, on a case to case basis, in order to verify whether the personal conduct of the third-country national is a real and present danger to public order.

Then, the court of appeal noted that neither the content nor the scope of the Directive argues in favour of a less protective interpretation of Article 11, paragraph 2, of the Directive.

It therefore concluded that the competent Dutch authorities could not base the 10-year entry ban solely on the nature of the offences committed by the national in question, without establishing that he was a real and present danger to the public order.

Gerechtshof Amsterdam, ruling dated 17.11.15, ECLI:NL:GHAMS:2015:4751, www.rechtspraak.nl,

IA/34141-A

[SJN]

**** Briefs (The Netherlands)***

Judicial cooperation in criminal matters - Directive 2013/48/EU - Right to legal assistance - Scope

In a judgment of 22 December 2015, the Supreme Court ruled that persons suspected of having committed an offense must, from 1 March 2016, in all cases, be able to have access to assistance from a lawyer during police interrogation following their arrest, which means that they must be informed of this right before the start of the interrogation.

According to the Supreme Court, it is not clear from Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, that it requires that a suspect must, without exception, be able to have access to assistance from a lawyer during the police interrogation.

Moreover, until now, the ECtHR did not consider that there is automatically a violation of Article 6 of the ECHR when the suspect cannot have access to assistance from a lawyer during the police interrogation following his arrest.

It is beneficial to note, in this regard, that in an earlier judgment, the Supreme Court had given the Dutch legislature a deadline until 27 November 2016 to organise the assistance of a lawyer during the interrogation. However, in the interest of legal certainty, the Supreme Court decided to settle the issue on its own. It therefore considered necessary to rule on the matter to avoid recourse to the preliminary ruling in this regard. Such a referral would have a significant negative impact on a lot of cases, given that the

police interrogation plays an important role in a large number of criminal cases.

Hoge Raad, ruling dated 22.12.15, ECLI:NL:HR:2015:3608, www.rechtspraak.nl,

IA/34150-A

[SJN]

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Judicial cooperation in civil matters - Jurisdiction and enforcement of decisions in civil and commercial matters - Regulation (EC) No. 44/2001 - Special jurisdiction - Multiple defendants - Jurisdiction of the court of one of the co-defendants - Condition - Established connection - Concept of connection

In this case, the Hague Court of Appeal assumed jurisdiction, under Article 6, paragraph 1 of Regulation (EC) No. 44/2001 on jurisdiction, recognition and enforcement of decisions in civil and commercial matters, read in conjunction with Article 7, paragraph 1, of the Code of Civil Procedure, to rule on the appeal brought by several Nigerian farmers against the subsidiary Shell Nigeria and its parent company established in the Netherlands, owing to discharges of oil in Nigeria caused by leaks in a pipeline. Under the aforementioned provision, a person can be sued, if there are several defendants, in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. According to the Court of Appeal, it was not clear at first glance whether the action against the parent company clearly had no chance of success.

Gerechtshof Den Haag, ruling dated 18.12.15, ECLI:NL:GHDHA:2015:3586, www.rechtspraak.nl,

IA/34149-A

[GRIMBRA]

Poland

**** Briefs***

Social policy - Equal treatment in employment and occupation - Directive 2000/78/EC - Prohibition of discrimination on grounds of age - National legislation providing the right to the Attorney General to authorise prosecutors who have attained the retirement age to continue working - Admissibility - Conditions

In a judgment of 15 December 2015, the Sąd Najwyższy (Supreme Court, hereinafter the "SN") interpreted Article 62a, paragraphs 2 and 3 of the law of 20 June 1985, on the prosecutor, in the light of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The national provisions mentioned above provide that, in principle, a prosecutor who has reached the retirement age can continue to hold his post if he has received the prior consent of the Attorney General. The actions against the refusal of the latter are brought before the SN.

In this case, the SN ruled on the appeal brought against the refusal of the Attorney General to approve the request of a prosecutor who had reached the retirement age to allow him to continue his professional activity. In its judgment, the SN stressed that the Attorney General has, within the framework, a discretionary power, the judicial review thus being limited to checking whether his limits are not exceeded, i.e. whether the decision has not been arbitrary or taken pursuant to prohibited criteria. In this regard, the SN referred, among others, to Directive 2000/78/EC and the case law of the Court of Justice in the Fuchs and Köhler ruling, (C-159/10 and C-160/10, EU:C:2011:508) and Commission / Hungary ruling, (C-286/12, EU:C:2012:687). He found that decisions like the one taken in this case could not be motivated solely by the requirement of a change of generation of prosecutors invoked in an abstract manner; the decision must be

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taken in view of the situation and the requirements of the body of prosecutors.

However, specifically in this case, the Attorney General had justified his decision by referring concretely to the situation of prosecutors in the relevant bodies and giving specific reasons justifying the need for such a change. As his decision cannot, therefore, be considered arbitrary, the appeal was dismissed.

Sąd Najwyższy, ruling dated 15.12.15, III PO 13/15, www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20PO%2013-15.pdf

IA/33736-A

[PBK]

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Approximation of laws - Unfair clauses in contracts with consumers - Right for a professional to retract in case of extraordinary circumstances preventing the delivery of a car - Inclusion

In a judgment of 15 January 2016, the Sąd Najwyższy (Supreme Court, hereinafter the "SN") interpreted Article 385 [1], paragraph 1, of the Civil Code in the light of Directive 93/13/EEC on unfair terms in contracts concluded with consumers. Said article provides that the consumer is not bound by an unfair term that has not been individually negotiated with him.

In this case, a consumer association had brought an action against a car dealer to recognise the unfairness of a clause used by it in the general terms and conditions of the contracts and to prohibit its use. According to the clause, the dealer had the option of exercising a right of withdrawal in case of extraordinary circumstances preventing the delivery of a car. The lower courts had upheld the appeal. Hearing an appeal filed by the professional, the SN, referring to Directive 93/13 and the case law of the Court of Justice, particularly the Aziz ruling (C-415/11, EU:C:2013:164), held that the contested clause was effectively unfair. The right that it establishes for the seller was independent of its potential liability in respect of said extraordinary circumstances. Therefore, in cases where the latter would be liable, the consumers would be deprived of certain rights provided in such a case by the Civil Code, notably to obtain damages. Said clause leading to a significant contractual imbalance and creating a disadvantage for the consumer was therefore unfair. Thus, the appeal for annulment contesting such a qualification was rejected.

Sąd Najwyższy, ruling dated 15.01.16, I CSK 125/15, www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20csk%20125-15-1.pdf

IA/33737-A

[PBK]

Czech Republic

European Parliament - Elections - Right to vote and be elected - Proportional representation system - National legislation setting a minimum threshold of 5% for the allocation of seats - Restriction of equal suffrage, free competition of political parties and equal access for citizens to elected office - Justification - Effective representation of the will of citizens - Admissibility - Constitutionality of such a minimum threshold

In a judgment of 19 May 2015, the Ústavní soud (Constitutional Court), meeting in plenary session, ruled on the constitutionality of the electoral threshold of 5% provided by law for the European elections. This constitutional review was initiated by the Nejvyšší správní soud (Supreme Administrative Court), a court having the jurisdiction for electoral disputes, following an appeal by two unelected candidates against the election results in the European elections in 2014.

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The principle of equal suffrage is reflected in the fact that every citizen has an equal number of votes

According to the Nejvyšší správní soud, fixing said threshold constituted a restriction on equal suffrage, free competition of political parties and the right of access of citizens to elected office, as guaranteed by the Czech Charter of Fundamental Rights and Freedoms. Said threshold prevented the applicants in the main proceedings from being given a seat in the European Parliament, although they had received significantly higher votes cast than some elected candidates.

The Ústavní soud then considered the question whether this restriction was likely to be, in a democratic State, justified by a legitimate aim and whether it respected the principle of proportionality. Firstly, it noted that the provisions relating to the European elections are rooted in the EU acts that are binding and that, therefore, the national legislation in this domain constitutes an implementation of the EU law, within the meaning of Article 51, paragraph 1, of the Charter of Fundamental Rights. In this regard, it noted that while the provisions of the Union do not require fixing an electoral threshold, they authorise Member States to provide for it, provided it does not exceed 5% of the votes cast. Moreover, the Charter of Fundamental Rights, in Article 39, while it does provide the right to vote and be elected to the European Parliament, does not guarantee equal participation of EU citizens in the election results.

In this context, the Ústavní soud reiterated its case law on the constitutionality of the electoral threshold of 5% as set by law for both the parliamentary elections as well as for municipal and regional elections. This shows that equal suffrage is not absolute and that its restriction is justified to the extent that it pursues the objective of stimulating political integration and preventing the creation of unstable governments.

having equal weight. However, it does not imply that every vote cast has the same value in the final allocation of seats.

The Ústavní soud then focused on the extent to which such a restriction on suffrage impacted genuine opportunities of the citizens to participate, through the European Parliament, in the joint exercise of public power, given its specific role and its supranational character. It considered that the participation of the European Parliament in the legislative process, its budgetary powers, constitutional powers as well as powers of ratification and control of the executive, particularly reinforced after the entry into force of the Lisbon Treaty, required it to be able to provide solutions based on consensus and create reliable majorities. The electoral threshold of 5%, in that it reinforces the integration effect, thus constituted a permissible and proportionate restriction on equal suffrage. Furthermore, reiterating the complementarity of the democratic process at the national and EU level, the Ústavní soud held that the European Parliament has no less importance than the national parliaments.

Finally, according to the Ústavní soud, the low number of mandates allotted for the Czech Republic, i.e. 21 mandates, did not affect the earlier findings. It felt, in this regard, that the analysis of integration or disintegration effects of electoral rules could only be assessed from the perspective of the entire collective body. The duty of loyalty of Member States towards the European parliament and its ability to act presupposes their joint and several liability in this regard and is opposed to an abrogation of a national inclusive measure under the pretext of its negligible impact on the entire structure. Furthermore, it noted that it was not yet possible to assess the impact of the abrogation in 2014 of the electoral threshold in Germany on the plurality of opinions in the European Parliament.

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In light of all the foregoing, the Ústavní soud held that the restriction on equal suffrage, free competition of political parties as well as equal access to elected office, resulting from the contested threshold for European elections, was consistent with the principles of a democratic constitutional State to the extent that it was suitable for the purpose of achieving the objective, namely the effective representation of the will of citizens in the European Parliament, and necessary for the proper exercise of its powers.

For the sake of completeness, let us note that among the fifteen judges of the plenary session, three had a dissenting opinion, criticising an unconvincing reason of the integration effect of the disputed threshold on the political spectrum in the European Parliament.

Ústavní soud, ruling dated 19.05.15, PI. ÚS 14/14, http://nalus.usoud.cz

IA/33739-A

[KUSTEDI] [MUELLPE]

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Air transport - Common rules on compensation and assistance to passengers in case of denied boarding and on cancellation or significant delay of flights - Right to compensation in case of delay - Exemption from the obligation of compensation in the event of extraordinary circumstances - Long delay caused by the aircraft's collision with a bird - Interpretation of the concept of extraordinary circumstances - Exclusive jurisdiction of the Court of justice - Absence of preliminary ruling by an ordinary court - Violation of the right to an effective judicial remedy

In a judgment of 8 December 2015, the Ústavní soud (Constitutional Court) overturned a judgment of the Obvodní soud pro Prahu 6 (District Court for Prague 6, hereinafter the "Obvodní soud"), by which the latter had heard an action for damages against an air carrier, brought by two passengers whose flights had been significantly delayed, in accordance with Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in case of denied boarding and of cancellation or long delay of flights. In this case, it was established that the delay was caused by a collision of the aircraft with a bird. However, to the extent that the collision occurred about 14 hours before departure of the applicants' flight, the Obvodní soud had found that it was irrelevant whether said collision could be described as an extraordinary circumstance within the meaning of the regulation. According to the Obvodní soud, the carrier had not proved that it had taken all measures to prevent the delay and was, therefore, required to pay the applicants the requested financial compensation.

However, the Ústavní soud, hearing the matter submitted by the air carrier concerned, held that, by the judgment, the carrier's right to an effective judicial remedy had been violated. In this regard, it reiterated its recent case law according to which neither the wording of Regulation No. 261/2014 nor the case law of the Court of Justice allows us to clearly deduce the answer to the question of whether an aircraft collision with a bird can be considered as not inherent to the normal operation of the activity of the air carrier and beyond the effective control of the latter. In addition, the Constitutional Court reiterated that, in such circumstances, it is up to the ordinary courts to ask the Court of Justice, through a preliminary ruling, for the interpretation of the relevant provisions of EU law.

In this regard, although the Obvodní soud ruled in this case that, given the long delay between the collision and the flight concerned, the question of the existence of extraordinary circumstances was irrelevant, the Ústavní soud held that there was no reason to depart from its previous case law mentioned above. According to the Ústavní soud, a certain reservation in the interpretation of this issue is needed, particularly as the Court of Justice did not rule on the qualification to be given to an aircraft collision with a bird or ash clouds, even though it had the opportunity to do so in the case resulting in its recent van der Lans judgment (C-257/14, EU:C:2015:618). Also, the criteria for assessing the liability of carriers in the event of

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force majeure vary depending on the sector concerned, which leads to more interpretation problems.

Accordingly, the Ústavní soud referred the case to the Obvodní soud. Moreover, it should be noted that no mention was made by the soud Ústavní of the preliminary ruling in last June by the Obvodní soud

(Pešková Peška pending case, C-315/15), by which it asked the Court of Justice's interpretation of Regulation No. 261/2014 and its case law in the context of a very similar dispute, between other passengers and the same airline on another delayed flight, caused, in this case as well, by a collision of the aircraft with a bird.

Ústavní soud, ruling dated 08.12.15, II.ÚS 2390/15,
http://nalus.usoud.cz

IA/33738-A

[KUSTEDI] [MUELLPE]

Romania

Unfair terms in contracts concluded with consumers - Directive 93/13/EEC - Mortgage loan or personal loan with mortgage - Clauses relating to variable interest rates and the early maturity of the loan - Inadmissibility

Delivered on 23 October 2015, decision no. 2123 of the High Court of Cassation and Justice is a historic decision on unfair terms in contracts concluded with a bank. This decision is part of an extensive case law of unfair terms, starting in 2009, after the transposition into Romanian law of Directive 93/13/EEC on unfair terms in contracts concluded with consumers and Directive 2008/48/EC on credit agreements for consumers.

The decision of the high court was delivered in the context of collective action for the repeal of several clauses found unfair in mortgage loan contracts or contracts for personal loan with mortgage entered into with a bank. In this case, the unfairness of the clauses relating to the fees for management and risk monitoring had already been found in the first instance by the Bucharest Court and upheld on appeal by the Bucharest Court of Appeal. Both courts had considered, however, that two other clauses, relating to the variable interest rate and the

early maturity of the loan, were not unfair under law no. 193/2000, transposing into national law the Directive 93/13/EC. In this context, 210 applicants had referred to the High Court of Cassation and Justice an appeal for annulment of the said clauses.

As regards the clause relating to the variable interest rate, whose determination was left to the discretion of the bank, the High Court of Cassation and Justice held that it was unfair and repealed it together with all clauses allowing the bank to unilaterally change the amount of the interest rate.

In relation to this clause, the high court held that the review of its unfairness could not be excluded, in that, despite being bound by the purpose of the contract, said clause was not drafted in a sufficiently clear and comprehensible manner. Moreover, the high court ruled that the equivocal nature of this clause, which does not allow the applicants to establish the criterion by which the bank would calculate the variable part of the interest rate, made it impossible to negotiate it. In addition, it was also not possible for the applicants to determine, at the conclusion of contracts, the total amount to be repaid under it. Pursuant to these arguments, the presumption of good faith of the bank was reversed ab initio by the High Court of Cassation and Justice. Consequently, it ordered the bank to change, on the basis of negotiations with the applicants, the content of this clause with regard to both the mode of determination of interest rates as well as the moment from which said change would be effective.

Moreover, the high court confirmed that due to their non-negotiated and equivocal content, the fees for management and risk monitoring were likely to create an imbalance between the rights and obligations of the parties and were, as a result, unfair. Based on these arguments, the high court found that the clause allowing the bank to initiate the early maturity of the loan when the value of the

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property provided as collateral fell below the

By holding that it required the borrower to solely bear the entire risk and that it was therefore contrary to the principle of good faith, the High Court decided to repeal this clause and order the

bank to remove it from its general credit terms and conditions.

This decision of the High Court of Cassation and Justice is a significant step forward with regard to the protection of consumer rights. However, it has also been criticised, especially for two reasons. Firstly, while the application of a variable interest rate must be based on the agreement of the parties, the high court did not require the bank to repay the amounts unduly paid in respect of said interest rate, considering that it was not able to establish the exact amount that was unduly received. Secondly, the high court did not extend the finding concerning the unfairness of the clause, for the early maturity of the loan, to the applicants who did not dispute it. This is explained by the fact that in the absence of a specific regulation concerning collective action in Romanian law, no legal provision requires that all applicants who brought such action should benefit from its positive effects.

Înalta Curte de Casaţie şi Justiţie, Secţia civilă, ruling no. 2123 of 20.10.15, http://www.scj.ro/736/Cautare-jurisprudenta

IA/33741-A

[PRISASU] [STOICRO]

United Kingdom

remaining loan balance due was unfair.

Judicial cooperation in civil matters - Jurisdiction, recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility - Regulation (EC) No. 2201/2003 - Determination of when a child is deemed to have lost his habitual residence - Factors to be taken into consideration

In a judgment of 3 February 2016, the Supreme Court ruled on the interpretation of the concept of

'habitual residence', within the meaning of Article 8, paragraph 1, of Regulation (EC) No. 2201/2003 concerning the jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ("Brussels II bis" regulation). Specifically, the Supreme Court addressed the question of when a child is deemed to have lost his habitual residence under that provision.

The case concerned the determination of the place of residence of a child born in England in 2008 by intrauterine insemination, of a same-sex couple who lived together from 2004 to 2011.

On 3 February 2014, the defendant went to Pakistan with the child to live there. On 13 February 2014, the applicant brought a first request before the UK courts concerning the child's residence and the visiting rights, which was rejected by the High Court.

It should be noted that, even without the consent of the applicant, taking the child away was lawful to the extent that the said applicant has never been defined as a legal parent of the child, or acquired parental responsibility for the child. It should also be noted that, under the provisions of the 1998 law on embryology and human fertilisation, while the insemination that led to the child's birth was performed after 6 April 2009, in case of written consent of the defendant, the applicant had had the status of legal parent of the child.

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Hearing the case, the Supreme Court ruled that the habitual residence of the child had not been transferred to Pakistan and identified some revealing details used to define the scope of this concept: the degree of integration of the child in the State of the former residence; the scale of the relocation planning; and the possible relocation of the most important people in the child's life together with him.

Reiterating the case law of the Court, in particular the A (C-523/07, EU:C:2009:225) and Wednesday (C-497/10 PPU, EU:C:2010:829) judgments, and the wording of Recital 12 of the Brussels II bis regulation, the Supreme Court quashed the judgments of the lower courts on the grounds that it is very unlikely, though conceivable, that the habitual residence is lost before a new habitual residence is acquired. Therefore, the intention of the defendant to reside permanently in Pakistan did not cause the loss of habitual residence in England.

This decision demonstrates an evolution of the established case law in this matter. Moreover, the Supreme Court stated that if there are several interpretations of the concept of "habitual residence", the court hearing the case must choose the one best suited to the child's interest.

While the decision was made by a majority vote, there was a dissenting opinion that rejected the lack of jurisdiction of the Pakistani courts. According to this opinion, the real reasons for the decision would be a likely intolerance of those courts against unions between same-sex partners and the possible lack of recognition of a non-genetic family relationship. The opinion notes that such an approach, even if it raises a legitimate concern, does not justify a jurisdictional claim of the UK courts.

Supreme Court, ruling dated 03.02.16, B (a child) [2016] UKSC 4, www.bailii.org

IA/34318-A

[HANLEVI]

**** Briefs (United Kingdom)***

Free movement of persons - Workers - Equal treatment - Refusal of social assistance to citizens of a Member State without economic activity staying in the territory of another Member State - No infringement of the right of movement and residence of citizens of the Union - Legitimate restriction on the principle of non-discrimination

By a decision dated 27 January 2016, and reiterating the case law of the Court in the Dano (C-333/13, EU:C:2014:2358) and Alimanovic (C-67/14, EU:C:2015:597) judgments, the Supreme Court held that the refusal to pay benefits for income support and housing assistance will not infringe the rights guaranteed by Articles 18 and 21, paragraph 1 of the TFEU. Furthermore, it stated that it is not realistic to require an assessment of the burden on the social security system for each individual application.

The national legislation implementing the 2003 Treaty of Accession provides that Polish nationals must, in order to claim benefits for income support, have worked legally for an uninterrupted period equal to or exceeding 12 months in the United Kingdom. In this case, the applicant, Mrs Mirga, born in Poland, after completing her studies in the United Kingdom, legally worked there only for 7 months. The Supreme Court held that the condition laid down by the national legislation was a legitimate restriction on the right of movement and residence of citizens of the Union guaranteed in Article 21, paragraph 1 of the TFEU and upheld the decision of the Minister of Work and Pensions to reject Mrs Mirga's request.

Similarly, the Supreme Court upheld the decision of the Westminster Common Council to

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refuse housing assistance to an Iraqi national who obtained Austrian citizenship before arriving in the UK, on the grounds that he did not have to a right of residence in the United Kingdom under the national legislation transposing Directive 2004/38/EC. By applying the Alimanovic ruling mentioned above, the Supreme Court said that such a decision is legitimate on the basis of the limitations to the principle of non-discrimination under Article 18 of the TFEU.

Since the Supreme Court had waited for the publication of the Court's judgment in the Alimanovic case mentioned above, before ruling on the case in question, it felt no need to await the judgment in the Commission/United Kingdom case (C-308/14), for which the Advocate General Cruz Villalón delivered his conclusions on 6 October 2015.

Supreme Court, ruling dated 27.01.16, Mirga / Secretary of State for Work and Pensions; Samin / Westminster City Council [2016] UKSC 1, www.bailii.org

IA/34319-A

[HANLEVI]

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Charter of Fundamental Rights - Right to effective judicial protection - Horizontal direct effect

The Court of Appeal, in a judgment of 5 February 2015, recognized the horizontal direct effect of Article 47 of the Charter of Fundamental Rights which proclaims the right of person whose rights and freedoms guaranteed by the EU law are violated to an effective remedy and to a fair trial.

The applicants, former employees of the embassies of Sudan and Libya in the UK, had brought legal action against their former employers for, inter alia, unfair dismissal, breach of the minimum wage rule, discrimination based on race and violation of the national legislation transposing Directive 2003/88 concerning certain aspects of the organisation of working time. In both cases, the defendants (embassies) sought to escape prosecution by invoking the State immunity under a 1978 law (State Immunity Act). For their part, the applicants argued that the 1978 law was incompatible with the rights recognised by Article 6 of the ECHR and Article 47 of the Charter.

Firstly, the Court of Appeal concluded that the broad scope of the immunity provided for in Article 16, paragraph 1, a) of the 1978 Act, which prevents members of the junior staff, such as the applicants, to bring an action that does not involve sensitive questions about their employer State, was not required under the obligations of the United Kingdom under international law and, thus, did not comply with Article 6 of the ECHR.

Then, as regards the question of whether the applicants could cite Article 47 of the Charter, the Court of Appeal reiterated the case law of the Court according to which a right guaranteed by the Charter may, in certain circumstances, be invoked in the context of a dispute between private persons. The English court relied in particular on the Mangold (C-144/04, EU:C:2005:709), Kücükdeveci (C-555/07, EU:C:2010:21) and AMS (C-176/12, EU:C:2014:2) judgements to conclude that the rights enshrined in the Charter which have been recognised as general principles of EU law and which are fully effective without the need to clarify their significance in national law may have a horizontal direct effect. This is also the case with the right to an effective remedy guaranteed by Article 47 of the Charter.

In this regard, since the pleas alleging discrimination based on race and a violation of the national legislation transposing Directive 2003/88/EC fall outside the scope of EU law, the Court of Appeal found that Article 16, paragraph

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1, a) of the 1978 Act was not compliant with Article 47 of the Charter.

Court of Appeal (Civil Division), ruling dated 05.02.15, Benkharbouche and Janah / Embassy of the Republic of Sudan e.a. [2015] EWCA Civ 33, www.bailii.org

IA/34320-A

[PE]

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Court procedure - Granting of anonymity - Conditions

On 27 January 2016, the Supreme Court addressed the circumstances under which it is appropriate to grant anonymity to a litigant. In this case, the grant of anonymity had been sought by a person suffering from mental disorders and detained in a psychiatric hospital, who had been convicted of culpable homicide of his ex-partner and his common law partner. According to the Supreme Court, there is no presumption in favour of granting anonymity to people detained in psychiatric hospitals or subject to the provisions of the law on mental health (Mental Health Act 1983). Granting anonymity in such cases must be assessed based on whether it is necessary in the interests of the person concerned. As part of that assessment, it is necessary to balance, on the one hand, the public's right to know what is going on in legal proceedings and, on the other hand, the risk to the psychosocial rehabilitation of the person concerned caused by exposing his identity.

Supreme Court, ruling dated 27.01.16, R (on the application of C) / Secretary of State for Justice [2016] UKSC 2, www.bailii.org

IA/34321-A

[PE]

Sweden

Fundamental rights - Protection of property - Labour law - Collective action in the form of a blockade - Blockade leading to the bankruptcy of the employer concerned - Right to compensation for the damage

In a judgment of 17 December 2015, the Supreme Court considered the question of whether, following the judgment of the ECtHR in the Evaldsson and others / Sweden case (request no. 75252/01) finding an infringement of article 1 of Protocol 1 of the ECHR, a union could be liable to pay non-contractual damages because of this infringement.

In the main proceedings, a union had organised collective actions in the form of a blockade against the applicant. The blockade was motivated by the fact that the applicant, as an employer, had not signed the collective agreement applicable in the relevant sector of the labour market; this was an agreement that provided for an employer contributions system to cover certain supervision costs of the union. In the case cited by the ECtHR, this system was considered incompatible with Article 1 of Protocol 1 of the ECHR.

According to the applicant, said blockade eventually resulted in his bankruptcy.

In the Supreme Court, he argued that the collective action taken against him was in violation of Articles 11 of the ECHR and Article 1 of Protocol no. 1 of the ECHR. He thus claimed compensation for material and moral damage suffered as a result of said infringements.

The Supreme Court first found that the collective actions incompatible with the ECHR do not fall within the right of trade unions to take collective action enshrined in Article 14 of Chapter 2 of the Swedish Constitution (Regeringsformen) and that said Article does not generally prohibit such collective action from

resulting in a non-contractual liability. Then, the Supreme Court ruled that the unions are not equivalent to State agencies from the point of view of the ECHR, thus eliminating any direct liability of the union regarding the compensation of the applicant. In addition, the Supreme Court considered whether the ECHR could have horizontal direct effect between individuals. It concluded that, although the Swedish law may comprise, on an exceptional basis, a non-contractual right to compensation for purely pecuniary losses following a violation of the ECHR, the violation was not adequately direct and immediate enough to create such a right.

Although this could have been the case, according to the Supreme Court, pursuant to the general principles of civil liability, the latter were not applicable in the case before it owing to the pleas raised before it.

Högstadomstolen, ruling dated 17.12.15, n° T 3269-13,
http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2015/2015-12-17%20i%20m%C3%A5l%20T%203269-13%20Dom%20%282%29.pdf

IA/33743-A

[JON]

2. Other countries

Canada

**** Brief***

Fundamental rights - Freedom of religion - Collective aspects - Regulations for denominational schools

In a judicial review proceeding, the Supreme Court, by a judgment of 19 March 2015, repealed a ministerial decision according to which all aspects of the courses proposed by the Loyola Catholic Secondary School were to be taught from a neutral point of view, including the teaching of Catholicism.

Since 2008, the "Ethics and Religious Culture" ("ERC") course has been mandatory for all Quebec schools. The goal of the course is to present from a neutral and objective standpoint the beliefs and ethics of various religions in the world, in order to inculcate in students a spirit of openness to human rights and diversity and mutual respect.

In accordance with implementing regulations of the law on private education, the government may exempt a school from said course provided the replacement course is deemed "equivalent", which Loyola had asked by proposing a course from the point of view of beliefs and ethics of Catholicism. The contested decision did not recognise the proposed course as "equivalent" to the "ERC" due to the fact that all religions included in the course were going to be taught from a Catholic perspective.

The Supreme Court considered that the decision restricted the freedom of religion, guaranteed by the Canadian Charter of Rights and Freedoms, more than was necessary, given the objectives of the law, namely the promotion of tolerance and respect for differences. Preventing a denominational school, in a State where the existence of such schools is legal, from teaching Catholicism and talking about it from the Catholic viewpoint would do little to achieve the objectives of the "ERC" course while seriously undermining freedom of religion. Therefore, the Court held that this decision did not, as a whole, reflect a proportionate balancing of the interests in question.

Supreme Court of Canada, ruling dated 19.03.15, http://www.scc-csc.ca/home-accueil/index-fra.aspx

IA/34158-A

[SAS] [HERENMA]

United States

...

Fundamental rights - Family reunification - Right of an American citizen to be joined by her husband needing a visa - Exclusion

In a judgment of 15 June 2015, the Supreme Court ruled that there is no constitutional right for a US citizen to be joined by her spouse who is a third country national. Following the adoption by the competent authority of a decision refusing to issue an immigration visa to her husband, the applicant had brought an action alleging a violation of her constitutional rights.

Under the law on immigration and nationality, a foreigner is restricted from entering and residing permanently in US territory without obtaining a visa.

A special procedure is prescribed by said law for foreigners admitted as members of the immediate family of a citizen of the United States. Thus, the applicant had obtained such a status for her husband. However, the competent authority had rejected the visa application filed by her husband on the grounds of his material support to a terrorist organisation.

In its action, the applicant claimed that, by rejecting the request made by her husband, the competent authority had violated her rights to due process of law and family reunification. Following the rejection of his appeal by the trial court, the Supreme Court, on appeal, reiterated that there is no violation of the right to due process of law except in case a person is deprived of his or her rights to life, liberty or property.

The Supreme Court emphasised that in order to confer constitutional status to a freedom that previously did not have that status, the doctrine of "judicial self-restraint" requires, *inter alia*, that this right to be deeply rooted in the past and national tradition. This led to the rejection of the applicant's arguments.

It should be emphasised, however, that a minority of judges considered that in this case, there was no question of a new law, but rather, the right to marry includes the right of the spouses to live together and start a family. In addition, the law, including the law on visas, provides marriages with a range of legal protections such that there is, among spouses, a strong expectation that the government will not deprive them of their freedom to live together, unless there are serious grounds for this, which are to be assessed case by case and to be applied in the context of a fair trial.

Supreme Court of the United States, ruling dated 15.06.15, http://www.supremecourt.gov/

IA/34159-A

[SAS] [HERENMA]

Switzerland

EC-Switzerland Agreement on the free movement of persons - Interpretation by the Swiss courts - Taking into account the case law of the Court subsequent to the date of signing - Constitutional review following the referendum on mass immigration - Lack of impact

Hearing an appeal against the refusal to renew the residence permit of a third country national who raised a child born of a relationship with a German citizen living in Switzerland and who invoked the agreement on free movement of persons (AFMP), the federal Court ruled on the impact of the constitutional review introduced following the 2014 referendum on mass immigration, which provides that Switzerland shall autonomously manage the immigration of foreigners and that the number of authorisations issued for the residence of foreigners in Switzerland is limited by annual quotas and limits. To this end, Article 121a of the Federal Constitution provides that no international agreement contrary to this provision will be concluded and that a pre-existing international agreement on the matter should be renegotiated and adapted (see *Reflets No. 2/2014*, p. 54-55).

Reiterating that Swiss law enshrines the principle of the primacy of international law over a

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subsequent national law, the Federal Court held that international conventions such as the AFMP must be applied as long as they have not been renegotiated or terminated. Thus, the constitutional provision in question has not effectively resulted in a change in the method of interpretation of the AFMP and does not prevent the Swiss courts from continuing to build on the case law of the Court subsequent to the signing of the AFMP in order to ensure a parallel legal situation between the EU and Switzerland.

Federal Court, ruling dated 26.11.15, 2C_716/2014, www.bger.ch

IA/34145-A

[KAUFMSV]

B. National legislations

Germany

Law introducing a retention obligation and a maximum storage duration for traffic data

Following the repeal by the Bundesverfassungsgericht (Federal Constitutional Court), in March 2010, of the national system for data retention, adopted in transposition of 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 in the light of the judgment of the Court in the Digital Rights Ireland and Seitlinger e.a. case (C-293/12 and C-594/12, EU:C:2013:845) which repealed said Directive, the German legislature adopted new regulations on the matter, which came into force on 18 December 2015.

The new regulations establish an obligation, to be fulfilled by the telecommunication service providers, to retain, in German territory and as a preventive measure, all traffic data. This covers, for a retention of a period of ten weeks, the number and identification of the connections involved in the call, the date and duration of the call as well as some data specific to mobile and Internet telephony. As regards the Internet service providers, they must retain the IP address assigned, the identification of the connection and the user concerned as well as the date and duration of the use of the Internet service. In addition, some data on telephony or access to mobile Internet must be retained for a limited period of four weeks. The new regulations are set to be evaluated between 2017 and 2020.

Therefore, in the light of the Zhu and Chen ruling, C-200/02, EU:C:2004:639, in which the Court made the right of residence of a third country national parent with effective custody of a minor child who is a national of a member State conditional upon the availability of sufficient resources in order not to become a burden on the public finances of the host member State, the Federal Court dismissed the appeal on the ground that the applicant depended on welfare for many years.

With particular regard to custodians of trade secrets, the scope of the new regulations only includes people, authorities and bodies in the social or ecclesiastical domain. The other custodians are thus in principle covered by the retention obligation; the collection and use of data relevant to them is, however, prohibited. The preparatory work reveals that the German legislature considered that it is not possible to exclude all custodians of trade secrets from the scope of the new regulations to the extent that this would involve informing suppliers of telecommunication services regularly about the persons concerned.

Moreover, the German legislature has also made possession of stolen data an offence, thus criminalising the acquisition, from a third party, of data that is not publicly accessible and that has been obtained illegally.

The new regulation has already been the subject of some criticism, particularly from the perspective of its proportionality as an exception to the protection of personal data, since such an exemption must be “made within strictly necessary limits” (Digital Rights Ireland and Seitlinger and Others ruling mentioned above,

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paragraph 52), as well as from the perspective of adequate protection of the custodians of trade secrets. It is currently the subject of a constitutional appeal before the Bundesverfassungsgericht introduced by several lawyers in their capacity as custodians of trade secrets.

Gesetz zur Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten, BGBl. 2015 I, p. 2218

[KAUFMSV] [LERCHAL]

Austria

Criminal Law Reform Act

The Strafrechtsänderungsgesetz 2015 (Criminal Law Reform Act), intended to modernise the Austrian criminal law and transposing several Directives came into force on 1 January 2016.

Regarding the transposition of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, the new paragraph 2a of Article 445 of the Austrian Code of Criminal Procedure allows the confiscation of property relevant to a criminal offence, in an independent procedure, when criminal proceedings are terminated due to illness or escape of the suspect.

In addition, pursuant to Directive 2014/62/EU on the protection of the euro and other currencies against counterfeiting, Article 64, paragraph 1, point 4 of the Penal Code provides that the Austrian criminal laws apply irrespective of the criminal laws of the place of the offence, if the offence was committed abroad, and as long as it involves the transmission and possession of counterfeit currency, it undermines the interests of the Austrian State and the offender cannot be extradited.

Regarding the obligations resulting from Directive 2013/40/EU on attacks against information systems, an illegal attack on the integrity of an information system and on the integrity of data are deemed criminal offences (Article 126a and 126b of the Austrian penal code).

Strafrechtsänderungsgesetz 2015 of 13.08.15 (BGBl. I Nr. 112/2015), https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_112/BGBLA_2015_I_112.pdf

[LEEBCOR]

Cyprus

Law on civil unions

On 9 December 2015, a new law on the establishment of a civil union regime came into force. This law is a significant change in the Cypriot family law as it establishes for heterosexual couples not wishing to be married, or homosexual couples who do not have the right to marry, a legal framework governing civil union between two people.

In this regard, the law provides two people who are above the age of 18 the possibility of entering into a civil union regardless of their sexual orientation. Under Article 4 of that law, the civil union has effects similar to those of marriage in accordance with the Cypriot law on marriage. According to the same article, any reference to the term “spouse” under the law on marriage includes a person who has entered into

a civil union, under the provisions of the law on civil unions.

As for the termination of a civil union, the law also contains provisions relating thereto. This termination can take place through a joint declaration before the clerk of the district, by way of an order of the District Court on the request of one of the two persons involved in the civil union, automatically in case the (heterosexual) couple in question get married, or in case of death. It should be noted that, with regard to requests for termination of a civil union before the District Courts, under Article 18 of the law that provides the criteria that the District Court must consider in case of such a request and the provisions of the law on marriage, the legislative intent was, it seems, to ensure that the procedure for terminating a civil union corresponds to the procedure already established for divorce.

In addition, the provisions of the law regulate various issues concerning the relationship of the couple in a civil union. These include, for example (for heterosexual couples only), the presumption of paternity for a child born to a couple who has entered into a civil union as well as the alimony system in the event of the termination of the civil union. Furthermore, in accordance with the law, issues concerning joint property of the couple as well as hereditary issues are resolved in the same way as in the context of marriage. Moreover, under Article 43 of the law, civil unions entered into in other States are recognized by the Republic of Cyprus.

Since this past 18 January, district governments are welcoming citizens wishing to enter into a civil union.

Law no. 184 (I)/2015 on the conclusion of civil unions (Official Journal, Annex 1, Part 1, No. 4543, page 1358), 09.12.15, http://www.mof.gov.cy/mof/gpo/gpo.nsf/All/13619D477EE08945C2257F16002C668D/$file/4543%209%2012%202015%20PARARTIMA%201o%20MEROS%20I.pdf

[LOIZOMI]

France

Decree on various provisions for adapting other laws into the European Union law in matters of cross-border successions

On 2 November 2015, Decree no. 2015-1395 on various provisions adapting other laws into the European Union law in matters of cross-border successions was adopted by the government to implement the Regulation (EU) No. 650/2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. This regulation entered into force in all Member States, except the UK, Ireland and Denmark on 17 August 2015 and

establishes in principle the unity of the law of succession, creates the European Certificate of Succession and defines the succession agreements.

The decree firstly drew the consequences of the simplification of procedures and introduced several adaptations intended to facilitate the movement of decisions, authentic instruments and court settlements referred to in Regulation (EU) No 650/2012. The requests for certification of the French enforceable instruments will now be presented to the chief registrar of the court that approved the agreement, for the purpose of their recognition abroad (CPC, art. 509-1 of the Code of Civil Procedure, hereinafter "CPC"). Conversely, it is these same authorities that will have jurisdiction for granting enforceability to decisions and foreign court settlements on French territory (CPC, art. 509-2). Notwithstanding these provisions, the requests for certification, recognition or establishment of the enforceability on national territory of foreign authentic notarial instruments may be submitted to the President of the Chamber of Notaries (CPC, art. 509-3). Appeals against decisions

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establishing or denying enforceability must, meanwhile, be brought before the President of the regional court (CPC, art. 509-9).

Secondly, the decree provided the adaptations required for the implementation of the European Certificate of Succession. This is an instrument for optional use and intended to be used by the heirs, legatees, executors of wills or administrators of the estate in order to prove their status, rights and powers in another Member State. Article 5 of the decree inserted a section VIII in Title III of the Code of Civil Procedure, titled "European Certificate of Succession", and devoted to the terms of its issuance (CPC, art. 1381-1 to 1381-4). Said section sets the jurisdiction of the notary to establish a European Certificate of Succession. The notary's decision to issue or to refuse to issue may be referred to the president of the regional court in whose jurisdiction the notary's office is located.

Finally, Article 6 of the Decree added, in Table I of the annexes to Decree No. 78-262 of 8 March 1978 fixing the rates of the notaries, a line concerning the remuneration of the notary for drafting or editing this certificate.

Decree no. 2015-1395 of 02.11.15 published in O.J. No. 0256 of 4.11.15,
https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031417982&categorieLien=id

[MANTZIS]

Hungary

Amendments to the competition act

The Hungarian Parliament recently passed amendments to the Competition Act that limit the exemption from competition rules applicable to the agrarian operations to national-level cartels. Since 2012 and under certain conditions, the cartels affecting the agrarian market and products are exempt from the application of rules on anti-competitive practices. Since the entry into force on 1 September 2015 of the above amendments, the cartels in this market violating Article 101 of the TFEU are no longer exempt. It should also be noted that, according to the Hungarian case law, a cartel affecting the entire territory of Hungary takes a European dimension.

Law no. LXXVIII of 2015 amending Law no. LVII of 1996 on the prohibition of unfair commercial practices and the restriction of competition

[VARGAZS]

Poland

Amendments to the law on the Constitutional Court

The law of 25 June 2015 on the Constitutional Court (O.J. 1064 position) was already presented in *Reflets No. 3/2015*. According to the legislator, the new system was to contribute to the optimisation of the proceedings before the Constitutional Court and the shortening of the processing time for cases by a few months. However, less than six months after its entry into force on 30 August 2015, the law was substantially amended. Following legislative elections in October 2015, the new parliament adopted the Law of 22 December 2015 on the amendment of the Law on the Constitutional Court (O.J. 2217 position). The amending law provides, inter alia, that the actions shall be processed in chronological order of receipt, that the cases are, in principle, ruled upon in the grand chamber, which will comprise 13 judges and take decisions by a majority of two thirds, and that the hearing in the cases ruled upon in the grand chamber cannot take place within 6 months following the notification of its date to the parties.

Hearing several requests for constitutional review of this text, in its judgment of 9 March 2016, the Constitutional Court, without applying the provisions of the new law and relying

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directly on the Constitution, ruled said law as unconstitutional.

Two days later, in its opinion of 11 March 2016, the Venice Commission of the Council of Europe felt with regard to the new law that "a high quorum, requirement of a two-thirds majority to adopt decisions and strict regulations preventing urgent matters from being settled, are constraints that undermine the effectiveness [of the Court], particularly owing to their combined effects. Consequently, these amendments would jeopardise the rule of law as well as the functioning of the democratic system".

Law of 22.12.15 on amending the law on the Constitutional Court (O.J. 2217 position) *http://isap.sejm.gov.pl/DetailsServlet?id=WDU20150002217*

[PBK]

Romania

Change in the legal system for access to data related to electronic communications

Law no. 235/2015 amending and supplementing Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector, which came into force on 17 October 2015, changed the national legal system for access to data derived from electronic communications.

It should be noted that Law no. 235/2015 was adopted following the repeal, by the Court of Justice, of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of electronic communications services, and the repeal, by the Romanian Constitutional Court, of laws transposing said Directive into national law, namely law nos. 298/2008 and 82/2012.

The main changes introduced by this law concern access for authorities to traffic data, location data and identification data from communication equipment. Thus, access to these data is now subject to prior authorisation issued by a court and can be requested by judges, law enforcement bodies or any other State agency with responsibilities in the field of defence and national security. In addition, Law no. 235/2015 no longer provides for a period of six months for data retention but states, however, that the data must be erased or made anonymous when no longer needed for the transmission of a communication. The removal of these data must be made no later than three years after the date of this communication or five years after the date of the solicitation, when an authority claims these data and notifies the need to maintain them.

Legea nr. 235/2015 pentru modificarea și completarea Legii nr. 506/2004 privind prelucrarea datelor cu caracter personal și protecția vieții private în sectorul comunicațiilor electronice, *http://legislatie.just.ro/Public/DetaliiDocument/172027*

[PRISASU] [STOICRO]

United Kingdom

Act providing for a referendum on keeping the United Kingdom in the European Union

On 17 November 2015, a new law confirming the holding of a referendum on maintaining the United Kingdom in the EU was adopted. The ballot will let voters choose between two options: stay in the Union or leave it. The Cypriot, Irish and Maltese citizens registered on the electoral list as well as the people who can vote for the European Parliament elections in Gibraltar are among the persons entitled to participate in the referendum. Like the legislative elections in the UK, other European citizens do not have the right to participate in the referendum, even if they reside in the territory.

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The law provides that the referendum will take place no later than 31 December 2017. The government has already confirmed that it will be held on 23 June 2015. The government is required, no later than ten weeks before the referendum, to present the outcome of negotiations that were conducted between Member States on the request of the United Kingdom, its own opinion on what has been agreed upon, information on the rights and obligations under the EU law resulting from membership of the United Kingdom thereto and examples of agreements concluded by other countries with the European Union when they were not a member. Furthermore, the law lays down detailed rules on the election campaign, financial control and vote counting process.

European Union Referendum Act 2015, www.legislation.gov.uk

[HANLEVI]

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Amendment of asylum rules

A major reform of the rules on treatment of asylum applications was adopted on 29 October 2015. The amendments include clarifying the circumstances in which the refugee status may be revoked, and significantly limiting the possibility for citizens of the Union to apply for asylum in the UK.

The first major change concerns the distinction that is now made between the recognition of refugee status and the granting of a residence permit. Until now, a person granted a refugee status enjoyed a right of residence. The amendment breaks with the tradition of offering a permanent home to all those who had to flee from theirs. It allows the removal of persons whose refugee status has ended, without these persons being able to claim a right of residence in the United Kingdom.

The second major change is the expansion of cases of exclusion from the refugee status. Previously, the rules were based on the text and terminology of Article 1F of the 1951 Convention relating to the Status of Refugees. Now, the rules are similar to the provisions of Directive 2011/95 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. In this regard, a person can be excluded from refugee status not only if he or she falls within one of the exclusions provided under said Article 1F, but also if the Minister of Home Affairs believes that he or she has instigated or participated in crimes referred to in this provision.

The final change of note is the inadmissibility of asylum applications submitted by citizens of the European Union, except in exceptional circumstances, such as the existence of an exemption by the Member State concerned for the rights and freedoms guaranteed by the ECHR or the invocation of Article 7, paragraph 1, TFEU against that Member State. No right of appeal is provided against a decision on the inadmissibility of an asylum application.

Statement of Changes in Immigration Rules (HC 535), www.gov.uk/government/uploads/system/uploads/attachment_data/file/472374/51786_hc_535web_accessible.pdf

[PE]

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Introduction of a balanced budget amendment

Similar to the provisions of treaty on stability, coordination and governance, better known as the European fiscal compact, signed on 2 March 2012 by the Member States other than the Czech Republic and the United Kingdom, the latter adopted on a balanced budget amendment on 14 October 2015. The Charter established for this purpose requires the government to balance its

structural budget by 2017-2018 and maintain a budget surplus from 2020. The requirements of the Charter, however, apply only in "normal economic times", that is to say, when the economy shows a growth of at least 1%.

A non-departmental public body - the Office for Budget Responsibility (OBR) - is responsible for ensuring compliance with the Charter. This entity was created in 2011 with a mission to verify the sustainability of public finances and evaluate the budgetary policy of the government.

In case of violation of the provisions of the Charter, the consequences will be political, since the OBR enjoys no sanctioning or remedial powers vis-à-vis the irregularities identified.

Charter for Budget Responsibility (Autumn edition 2015), *www.gov.uk/government/uploads/system/uploads/attachment_data/file/467082/PU1855_OBR charter_final_web_Oct_2015.pdf*

[PE]

C. Doctrinal echoes

On the application of jurisdiction rules of Regulation (EC) no. 44/2001 to actions for damages resulting from violations of competition law of the Union: comments on the Court's judgments in the flyLAL-Lithuanian Airlines case (C-302/13, ECLI:EU:C:2014:2319) and CDC Hydrogen Peroxide case (C-352/13, ECLI:EU:C:2015:335)

In a judgment of 23 October 2014, in the flyLAL-Lithuanian Airlines case, the Court found that actions seeking compensation for damages resulting from alleged violations of the competition law of the EU fall within the scope of Regulation (EC) no. 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters.[1] Furthermore, in its judgment of 21 May 2015, in the CDC Hydrogen Peroxide case, the Court ruled on the interpretation of certain jurisdiction rules of that regulation in the context of actions brought against several companies involved in a violation of Article [101 TFEU] and Article 53 of the agreement on the European Economic Area established by a decision of the Commission. These are the first two cases in which the Court was required to look into the application of Regulation (EC) No. 44/2001 to such actions. Moreover, it must be noted that they have recently been the subject of Directive 2014/104/EU concerning certain rules governing actions for damages under national law for infringements of the provisions of the competition law of Member States and the European Union.

On the inclusion of actions for damages resulting from a violation of competition law within the scope of Regulation (EC) No. 44/2001

As regards the flyLAL-Lithuanian Airlines case, the majority of the doctrine welcomed the inclusion of the actions for damages resulting from the violations of competition law in the concept of "civil and commercial matters" within the meaning of Article 1, paragraph 1 of Regulation (EC) No 44/2001[2], particularly as it

[1] It will be noted that since 10 January 2015, this regulation was repealed and replaced by Regulation (EU) No. 1215/2012 concerning jurisdiction, recognition and enforcement of judgments in civil and commercial matters. However, the latter was not applicable *ratione temporis* in the main proceedings resulting in the two cases discussed.

[2] Refer to, for example, KOHLER, C., "Sonderstellung staatseigener Unternehmen im Europäischen Zivilprozessrecht?", Praxis des internationalen Privat- und Verfahrensrechts, n° 6, 2015, pp. 500-505, p. 503, SUJECKI, B., "Anwendung der EuGVVO auf Schadensersatzklagen wegen Kartellrechtsverstoßes - Keine Berufung auf ordre public wegen schwerwiegender

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involves the applicability of both the jurisdiction rules as well as the recognition and enforcement system of the Regulation. [3] In this regard, **Vasilakakis** emphasises that the Court does not depart from guidelines that it had already established on the concept of "civil and commercial matters". [4] Although sharing this positive opinion about the final result of the judgment, some commentators, however, would have liked to see the Court set out its reasoning in greater detail. For example, according to **Landbrecht**, "[b]ezüglich der Bestimmung des Anwendungsbereichs der VO ist zu hoffen, dass es sich lediglich um eine verkürzte Begründung seitens des EuGH handelt"[5]. In any event, the doctrine notes the importance of this ruling for the implementation of the EU competition law noting, moreover, that "[i]n combining legal certainty as to the application of Regulation (EU) No. 1215/2012 and the recently passed Directive 2014/104 […] the findings of Case C-302/13 are non-controversially in line with the Commission's policy to increase the effectiveness of the EU Competition regime by clarifying and simplifying its private enforcement procedure"[6].

The applicability of the rule of concentration of jurisdictions in case of multiple applicants

Regarding Article 6, paragraph 1 of Regulation (EC) No. 44/2001, the Court specified in the CDC Hydrogen Peroxide ruling the conditions for its application in the context of an action for damages directed against several companies involved in a cartel found by the Commission. On this point, the doctrinal reactions should pay special attention to two issues: firstly, the existence of the same legal and practical situation and, secondly, the possible misuse of this jurisdiction rule.

Regarding the first issue, the solution adopted by the Court, under which, in the context of an action such as that at issue, it is considered that the requests brought against different defendants will form part of the same legal and practical situation, is welcomed by many commentators. [7] **Idot** notes, for example, that "the fact of separately judging actions for damages against several companies established in different Member States participating in a single and continuous cartel is likely to lead to irreconcilable judgments. Article 6, point 1 is therefore applicable. It is true that beyond the technicalities of interpretation of the text, it is highly beneficial in competition law to make use

wirtschaftlicher Folgen von einstweiligen Anordnungen für Staatsunternehmen - 'flyLAL'", Europäisches Wirtschafts- und Steuerrecht, nº 6, 2014, p. 340-341, p. 341, IDOT, L., "A year marked by the adoption of Directive 2014/104/EU on actions for compensation", Quarterly Review of European Law, No. 4, 2015, p. 807, or KNÖFEL, O.L., "Zum Begriff 'Zivil- und Handelssachen' im europäischen Zivilprozessrecht: Anmerkung zu EuGH, Urt. v. 23.10.2014, Rs. C-302/13 (flyLAL, Lithuanian Airlines AS/Starptautiskā lidosta Rīga VAS, Air Baltic Corporation AS)", Zeitschrift für das Privatrecht der Europäischen Union, nº 5, 2015, pp. 251-258, p. 253.

[3] DE MIGUEL ASENSIO, P.A, "Nota. Sentencia del Tribunal de Justicia de la Unión Europea, de 23 de octubre de 2014, asunto C-302/13", Revista Española de Derecho Internacional, vol. 67, nº 1, 2015, p. 255-257, p. 255; also refer to PIRONON, V., "The application of the "Brussels 1" regulation to the disputes of anticompetitive practices - Court of justice of the European Union, 23 October 2014", AJ business contracts - Competition - Distribution, No. 1, 2015, p. 42.

[4] VASILAKAKIS, E., "Yperkratika/diethni dikastiria", Epitheorisi Politikis Dikonomias, 2015, p. 379-383, p. 380-381.

[5] LANDBRECHT, J., "EuGVVO: Anwendungsbereich, ausschließliche Zuständigkeit und Ordre-Public-Widrigkeit im Fall kartellrechtlicher Schadensersatzklagen", Europäische Zeitschrift für Wirtschaftsrecht, nº 2, 2015, p. 76-80, p. 80.

[6] FRÜHLING, P. et DELARUE, J., "flyLAL-Lithuanian Airlines: EU Rules on Jurisdiction Cover Antitrust Damages", Journal of European Competition Law & Practice, vol. 6, nº 7, 2015, p. 493-495, p. 495.

[7] Refer to, for example, WELLER, M. and WÄSCHLE, J., "EuGVVO - Zuständigkeitskonzentration bei Schadensersatzklage gegen mehrere Kartellanten und Reichweite einer abweichenden Gerichtsstandsvereinbarung", Recht der internationalen Wirtschaft, n° 9, 2015, p. 603-605, p. 604, as well as WIEGANDT, D., "EuGVVO: Auskunfts-/Schadensersatzklage gegen mehrere Kartellbeteiligte aus verschiedenen Mitgliedstaaten (Private Enforcement) - Rücknahme gegen den im Forumsstaat ansässigen Beklagten - Wirkung von Gerichtsstandsklauseln gegenüber Dritten? - 'CDC'", Europäisches Wirtschafts- und Steuerrecht, n° 3, 2015, p. 157-159, p. 158.

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of all the rules that allow a concentration of jurisdictions". [8] Similarly, **Luciani** notes that "the grouping of jurisdictions accepted by the ECJ is highly appropriate because of the great disparity between national laws, which also affect the procedure and increase the risk of irreconcilable judgments". [9] In the same way, **Wurmnest** observes: "[g]iven that the law of damages as well as the rules of civil procedure vary greatly across Europe and that these differences will not be weeded out completely in the near future when the [Directive 2014/104] is implemented, plaintiffs should not underestimate the benefits of centralizing their actions before a convenient forum"[10].

Other authors, such as **Harms**, **Sanner** and **Schmidt**, however, temper the favourable reactions vis-à-vis the ruling, noting that the Court's considerations concerning the notion of "same legal and practical situation" could be further developed and that the ruling leaves out, in particular, the analysis of the existence of the same legal situation.[11] Finally, several commentators warn that the ruling does not clarify the doubts about the possibility of using the jurisdictional rule of Article 6, paragraph 1 of Regulation (EC) No 44/2001 in "stand alone" actions, that is to say, in cases where the violation of the rules of competition law has not been previously found by the Commission [12], or in "follow on" actions resulting from an infringement found not by the Commission, but by a national competition authority.[13]

Regarding the second issue, the authors welcome as a majority the possibility, recognised by the Court in its judgment, of considering that there is a misuse of the jurisdiction rule of Article 6, paragraph 1 of Regulation (EC) No. 44/2001 when the national court finds that the applicant has artificially created or maintained the conditions of application of this provision. According to **Mélin** , "[t]his reservation is fully justified in the light of the previous case law, which holds that Article 6, paragraph 1 shall not allow the applicant to make a claim against multiple defendants with the sole purpose of removing one of these defendants in the courts of the State where he is domiciled". [14] Nevertheless, the restrictive nature of this reservation is welcomed by a part of the doctrine: according to **Wurmnest,** "[f]or good reasons, the [CJEU] set the hurdles very high for showing such a circumvention. There must be 'firm evidence' in support of the finding that the parties concerned had colluded to artificially prolong the applicability of Article 6(1). […] The [CJEU]'s reasoning is convincing. Settlement agreements between the parties, be they out-of-court or in the context of a civil proceeding, are vital for the functioning of the judicial system. […] Any rule that weakens the willingness of the parties to

[8] IDOT, L., "Tort actions in competition law", Europe. European Union law news, No. 7, July 2015, comm. 287, p. 34-36, p. 35.

[9] LUCIANI, AM, "Action for compensation for damage caused by anti-competitive practices - Court of Justice of the European Union 21 May 2015", AJ Contrats d'affaires - Concurrence - Distribution, no. 8-9, 2015, p. 382.

[10] WURMNEST, W., "International jurisdiction in competition damages cases under the Brussels I Regulation: CDC Hydrogen Peroxide", Common Market Law Review 2016, vol. 53, nº 1, p. 225-247, p. 235-236.

[11] HARMS, R., SANNER, J.A., and SCHMIDT, J., "EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen", Europäische Zeitschrift für Wirtschaftsrecht, nº 14, 2015, p. 584-593, p. 587-588.

[12] WIEGANDT, D., cit. *supra* note 7, p. 158-159; see also STADLER, A., "Schadensersatzklagen im Kartellrecht – Forum shopping welcome!", Juristenzeitung n° 23, 2015, p. 1138-1149, p. 1142, et NEGRI, M., "Una pronuncia a tutto campo sui criteri di allocazione della competenza giurisdizionale nel private antitrust enforcement transfrontaliero: il caso esemplare delle azioni risarcitorie c.d. follow-on rispetto a decisioni sanzionatorie di cartelli pan-europei", Int'l Lis, nº 2, 2015 p. 78-84, p. 81.

[13] ORÓ MARTÍNEZ, C., "Reglamento Bruselas I y acciones indemnizatorias derivadas de un cártel: cuestiones de competencia judicial internacional", La Ley Unión Europea, nº 30, 2015, pp. 1-13, p. 5.

[14] MÉLIN, F., "Entente et compétence dans l'Union européenne en cas de co-défendeurs", Dalloz actualité, 15 June 2015; also refer to STADLER, A., cit. *supra* note 12, p. 1143 and WIEGANDT, D., cit. *supra* note 7, p. 159.

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settle would have a negative impact on the sound administration of justice"[15].

On the interpretation of the jurisdiction rule in matters relating to tort, delict or quasi-delict

In the CDC Hydrogen Peroxide judgment, the Court had to examine the rules that helped identify the damaging event, within the meaning of Article 5, paragraph 3 of Regulation (EC) No 44/2001 in the context actions for damages arising from a violation of competition law. Since, in the present case, there was dissociation between the place of the causal event and the place of the materialisation of the damage, the Court examined two possible connecting factors.

Regarding the place of the causal event, several authors are surprised that the Court places it at the place of conclusion of the agreement, especially given the impractical[16] or frequently fortuitous nature [17] of this place. According to them, this would go against the existence of a "particularly close connecting factor" between a dispute and possibly competent jurisdiction under Article 5, paragraph 3 of Regulation (EC) No 44 / 2001. Similarly, **Idot** notes, firstly, that "the reference to the place of conclusion is all the more surprising that, in the *Pâte de Bois I* judgment [...] [the Court] had recognised that in this area, the place of conclusion was irrelevant... [...]", to conclude, secondly, that "the place of conclusion of an agreement does not make sense! What will the Court do, in the presence of simple electronic exchanges of information?"[18] The first possible application of Article 5, paragraph 3 of the Regulation therefore has a rather theoretical character.[19]

Regarding the place of the damage, the Court has placed it, in principle, at the headquarters of each alleged victim considered individually. A part of the doctrine criticises this choice, in that it assumes the recognition of a forum actoris[20], especially in relation to purely economic damage [21] . Therefore, some authors have expressed the wish that this should be a solution limited to the field of infringements of competition law: for example, for **Harms**, **Sanner** and **Schmidt**, "[e]s bleibt zu hoffen, dass der EuGH diese im Gegensatz zum Grundsatz des Art. 2I Brüssel I-VO stehende Entwicklung zumindest auf Kartelldelikte begrenzt" [22]. However, several authors believe that there is good reason justifying the forum actoris under this type of action[23], such as, for example, encouraging victims to take action and thus promoting the development of these actions [24] . Although without refuting these benefits, **Wurmnest** nevertheless stresses that "[t]hat the [CJEU] did not try to base its analysis on [an] internationally accepted connecting factor [i.e. that a given Court has jurisdiction if the market in its territory was affected by the

[15] WURMNEST, W., cit. *supra* note 10, p. 238-239; also refer to BOYLE, N., CHHOKAR, G., et GARTAGANI, S., "Jurisdiction in follow-on damages claims: update on the judgment of the European Court of Justice in the hydrogen peroxide cartel claim", Global Competition Litigation Review, vol. 8, nº 3, 2015, p. R58-R62, p. R61.

[16] WELLER, M. and WÄSCHLE, J., cit. *supra* note 7, p. 604. 17 HARMS, R., SANNER, J.A., and SCHMIDT, J., cit. *supra* note 11, p. 589-590.

[17] HARMS, R., SANNER, J.A., and SCHMIDT, J., cit. *supra* note 11, p. 589-590.

[18] IDOT, L., cit. *supra* note 8, p. 35-36.

[19] Refer to, for example, STEINRÖTTER, B., "Internationale Zuständigkeit in kartelldeliktischen Rechtsstreitigkeiten bei innereuropäischer Beklagtenmehrheit ('CDC Hydrogen Peroxide')", juris PraxisReport-Internationales Wirtschaftsrecht, n° 3, 2015, Anm. 3.

[20] NEGRI, M., cit. *supra* note 12, p. 82-83, and IDOT, L., cit. *supra* note 8, p. 35-36.

[21] VAN CALSTER, G., "Anchor defendants in follow-up competition law cases. The ECJ confirms AG's view on joinders. Sticks to Article 5(3)/7(1). Locus damni for purely economic loss = registered office", 26 mai 2015, available on https://gavclaw.com/2015/05/26/anchor-defendants-in-follow-up-competition-law-cases-the-ecj-confirms-ags-view-on-joinders-sticks-to-article-53-71-locus-damni-for-purely-economic-loss-registered-office.

[22] HARMS, R., SANNER, J.A., and SCHMIDT, J., cit. *supra* note 11, p. 591.

[23] WELLER, M. and WÄSCHLE, J., cit. *supra* note 7, p. 604.

[24] LUCIANI, A.M., cit. *supra* note 9, p. 382; also refer to WIEGANDT, D., cit. *supra* note 7, p. 159.

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restriction of competition] is a setback in the attempts to build a coherent legal framework for cross-border competition actions" [25]. Finally, some authors believe that the solution adopted by the Court is consistent with its previous case law.[26]

On the effects and scope of jurisdiction clauses contained in delivery contracts

The Court established, in the CDC Hydrogen Peroxide judgment, that Article 23, paragraph 1 of Regulation (EC) No. 44/2001 does not preclude the inclusion of jurisdiction clauses contained in delivery contracts, provided that they refer to disputes concerning the liability incurred due to a breach of competition law.

Regarding specific indications for national courts regarding the interpretation of the material scope of such clauses, the doctrinal reactions have been overwhelmingly positive, stressing the usefulness of these indications for drafters of contracts [27] and for the uniform application of EU law [28]. On a more general note, **Wurmnest** also reports that "[t]he Court was right to point out that rules applicable to the substance of a case cannot affect the validity of a jurisdiction clause agreed upon in accordance with Article 23 […]. [Allowing] national courts to deny the enforcement of jurisdiction agreements based on a violation of the principle of effective enforcement would, furthermore, have undermined jurisdiction agreements' objective of providing legal certainty and predictability with regard to the courts having jurisdiction in international commercial transactions" [29].

That said, many commentators complain that the Court has excluded the arbitration clauses from its response.[30] According to **Panitsas**, it would have been useful for interpretation purposes if the Court takes a clear position regarding such clauses [31]. However, for **Idot**, "the solution chosen, which emphasises the reality of consent, [...] appears to be entirely transposable to arbitration clauses, and thus also to jurisdiction clauses not covered by Article 23, simply because it is the logical thing to do".[32]

Conclusions

Like the flyLAL-Lithuanian Airlines judgement, many authors point out that the judgment in the CDC Hydrogen Peroxide case is likely to produce effects beyond this individual case and facilitate implementation of the competition law in the broad sense. For example, according to **Musger**, "[d]ie Entscheidung ist weit über den Anlassfall hinaus bedeutsam. Im Ergebnis erleichtert sie die Durchsetzung von Kartellschadenersatz" [33]. Although the doctrine does not necessarily share the Court's reasoning, it remains pragmatic and recognises, in general terms, that this is a judgement that will be helpful for applicants, particularly in that it clarifies important issues concerning actions for damages caused by a violation of competition law.[34] Moreover, many commentators highlight, in this context, the fact that the judgment resulted in a favourable outcome for the interests of people and businesses who have suffered

[25] WURMNEST, W., cit. *supra* note 10, p. 244; also refer to ORÓ MARTÍNEZ, C., cit. *supra* note 13, p. 8.

[26] GEISS, O., et HORST, D., "Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others: A summary and critique of the judgment of the European Court of Justice of May, 21 2015", European Competition Law Review, vol. 36, nº 10, 2015, p. 430-435, p. 435.

[27] LUCIANI, A.M., cit. *supra* note 9, p. 382.

[28] WURMNEST, W., cit. *supra* note 10, p. 246.

[29] WURMNEST, W., cit. *supra* note 10, p. 245.

[30] HARMS, R., SANNER, J.A., and SCHMIDT, J., cit. *supra* note 11, p. 591.

[31] PANITSAS, G., "Ritres diaitisias/Ritres parektasis diethnous dikaiodosias kai adikopraktikes axioseis apozimiosis logo paraviasis ton kanonon antagonismou", Dikaio Epicheiriseon & Etairion, 2015, p. 1117-1119, p. 1119.

[32] IDOT, L., cit. *supra* note 8, p. 36.

[33] MUSGER, G., "Internationale Zuständigkeit für Kartellschadenersatz", Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht n° 5, 2015, p. 228-237, p. 235; also refer to WURMNEST, W., cit. *supra* note 10, p. 246, or STADLER, A., cit. *supra* note 12, p. 1138.

[34] See, for example, HARMS, R., SANNER, JA, and Schmidt, J., cit. *Supra* note 11, p. 593.

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damage due to a violation of competition law. This is the case with **Woodgate** and **Owen**, who note that after the judgement "victims have a wider choice of potential jurisdictions in which to sue for redress, and, in spite of the [CJEU's] protestations to the contrary, ample scope for forum shopping"[35]. However, some questions remain unanswered regarding the relationship between the Court's case law in the field of competition law and the case law concerning Regulation (EC) No. 44/2001. In this regard, **Wurmnest** states that "national courts should not hesitate to initiate further preliminary proceedings, for example to clarify the impact of the single economic unit doctrine on the delineation of international jurisdiction"[36]. In sum, the overall assessment of this judgment and its practical effect remains positive. "Overall, the CJEU judgment is helpful in putting to bed many of the jurisdictional arguments that have raged in cartel damages cases"[37].

[OROMACR] [LOIZOMI] [LERCHAL]

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[35]WOODGATE, T., and OWEN, C., "Jurisdiction revisited. Forum shopping in cross-border damages claims", Competition Law Insight, vol. 14, nº 7, 2015, p. 16-17, p. 17.

[36]WURMNEST, W., cit. *supra* note 10, p. 246.

[37]PIKE, R., and TOSHEVA, Y., "CDC v Evonik Degussa (C-352/13) and its potential implications for private enforcement of European competition law", Global Competition Litigation Review, vol. 8, nº 2, 2015, p. 82-85, p. 84.

Information

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

The references under the case law decisions (IA/..., QP/..., etc.) refer to the case numbers in internal DEC.NAT. and CONVENTIONS bases. The records relating to these decisions can be found in the research and documentation department.

The case law notes included in the "Doctrinal echoes" section have been carefully selected. A comprehensive list of the published notes is provided in the internal NOTES base.

The publication "*Reflets"* is available on Curia (www.curia.europa.eu) under "Library and Documentation/Legal information of interest for the Union" and on the intranet of the Directorate-General of the Library, Research and Documentation.

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