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R E F L E T S

Brief information on legal developments of European Union interest

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European Court of Human Rights

European Convention on Human Rights – Interception on the high seas of vessels transporting migrants – Application of the non-refoulement principle – Breach of Articles 3 and 13 of the Convention, and of Article 4 of Protocol No. 4

The Grand Chamber of the European Court of Human Rights (ECHR) held that Italy's practice of intercepting vessels transporting refugees was in breach of Article 3 of the Convention prohibiting torture and inhuman or degrading treatment, Article 4 of Protocol No. 4 prohibiting collective expulsion, and Article 13 of the Convention concerning the right to an effective remedy, in conjunction with the aforementioned Articles 3 and 4.

The application had been submitted by 24 Somali and Eritrean nationals ("the applicants"). The vessels transporting the applicants to Italy had been intercepted by the Italian Coastguard within Maltese waters, transferred to an Italian military vessel and returned to Libya, the country from which they had originally departed. This practice of intercepting vessels and 'pushing back' migrants (*refoulement*) immediately was part of a policy agreed between Italy and Libya.

The applicants had maintained that the decision by the Italian authorities to return them to Libya had exposed them to the risk of torture or inhuman or degrading treatment in both Libya and their respective countries of origin. Furthermore, they had claimed that the act of pushing them back to Libya constituted collective expulsion in breach of Article 4 of Protocol No. 4 to the Convention. Finally, they had claimed that they had no access to an effective remedy under Italian law via which to lodge their complaints.

The Italian government had attempted to have their appeal declared inadmissible on the basis of a plea citing the absence of Italian jurisdiction on the grounds that the interception was classed as "a search and rescue operation on the high seas". The ECHR rejected this argument, finding that the interception did indeed fall within Italy's jurisdiction and that "pursuant to the relevant provisions of the law of the sea, a vessel sailing on the high seas falls exclusively within the jurisdiction of the State under whose flag it sails". Consequently, the Italian government enjoyed powers similar to those it exercised on its own territory, especially where a military vessel was concerned.

In relation to Article 3 of the Convention, the ECHR underscored that Libya's failure to observe its international obligations was an indisputable fact which had been condemned in reports by international bodies and non-governmental organisations. Moreover, the conclusions drawn in these reports had been confirmed in that compiled by the European Committee for the Prevention of Torture (CPT). In this connection, the ECHR also noted that the fact that national legislation existed and that international treaties had been ratified was not sufficient evidence that a State respected fundamental rights where reliable sources testified to the contrary.

In addition, Libyan law stipulated that all irregular migrants, including those who were entitled to claim refugee status, be forcibly returned to their countries of origin, even if said countries were classed as 'at risk'.

The ECHR thus held that the Italian authorities had breached the *non-refoulement* principle in pushing the applicants back, on the high seas, without first ascertaining how the Libyan authorities fulfilled their international obligations in respect of protecting refugees.

It is important to note that Italy remains liable despite citing its obligations under the relevant bilateral agreements concluded with Libya. In this respect, the ECHR held: "(…) the Member States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States".

With regard to Article 4 of Protocol No. 4, the ECHR examined for the first time the issue of whether said article was applicable to "a case involving the removal of aliens to a third State outside national territory". The Grand Chamber found that Article 4 prohibited States from expelling aliens from their territories.

Nevertheless, in the case at hand the ECHR held that in exercising jurisdiction outside its territory, on board a vessel, the State had incurred liability. Indeed, the transfer of the applicants to Libya had been carried out "without any form of examination of each applicant's individual situation". Neither had the Italian authorities carried out any checks as to the identity of the migrants.

Finally, as regards the breach of Article 13 of the Convention, the ECHR held that the applicants' claims that they had "not been given any information by the Italian military personnel, who had led them to believe that they were being taken to Italy and who had not informed them as to the procedure to be followed to avoid being returned to Libya" were credible.

The actions of the Italian authorities had deprived the applicants of any effective remedy by which to lodge their complaints under Article 3 of the Convention and Protocol No. 4.

European Court of Human Rights, judgment of 23 February 2012, Hirsi Jamaa and Others v. Italy (application no. 27765/09,) www.echr.int/echr

IA/32864-A

[GLA]

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European Convention on Human Rights – Unfair practices – Decision by the competition regulator imposing a fine – Whether Article 6 of the Convention applicable to penalties in competition matters – Judicial review by the administrative courts – No violation of Article 6 of the Convention

The European Court of Human Rights (ECHR) held that Italy had not breached Article 6(1) of the Convention as regards judicial review of a decision by an independent administrative authority imposing a fine.

In the case at hand, an administrative penalty had been imposed by the independent regulatory authority in charge of competition, the *Autorità Garante della Concorrenza e del Mercato* (AGCM), on an Italian company selling diabetes diagnosis tests on the grounds that the company had employed unfair practices. The company in question had lodged a number of appeals against the AGCM's decision before the Italian administrative courts of first and final instance, all of which had been rejected. It had subsequently lodged an appeal in cassation but the Supreme Court had declared the appeal inadmissible.

Finally, the company had lodged an application before the ECHR complaining that it had had no access to a court with full jurisdiction.

The ECHR first examined the argument raised by the Italian government that Article 6 of the Convention was inapplicable *rationae materiae* to penalties imposed by the AGCM.

The ECHR rejected this argument, finding that the fact that unfair practices did not constitute a criminal offence under Italian law was not a determining factor for the purposes of the relevant article's applicability.

Reiterating that the role of the AGCM affected the general interests of society which were normally safeguarded by criminal law, the ECHR held that the fine of €6 million was repressive and served as a deterrent. Consequently, the nature and severity of the fine imposed were criminal in character.

Having regard to the above, the ECHR dismissed. In terms of the substance of the case, the ECHR held that while Article 6(1) of the Convention did not preclude an administrative authority from imposing a fine, any decision by that authority must be reviewed by a court with full jurisdiction.

The ECHR thus held that the regional administrative court and the Consiglio di Stato, before which the applicant company had sought to challenge the penalty, fulfilled the conditions of independence and impartiality required of a court pursuant to Article 6 of the Convention.

As regards the review by the two courts in the case at hand, the ECHR noted that it was not simply a review of lawfulness. The courts in question had ascertained that the AGCM had exercised its powers correctly, that its decisions had been justified and proportional, and that the penalty imposed had been appropriate to the offence committed.

European Convention on Human Rights, judgment of 27 December 2011, Menarini Diagnostics s.r.l .v. Italy (application no. 43509/08), www.echr. coe.int/echr

IA/32851-A

[GLA]

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European Convention on Human Rights – Freedom of expression – Criminal conviction for agitation against a national or ethnic group – No breach of Article 10 of the Convention

On 9 February 2012, the Fifth Section of the European Court of Human Rights (ECHR) handed down a judgment in *Vejdeland and Others v. Sweden* in which it held unanimously that a judgment by the Swedish Supreme Court, the Högsta Domstolen (HD), convicting four individuals of agitation against a national or ethnic group did not constitute a breach of Article 10 (right to freedom of expression) of the Convention.

The applicants had distributed leaflets in an upper secondary school; the content of the leaflets had been deemed to express contempt for homosexuals. The HD had sentenced the first three applicants to a suspended prison term and to fines ranging from approximately €200 to €2,000, and the fourth to probation.

The applicants had challenged this ruling before the ECHR claiming that their right to freedom of expression had been violated. They had also complained that they had been convicted of a crime not prescribed by Swedish law.

In December 2004, the applicants, who were members of a far-right organisation, distributed approximately 100 leaflets in an upper secondary school by placing them in or on pupils' lockers. They claimed that the purpose of distributing the leaflets had been to prompt a debate on the lack of objectivity around homosexuality in the Swedish education system. The leaflets contained statements presenting homosexuality as a "deviant sexual proclivity", as having a "morally destructive effect on the substance of society" and as being the root cause of the spread of HIV and AIDS. The leaflets also claimed that "homosexual lobby organisations" were trying to play down paedophilia.

Since "agitation" against a specific group of the population is a criminal offence under Chapter 16(8) of the Swedish Penal Code, the prosecutor had launched criminal proceedings. The local court having found the applicants guilty as charged, the appeal court had subsequently acquitted them. The HD found them guilty on the following grounds: the text of the leaflet clearly expressed contempt for homosexuals and thus constituted "agitation" as provided for in the Penal Code, despite the fact that the idea behind the manner in which they had been distributed had, to a certain degree, been to prompt debate on the subject. The issue – a controversial one – was thus to determine whether Article 10 of the Convention demanded a narrower interpretation of the concept of contempt. The HD held that the determining factor was whether restriction of the freedom of expression was necessary in a democratic society and whether the restrictions on the applicants' freedom was proportional to the interests of protecting a particular group, in this case homosexual individuals. In this regard, the HD underlined that the ECHR had made clear that where a person enjoys certain freedoms, s/he has a responsibility and obligations, inter alia an obligation to avoid, as far as possible, unjustified attacks on other individuals since such attacks were not conducive to a further mutual understanding. In the case at hand, the HD found that the conviction pursuant to the Swedish Penal Code did not breach the right to freedom of expression enshrined in the Convention.

The ECHR upheld the State's decision and confirmed that an individual enjoying the freedom of expression had a duty to exercise said freedom responsibly so as not to cause offence to certain groups of the population. Although the intention to prompt debate around the lack of objectivity on the subject in Swedish schools might be an acceptable purpose, regard should be paid to ensuring that it be pursued appropriately. In addition to inviting debate on the subject, the leaflets had also contained statements which, .although not directly recommending individuals to commit hateful acts, were nonetheless serious and prejudicial allegations. The ECHR reiterated that insulting, holding up to ridicule or slandering specific groups of the population could be sufficient grounds for the authorities to consider freedom of expression to have been exercised in an irresponsible manner. The ECHR stressed that discrimination based on sexual orientation was just as serious as discrimination based on race, origin or colour. The fact that the leaflets were distributed in a secondary school in which the recipients were at a sensitive and impressionable age, which none of the applicants attended and to which none of them had free access were aggravating factors. The ECHR concluded that the balance struck by the HD between the various interests at stake had been appropriate and adequate and that the measures taken by the national authorities had been necessary to safeguard the rights of other individuals within the population.

The ECHR therefore held that the penalties imposed on the applicants were not excessive in relation to the maximum penalty provided for under the Swedish Penal Code. It also ruled that the applicants' argument that the offence in question was not prescribed by Swedish law was manifestly ill-founded.

European Court of Human Rights, judgment of 9 February 2012, Vejdeland and Others v. Sweden (application no. 1813/07), www.echr. coe.int/echr

IA/32863-A

[LTB]

International Court of Justice

International Court of Justice – Jurisdictional immunities of a State – Scope – Serious breaches of humanitarian law – Inclusion – Immunity from enforcement – Measures of constraint taken against property belonging to the applicant State on the territory of the defendant State - Violation

The principle of States' jurisdictional immunity and immunity from enforcement remains firmly rooted in international law, even against the backdrop of serious violations of humanitarian law such as those committed by Germany's Third Reich. This was the finding, by a significant majority of judges, of the International Court of Justice (ICJ) in its ruling of 3 February 2012 in a case involving Germany and Italy surrounding a dispute followed closely by *Reflets* since it first arose (see, *Reflets No. 3/2010* and *Reflets No. 3/2008)*.

Throughout the dispute, Germany, the plaintiff party, had been complaining that Italy had violated its jurisdictional immunity via a series of rulings adopted by Italian courts, in particular the Corte di Cassazione, which had held that such immunity did not apply where the act in question constituted a crime under international law and that, consequently, the Italian courts had jurisdiction to hear the corresponding legal action. On the basis of this case law, the Italian courts had been asked to rule on an array of actions seeking to have Germany ordered to pay compensation to victims, direct or indirect, of the harm suffered on account of massacres by German troops during World War Two. The Florence Court of Appeal had also ruled that a Greek ruling handed down on 30 October 1997 by the Livadia court of first instance finding Germany guilty of the crimes and awarding damages to the victims was enforceable in Italy. This substantive ruling by the Greek court had been upheld in cassation via a judgment handed down on 4 May 2000, and the enforcement ruling by the Florence Court of Appeal was duly upheld via a ruling of 16 June 2006 by Italy's Corte di Cassazione.

It should be noted that the Greek applicants had approached the Italian courts after the Greek justice minister had refused to allow the ruling to be enforced in Greece and after an appeal lodged by the same applicants before the European Court of Human Rights (ECHR) following this refusal had been declared inadmissible by the latter. By the same token, when asked to rule on an application for enforcement by the same applicants, Germany's Federal Supreme Court had held on 26 June 2003 that the ruling, which had been issued in violation of the German State's jurisdictional immunity, could not be recognised by the German legal system. It should also be noted, on the one hand, that the enforcement by Italy of the ruling passed by the Livadia court of first instance had been the sole reason giving rise to mandatory enforcement measures against German property located on Italian territory (registration of a legal charge on Villa Vigoni, owned by the German State and situated near Lake Como) and, on the other, that after the case had been brought before the ICJ by Germany, Italy adopted a law on 23 June 2010 suspending enforcement on its territory of all judgments passed against Germany pending the ICJ's ruling on the appeal lodged by Germany. The decision passed on 3 February 2012 reaffirmed at several points that the ICJ had not been asked to rule on the lawfulness of the acts of which Germany had been accused, both the ICJ and Germany itself having admitted that said acts had been committed "in complete disregard for the elementary considerations of humanity". The purpose of the ICJ's ruling was thus to determine whether Germany's jurisdictional immunity had been violated by the rulings passed by the Italian courts, regardless of the basis upon which said rulings had been passed. The ICJ held that entitlement to immunity, which was essentially of a procedural nature, was thus completely separate from the material law determining whether or not a particular action was lawful.

In this context, the ICJ reaffirmed firstly that entitlement to immunity was based solely on customary international law, which requires that there be a "settled practice" together with *opinio juris.* Such a custom existed in the case at hand and had its origins, in the ICJ's view, in the principle of sovereign equality of States. The scope of the rule was determined on the basis of the legislation in force at the time at which the action in question occurred, a time which, in the present situation, fell within a period during which the rulings by the Italian courts against which Germany was appealing had been handed down.

The ICJ went on to examine the distinction between acts carried out by the State *jure gestionis,* in respect of which certain restrictions on immunity rules are permitted, and those carried out *jure imperii,* in respect of which States generally enjoyed immunity.

Neither the parties to the case nor the ICJ had contested either the unlawfulness or the *jure imperii* nature of the acts committed by the German troops. Nevertheless, following an in-depth examination of various explanatory reports and of the practice and case law of the several contracting states, the ICJ held that whatever the circumstances, State immunity in respect of harmful acts committed by its armed forces did not fall within the scope of any of the exceptions stipulated in either Article 11 of the European Convention on State Immunity or Article 12 of the United Nations Convention on Jurisdictional Immunity of States. Such exceptions pertained either to acts committed *jure gestionis* or, where indeed applicable to acts *jure imperii,* to acts outside the exercise of military activities, in particular acts by armed forces as a whole. By contrast, the obligation to grant immunity in respect of harmful acts committed by the armed forces of a State was rooted in a wealth of case law frequently cited by the ICJ, several countries such as Germany, Belgium, Brazil, the United States, France, Egypt, Italy (in decisions other than those having given rise to the present dispute), Ireland, Poland, the Netherlands, the United Kingdom, Serbia and Slovenia, and in the judgment handed down by the ECHR in *McElhinney v. Williams*, in which the ECHR acknowledged that entitlement to immunity was not incompatible with the European Convention on Human Rights.

With regard to Italy's argument that refusing immunity was justified in the case at hand by the particular seriousness of the violations of humanitarian law comprising imperative *jus cogens* rules, the ICJ noted firstly that aside from the isolated case of a US law prohibiting immunity in respect of certain acts of terrorism committed by a State, no legislative text or practice made provision for entitlement to immunity to be based on the severity of the act of which a State was accused. The same position was adopted by the ECHR in its ruling handed down on 21 November 2001 in *Al-Adsami v. United Kingdom*.

The ICJ continued, citing similar case law from courts in the United Kingdom, Canada, Poland, New Zealand and Slovenia, as well as the ECHR, that there was no conflict between *jus cogens* rules rooted in the law of armed conflict and recognition of Germany's immunity. It held: "(…) these two categories of rules pertain to different issues. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question of whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. The obligation to pay compensation is a rule which exists regardless of the rules governing the means via which it should be effected." The ICJ ultimately rejected Italy's arguments that, on the one hand, the refusal to grant immunity was justified by the fact that if immunity were granted, the victims of German acts of war would be deprived of any compensation, and, on the other, that the aforementioned aspects, namely the severity of the violations, the nature of the rules violated and the lack of any channel via which victims could obtain a remedy, would have a cumulative effect. Concerning the first argument, the ICJ saw no reason for entitlement to immunity to be dependent upon the existence of other avenues via which to seek compensation. To uphold the second argument would, in the ICJ's view, be to misunderstand the very nature of immunity, devised as a right for a foreign State and the existence of which, moreover, should be examined at a preliminary stage prior to any examination of the substance of a case.

For all these reasons, the ICJ concluded that the refusal by the Italian courts to grant Germany the jurisdictional immunity to which it was entitled under customary international law constituted a failure on the part of the Italian State to fulfil its obligations.

The ICJ went on to examine the constraint measures, described above, taken by Italy in respect of German property located on Italian territory. In this context, going beyond the arguments cited by the parties, the ICJ referred to the distinction between the jurisdictional immunity of one State before the courts of another, and the immunity from enforcement enjoyed by various States on the territory of other States. In so doing, it detailed the difference between the lawfulness of the constraint measures in question and that of the Italian court rulings finding that the Greek rulings ordering Germany to pay compensation for crimes committed by its troops against Greek nationals were enforceable in Italy. The ICJ noted firstly that even where mandatory enforcement *could* be effected against the property of a foreign State, said property may not be used for government non-commercial purposes. This was not so in the case at hand, the Villa Vigoni being the headquarters of a cultural centre designed to promote cultural exchange between Germany and Italy

and, in Italy's words, a "centre of excellence for Italian-German cooperation in the fields of research, culture and education". The ICJ concluded that the registration of a charge on the Villa Vigoni constituted a violation of the immunity Italy was required to grant Germany.

Finally, the ICJ conducted a separate examination of the ruling by the Florence Court of Appeal finding the rulings by the Livadia court in Greece ordering Germany to pay compensation in respect of war crimes to be enforceable in Italy, and the ruling by Italy's Corte di Cassazione upholding the appeal ruling. In contrast to the aforementioned examination which dealt with Germany's jurisdictional immunity itself, this one focussed on the violation of the German State's jursidctional immunity via the enforceability in Italy conferred upon the rulings by the Greek court. In the ICJ's view, any liability on the part of Italy was separate from the issue of whether the Greek courts had themselves violated Germany's jurisdictional immunity. The ICJ held that the only consideration of relevance was whether said immunity had been respected in the enforcement proceedings brought in Italy. However, in accordance with Article 6(2) of the aforementioned UN Convention, said proceedings had been brought against a State found guilty via a foreign ruling. Therefore, the court before which the case had been brought was required to ascertain whether the defendant State enjoyed jurisdictional immunity before it and to ask itself whether, if it itself had been asked to issue a substantive ruling in an identical case, it would have been forced to grant the foreign State jurisdictional immunity. The ICJ concluded that by failing to ascertain these facts, the Italian courts had once again violated Germany's jurisdictional immunity.

International Court of Justice, judgment of 3 February 2012, Germany v. Italy, www.icj-cij.org

IA/32871-A

[RA]

EFTA Court

European Economic Area – Free movement of persons – Freedom of establishment – Freedom to provide services – Workers – Recognition of professional qualifications – Directive 2005/36/EC – Doctors – Assessment criteria

The EFTA Court was asked to rule on whether Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications ("the Directive"), or any other provision of EEA law permitted the authorities in Member States to apply national rules conferring the right to deny authorisation to practice medicine or to grant only partial authorisation to applicants with inadequate professional qualifications, specifically a migrant applicant who is a national of another Member State and who formally fulfils the requirements under the Directive for a right to mutual recognition of professional qualifications, where his professional experience in the host Member State is characterised by a lack of professional qualifications. The EFTA Court held thus:

"In principle, the Directive precludes the authorities of EEA States from applying national rules providing for a right to deny an authorisation as a medical doctor to a migrant applicant from another EEA State who fulfils the requirements under the Directive for a right to mutual recognition of professional qualifications.

However, an EEA State may make an authorisation conditional upon the applicant having a knowledge of languages necessary for practising the profession on its territory. Moreover, an EEA State may suspend or withdraw an authorisation to pursue the profession of medical doctor based on information concerning the personal aptitude of a migrant doctor relating to the professional qualification other than language skills (...) only if such requirements are objectively justified and proportionate to achieve the objective of protecting public health and if the same information would also entail a suspension or withdrawal of authorisation for a national doctor. If such grounds for suspension or withdrawal are available to the competent authorities at the time of assessment, the authorisation may be denied."

It noted:

"Requirements regarding linguistic skills shall ensure, in particular, that the doctor will be able to communicate effectively with patients, whose mother tongue is that of the EEA State concerned. However, such requirements should not go beyond what is necessary to attain that objective." (point 70)

"As for other factors concerning personal aptitude of a migrant applicant, it is important to note that it follows from Article 4(1) of the Directive that the effect of recognition of professional qualifications by the host EEA State is that the beneficiary is allowed to gain access to the same profession as that for which he is qualified in the home EEA State, and to pursue it in the host EEA State under the same conditions as its nationals. Thus, the rights conferred on individuals under the Directive are without prejudice to compliance by the migrant professional with any non-discriminatory conditions of pursuit which might be laid down by the authorities of the host State provided that these are objectively justified and proportionate, inter alia, with regard to ensuring a high level of health and consumer protection (.) .

Accordingly, the EEA States retain the competence to take disciplinary action and impose criminal sanctions against migrant medical professionals and, where appropriate, to suspend or withdraw the authorisation to practise if the respective conditions under national law are fulfilled, provided that the general principles of EEA law are respected.

However, the requirements on the pursuit of a profession must reflect objective criteria known in advance. They must adequately circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily, thereby eliminating discretionary conduct liable to deprive the Directive of its full effectiveness.

Furthermore, the requirements which an EEA State may impose must be non-discriminatory, able to ensure achievement of the objective of protecting public health and not go beyond what is necessary for that purpose. Thus is for the EEA State concerned to demonstrate". (points 72-72).

EFTA Court, judgment of 15 December 2011 in Case E-1/11, Dr A, www.eftacourt.int

IA/32687-A

[LSA]

European Economic Area – Freedom to provide services – Posting of workers in the framework of the provision of services – Directive 96/71/EC – Working conditions and conditions of employment – Maximum work periods – Remuneration in addition to the basic hourly rate – Compensation for travel, board and lodging – Constituent elements

The EFTA Court was asked to rule on whether Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services ("the Directive") – in particular Article 3(1) first subparagraph point (a) and/or point (c) – permitted an EEA State to guarantee workers from another EEA State and posted to its territory entitlement to certain working conditions and conditions of employment which are laid down in generally applicable collective agreements in the EEA State in which the work is to be performed, in accordance with Article 3(8) of the Directive.

With regard to maximum normal working hours, the EFTA Court held thus:

"The term "maximum work periods and minimum rest periods" set out in point (a) of the first subparagraph of Article 3(1) of the Directive covers terms and conditions regarding "maximum normal working hours"."

It noted:

"Thus, (.) provided that these terms and conditions apply in a general and equal manner to all similar undertakings in the geographical area and in the profession or industry concerned and, where these terms and conditions are laid down by collective agreement, that the conditions of Article 3(8) of the Directive are satisfied.

The (.) national legislation or collective agreements declared universally applicable concerning remuneration paid in compensation for working outside normal working hours are compatible with the Directive, provided these fall within the notion of "the minimum rates of pay" set out in point (c) of the first subparagraph of Article 3(1) of the Directive." (points 58-59)

Moving on to the issue of remuneration in addition to the basic hourly rate for tasks requiring the employee to spend at least one night away from home, except for site employees, the EFTA Court held:

"Article 3(1), first subparagraph, point (c), of the Directive, as interpreted in light of Article 36 EEA, does, in principle, preclude an EEA State from requiring an undertaking established in another EEA State which provides services in the territory of the first State to pay its workers the minimum remuneration fixed by the national rules of that State for work assignments requiring overnight stays away from home, unless the rules providing for such additional remuneration pursue a public interest objective and their application is not disproportionate. It is for the national authorities or, as the case may be, the courts of the host EEA State, to determine whether those rules in fact pursue an objective in the public interest and do so by appropriate means."

It found that:

" (.) an entitlement to additional remuneration for work assignments requiring overnight stays away from home may be compatible with point (c) of the first subparagraph of Article 3(1) of the Directive, provided it corresponds to a rate which is regarded as the minimum rate of pay for such assignments. In accordance with Article 4(3) of the Directive, furthermore, such terms and conditions of employment must be expressly stated and rendered transparent for both the foreign service provider and the posted workers, and apply in a general and equal manner to all similar undertakings in the geographical area and in the profession or industry concerned (.) ." (point 72).

"In exercising the discretion accorded to them to define the content of mandatory rules for minimum protection for the purposes of Article 3(1) of the Directive, EEA States are obliged, furthermore, to respect the EEA Agreement (.) " (point 74)

"It is for the national court to verify whether, on an objective view, the rules (.) promote the protection of posted workers. In this respect, it is necessary for the national court to determine

whether those rules confer a genuine benefit on the workers concerned which significantly adds to their social protection. In this context, the stated purpose of the rules may lead to a more careful assessment of the alleged benefits conferred on workers." (point 84)

"In doing so, the national court must balance the administrative and economic burdens that the rules impose on providers of services against the increased social protection that they confer on workers compared with that guaranteed by the law of the EEA State where their employer is established." (point 87)

Concerning compensation for travel, board and lodging in the case of work assignments requiring at least one overnight stay away from home, except for site employees, the EFTA Court held:

"[The] Directive (. . .) does not permit an EEA State to secure workers posted to its territory from another EEA State compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home, unless this can be justified on the basis of public policy provisions."

It noted:

"EEA States are, in principle, free to determine the requirements of public policy in the light of their needs. The notion of public policy, particularly when it is cited as a justification for a derogation from the fundamental principle of the freedom to provide services, must, however, be interpreted strictly (.) . Its scope cannot be determined unilaterally by each EEA State. Reasons which may be invoked by an EEA State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated. For example, an EEA State cannot rely on the public policy exception referred to in the first indent of Article 3(10) of the Directive in order to apply to undertakings posting workers on its territory a requirement relating to the automatic adjustment of wages other than minimum wages to reflect changes in the cost of living (.) . " (point 99)

The EFTA Court also held:

"The proportion of the employees covered by the relevant collective agreement, before it was declared universally applicable, has no bearing on the answers to Questions (...) [in this judgment]."

It found that:

"According to Article 3(1) of the Directive, the minimum terms and conditions of employment which an EEA State must guarantee to posted workers may be laid down in law, regulation or administrative provision and/or by collective agreement or arbitration award which have been declared universally applicable. In the context of this choice there is no requirement that any specific proportion of employees is covered by the relevant collective agreement before it is declared universally applicable. Thus the Court concurs with the view expressed by the parties." (point 105)

EFTA COURT, judgment of 23 January 2012 in Case E-2/11, STX Norway Offshore AS and Others v. The Norwegian State, represented by the Tariff Board, www.eftacourt.int

IA/32688-A

[LSA]

II. National courts

1. Member States

Germany

Competition – Cartels – Right of indirect victims of unfair practices to claim damages – Admissibility of the passing-on defence

The Bundesgerichtshof acknowledged the right to compensation of an indirect client of a company involved in a price-fixing cartel. By contrast, the company in question which had committed the offence was, in principle, permitted to cite the passing-on defence whereby it could claim that the indirect victim had not suffered any harm because it had been able to pass on the harm caused to it to its own clients (concerning this point see the position adopted in US and French case law, E. Combe, I. Simic, F. Rosati, *La repercussion des surcouts: Passing-on defence* in *Concurrences* No. 4-2011).

The cartel in question was one established in the carbon-paper industry and had been the subject of a Commission decision in 2001. Both the appeal before the Court of First Instance against this decision imposing fines on the companies involved and that before the European Court of Justice (ECJ) had been dismissed (judgment passed by the Court of First Instance on 26 April 2007, *Bolloré*, T-109/02, ECR II-947, and judgment handed down by the European Court of Justice on 3 September 2009, *Papierfabrik August Koehler*, joined cases C-322/07 P, C-327/07 P and C-338/07 P, ECR p. I-7191).

In the case before the Bundesgerichtshof, a printing firm had purchased carbon paper from a wholesale supplier, which was a wholly owned subsidiary of a company involved in a price-fixing cartel. In its action for damages against said company, the printing firm was claiming that its supplier had paid too high a price, which would then have been passed on to it. The lower court had dismissed the appeal since in its view only direct victims of an unfair practice could claim damages.

In the Bundesgerichtshof's view, the harmful effects of a cartel were felt across the market as a whole and, consequently, the prohibition on cartels stipulated in Article 101 TFEU was designed to protect the interests not only of direct clients but also of indirect ones. Making reference to the case law of the ECJ, in particular the judgments handed down on 20 September 2001 (*Courage*, C-453/99, ECR p. I-6297) and 13 July 2006 (*Manfredi*, C-295/04 to 298/04, ECR p. I-6619), the Bundesgerichtshof held that the efficacy and useful effect of the prohibition on cartels set out in the TFEU required that anyone, including indirect victims, be able to claim damages provided that a causal link between the unfair practice in question and the harm caused could be proven.

For its part, the perpetrator of the unfair practice may argue that any harm caused has been compensated already since the victim was able to pass it on to its own clients. In the Bundesgerichtshof's view, permitting such a defence prevented both the risk of unjust enrichment and a situation entailing a company being found guilty of the same harm on multiple occasions.

The Bundesgerichtshof set aside the judgment handed down by the lower court and ordered it to pass a fresh ruling.

Bundesgerichtshof, judgment of 28 June 2011, KZR 75/10, www.bundesgerichtshof.de

IA/33220-A

[AGT]

State aid – Plans to grant aid – Aid granted in breach of the prohibition stipulated in Article 108(3) TFEU – Right of competitors of the recipient of aid to claim reimbursement – Legal basis in German law

In its ruling of 10 February 2011, the Bundesgerichtshof passed judgment on Article 108(3) final sentence of the TFEU. Said provision prohibits Member States from putting proposed aid measures into effect before the Commission procedure has resulted in a final decision. The Bundesgerichtshof classified this provision as a "statute intended to protect another person" within the meaning of Article 823(2) of the German Civil Code (BGB), and thus as permitting, in principle, the competitors of a recipient of aid to demand that the State be reimbursed for aid paid in breach of Article 108(3) TFEU.

In the case at hand, an airline had brought legal action against the managers of a regional airport, a majority share of which was owned by the State,

since the airline felt that said managers were granting preferential conditions (specifically a reduction in airport fees) to a competitor airline. The lower court had dismissed the action seeking that the State be required to claim reimbursement of aid on the grounds that the case had no basis in law.

The Bundesgerichtshof held that the prohibition stipulated in Article 108(3) final sentence of the TFEU was directly applicable and conferred rights upon individuals. Making extensive reference to the case law of the European Court of Justice (ECJ), in particular the judgment of 12 February 2008 (*CELF*, C-199/06, p. I-469), it pointed out that the national courts were obliged to safeguard the rights of litigants in the event of a violation of Article 108(3) TFEU. National law was thus to be applied in such a way that the competitor of a recipient of aid should be able to demand that the State claim reimbursement of aid paid in breach of Article 108(3) TFEU. In the Bundesgerichtshof's view, under German law Article 823(2) of the BGB constituted the legal basis for safeguarding the rights of competitors of an aid recipient.

The case before the Bundesgerichtshof also raised the issue of whether the State could argue in its defence that a claim for reimbursement was time-barred and thus would inevitably be unsuccessful. In the Bundesgerichtshof's view, in view of the need to ensure that the rules of the TFEU were not deprived of their useful effect, faced with a claim by the State for reimbursement, the airline in receipt of the aid would have no means by which to challenge the time-barring were legal action to be brought by the competitor prior to expiration of the period during which said time-barring applied.

The Bundesgerichtshof set aside the ruling by the lower court and ordered it to examine in detail the aid measures in question.

Bundesgerichtshof, judgement of 10 February 2011, I ZR 136/09, www.bundesgerichtshof.de

IA/33219-A

[AGT]

Storage and supply of data generated via electronic communication – German Telecommunications Act – Rules governing authorities' access to passwords and secret codes – Incompatibility with the German Constitution

Having previously declared, in its ordinance of 2 March 2010 (see *Reflets No. 2/2010),* certain provisions of the Telecommunications Act (TKG) transposing Directive 2006/24/EC of the European Parliament and of the Council on the retention of data incompatible with Germany's Basic Law, the German Federal Constitutional Court, the Bundesverfassungsgericht, ruled on other provisions contained in the TKG. This time around, the constitutional appeal concerning Articles 111, 112 and 113 of the TKG brought the issue of the storage and supply of certain data, generated in the context of electronic communications, before the Karlsruhe courts. The latter held that the rules governing access by the authorities to passwords and secret codes were in breach of the Constitution.

With regard to Article 111 of the TKG setting out the obligation on the part of providers of electronic telecommunications services to retain certain technical telecommunications data and users' personal data, the Bundesverfassungsgericht noted that the scope of this obligation was largely determined by Article 5 of Directive 2006/24/EC. In this context, it reiterated that it did not, in principle, have any control over the provisions of national law transposing binding EU law in relation to German fundamental rights. However, the application was deemed admissible since the applicants were seeking a reference to the European Court of Justice (ECJ) for a preliminary ruling in order for the latter to declare the directive null and void. Were the directive to be annulled, the provision of national law would no longer be determined by EU law but would continue to exist as an independent piece of national legislation and as such, the Bundesverfassungsgericht would have some power of review with regard to it. Finally, having concluded that Article 111 of the TKG was compatible with the Constitution, the Bundesverfassungsgericht was no longer required to examine the relevant aspects of EU law.

In terms of the use of retained data, EU law stipulated no binding requirements. There were thus no restrictions on review, by the Bundesverfassungsgericht, of the rules giving rise to the obligation on the part of service providers to put in place automatic (Article 112 of the TKG) and manual (Article 113 of the TKG) information procedures. In substantive terms, only a number of aspects of the manual procedure detailed in Article 113 of the TKG posed a problem.

The Bundesverfassungsgericht held that the obligation on the part of service providers to forward passwords and secret codes intended to provide users with secure access to telecommunications devices, as detailed in Article 113(1) second sentence of the TKG, was incompatible with the fundamental right to freedom of choice in the context of information (*Grundrecht auf informationelle Selbstbestimmung*). Said provision was in breach of the principle of proportionality since the law did not state that in order to forward such data the authorities concerned were first required to have the right to use them. The Bundesverfassungsgericht pointed out that access to this kind of sensitive data was only justified where the conditions governing their use had been met.

By contrast, the general obligation on the part of service providers pursuant to Article 113(1) first sentence of the TKG to forward data complied, in principle, with the Basic Law. Nevertheless, in line with the Bundesverfassungsgericht's interpretation of the Constitution, fulfilling this obligation was only possible where the request for the data to be forwarded had a specific basis in law. Furthermore, in the Bundesverfassungsgericht's view, Article 113 of the TKG ought not to be cited for the purpose of identifying users of dynamic IP addresses, which were habitually used by individuals to surf the Internet. In order to be able to identify dynamic IP addresses, service providers would have to use data concerning users' communications, which would constitute an infringement of the fundamental right to confidentiality of correspondence (Article 10 of the Basic Law); Article 113 of the TKG did not meet the conditions justifying such an infringement.

However, the Bundesverfassungsgericht did not annul Article 113(1) second sentence of the TKG. Instead it introduced a transitional period ending on 30 June 2013, during which said provision could continue to be applied insofar as the conditions governing the use of forwarded data were met. During the same transitional period, the authorities could continue to apply Article 113(1) sentence one of the TKG without regard to the interpretation in line with the Constitution imposed by the Bundesverfasssunggericht.

Bundesverfassungsgericht, ordinance of 24 February 2012, 1 BvR 1299/05, www.bundesverfassungsgericht.de

IA/33222-A

Belgium

Fundamental rights – Equal treatment and non-discrimination – Right to effective judicial remedy – Decisions and action taken within the framework of an investigation by the Auditor's Office of the Competition Commission – No judicial remedy – Inadmissibility

In its judgment of 22 December 2011, the Cour constitutionnelle ruled on the compatibility of the Belgian Act on the Protection of Economic Competition with the principles of equal treatment and non-discrimination laid down in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union and with the rights to effective legal protection and to a fair trial enshrined in Article 47 of said Charter and in Article 6 of the European Convention on Human Rights.

The provisions in question of the Act on the Protection of Economic Competition governed the investigation procedure in relation to restrictive practices in respect of competition, as followed by the Auditor's Office of the Competition Commission. The provisions in question may be interpreted as excluding any judicial appeal against decisions and action taken by the Auditor's Office in the context of such an investigation.

In the view of the Cour constitutionnelle, if it were interpreted thus, such a rule could result in unlawful evidence and documentation continuing to be accessible until such time as investigation of a case was completed and submitted to the competent court, and even in said court being influenced by it despite the possibility that such evidence and documentation may be of such a nature as to be detrimental to those subject to measures taken by the Auditor's Office. Naturally, the fact of such evidence and documentation having been obtained unlawfully can only result in the court being forced to exclude them. Nevertheless, interpreted thus, the provisions in question undermine, in a discriminatory fashion, the right to effective legal protection insofar as it is not possible for the undertakings concerned to anticipate the occurrence of the measure via which the data would become subject to communication which would be of such a nature as to be detrimental to them.

The Cour constitutionnelle found that undermining said right in this way could not be justified by the concern that dossiers be dealt with swiftly.

Nevertheless, the Cour constitutionnelle held the provisions in question could be interpreted in a different way, since the decisions and actions taken by the Auditor's Office could also be considered as being rooted in permission from the chairman of the Competition Commission, which could indeed be appealed.

Whatever the scenario, it was the responsibility of the legislature to arrange for an appropriate judicial review.

Cour constitutionnelle, judgment of 22 December 2011, No. 197/2011, www.const-court.be

IA/33154-A

[CREM] [FLUMIBA]

Harmonisation of laws – Copyright and related rights – Right of reproduction – Private copying exception – National legislation including mobile telephones with MP3/MP4 functions and memory cards on the list of devices subject to remuneration for private copying – Violation of Directive 2001/29/EC – None

In its judgment of 1 December 2011, the Conseil d'Etat dismissed the action for annulment lodged against provisions contained in the Royal Decree of 17 December 2009 including mobile telephones with an MP3/MP4 function and memory cards on the list of devices allowing reproduction of auditory works and/or audiovisual works and thus subject to remuneration for private copying on such telephones. This remuneration was payable regardless of whether or not it had been established – or indeed recorded – that the telephones and memory cards in question were clearly being used for private-copying purposes.

The applicants were citing two arguments in support of their appeal, the first of which pertained in part to the compatibility of the disputed decree with Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society. In this regard, they were asking the Conseil d'Etat to submit a reference to the European Court of Justice (ECJ) for a preliminary ruling as to whether media which were clearly not being used for reproduction purposes fell within the scope of the exception stipulated in Article 5(2) of the directive.

The Conseil d'Etat held that the decree was indeed compatible with the directive and, consequently, that there was no need to submit a reference to the ECJ for a ruling on the question posed by the applicants. In the view of the Conseil d'Etat, in stating "any medium", Article 5(2)(b) of the directive could not reasonably be interpreted as applying only to media which were clearly being used for reproduction purposes. In support of this view, the Conseil d'Etat cited the judgment handed down by the ECJ on 21 October 2010 (*Padawan SL*, C-467/08, not yet published in the European Court Reports), concluding that media which may be used for private copying may be subject to remuneration even where they are either not actually used for private copying at all or are only used for it seldom.

The Conseil d'Etat also dismissed the applicants' second argument that in failing to take account of whether technical measures had been applied, the Royal Decree would be in breach of Article 5(2)(b) of the directive. In the applicants' view, with respect to musical works protected against all forms of copying via a technological measure, there was no justification for compensating copyright-holders and holders of related rights for private copying which was not possible.

In the view of the Conseil d'Etat, Article 5(2)(b) of the directive granted Member States an "option" to determine "exceptions or limitations". Said article stipulated that provision should be made for "fair compensation" for rights holders, which "takes account" of the application or non-application of technological measures. Consequently, the directive leaves Member States a degree of discretion. In this connection, the Conseil d'Etat added that whatever the situation, Article 5(2)(b) of the directive, which granted the Member States discretion on a number of points as regards the measures to be adopted to ensure that the directive was transposed, was not directly applicable and could therefore not form the basis of an appeal for annulment.

Conseil d'Etat, judgment of 1 December 2011, No. 216.664, www.raadvst-consetat.be/

IA/33155-A

[CREM] [FLUMIBA]

Spain

Social policy – Protection of the safety and health of workers – Directive 2003/10/EC – Strenuous nature of work – Right of workers to receive additional pay on account of the strenuous nature of work – Measuring the sound level in the workplace – Effect of using individual hearing protection – Dissenting opinion

Having been asked to rule on an appeal in cassation against a judgment handed down by the Valencia High Court upholding the ruling by the Valencia court of first instance of 1 June 2009, on 30 November 2011 the Social Chamber of the Tribunal Supremo passed a ruling confirming its consistent practice in respect of the strenuous nature of work. Given the solution adopted by the European Court of Justice (ECJ) in its judgment of 19 May 2011 (*Barcenilla Fernández and Others*, C-256/10 and C-261/10, not yet published) the Tribunal Supremo's judgment was controversial. Seven of the 15 judges issued a dissenting opinion (*voto particular*) detailing their disagreement with the majority of their colleagues in the Social Chamber.

The dispute in the main proceedings surrounded the request by a worker for the additional pay for which provision had been made in a collective agreement when exposed to a noise level in excess of 80 decibels.

In Spain, according to the consistent practice of the Tribunal Supremo, the sound level in a workplace should be measured factoring in the effects of individual hearing protection.

In the case at hand, the worker had been exposed to a noise level below 80 decibels factoring in the effects of his hearing protection. The Tribunal Supremo had therefore found that he was not entitled to claim the additional pay.

However, in the aforementioned *Barcenilla Fernández and Others* ruling passed by the ECJ, Article 3(1) of Directive 2003/10/EC of the European Parliament and of the Council on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) should be interpreted as meaning that the the stipulated noise-exposure limit of 85 decibels should be measured without factoring in the effects of using individual hearing protection.

In the view of the Tribunal Supremo, the solution adopted by the ECJ was linked to the fact that the noise level in the company in question exceeded 85 decibels, whereas in the present case that level was in excess of 80 decibels. Whilst acknowledging that the case before the ECJ was different, the Tribunal Supremo justified its decision to confirm its own case law.

However, this decision was not one which was shared unanimously by the court's judges, some of whom issued a dissenting opinion. The dissenting judges emphasised that in submitting a reference to the ECJ for a preliminary ruling, which had prompted the aforementioned judgment in *Barcenilla Fernández and Others*, the High Court of Castilla y León had been expressing doubts as to the case law of the Tribunal Supremo, i.e. questioning the fact that any strenuous work was involved where hearing protection reduced the noise level to below 80 decibels. The dissenting opinion also underlined that the crucial consideration should be whether or not noise-level measurements should factor in the effects of individual hearing protection and not the factual differences between the present case and that brought before the ECJ.

Via this dissenting opinion, the judges thus felt that the ruling by the Valencia High Court should have been upheld by the Tribunal Supremo, bearing in mind the case law of the ECJ. The criterion adopted had been that of measurements not factoring in the effects of individual hearing protection and the position adopted by the majority of the Social Chamber of the Tribunal Supremo was not such as to promote the adoption of collective protection measures, which, by contrast, had been the aim of the ECJ. The dissenting judges wanted to go further than simply comparing the facts of the present case with those of the case brought before the ECJ. They held that the ECJ had used a specific method to measure the noise level and that said method should be applied by the national courts. Since the collective agreement in force between the worker in question and the company stipulated that working while exposed to noise levels in excess of 80 decibels constituted strenuous work, the fact that Directive 2003/10/EC laid down a level of 85 decibels was irrelevant.

Tribunal Supremo, Sala de lo Social, judgment of 30 November 2011, Sentencia no. 9321/2011, www.poderjudicial.es/search/index.jsp

IA/33301-A

[PERREGU]

France

Returning illegally-staying third-country nationals – Directive 2008/115/EC – Scope within the French legal system – Direct effect of Article 16(5) – National legislation making provision for penalties in the event of illegal stays – Examination of compliance thereof with the principle of the need for penalties – Not unconstitutional

A number of rulings a few days apart by the Cour de cassation and subsequently by the Conseil constitutionnel cast fresh light on the scope in the French legal system of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally-staying third-country nationals (the "Return Directive") as interpreted by the European Court of Justice (ECJ) in *El Dridi* (judgment of 28 April 2011, C-61/11 PPU, not yet published in the European Court Reports) and *Achughbabian* (judgment of 6 December 2011, C-329/11, not yet published in the European Court Reports).

Firstly, in a judgment handed down on 1 February 2012, the Cour de cassation upheld the direct effect of the Return Directive acknowledged in Article 16(5) thereof via an ordinance issued by the First President of the Metz Cour d'appel. It should be noted that on the same day, 15 other identical judgments were passed by the Cour de cassation.

The dispute giving rise to the judgment was similar to that at the heart of the aforementioned *Achughbabian* case. A foreign national staying in France illegally had been questioned and taken into custody; during this time, a decision authorising action to remove him had been taken as had a decision to place him in administrative detention. After the period of detention was extended by the judge responsible for determining whether an individual should be placed in custody while his/her case is investigated (*juge des libertés et de la détention*), the foreign national in question had lodged an appeal against this decision, which was subsequently overturned by the First President of the Cour d'appel "on account of the failure to acknowledge the rights conferred upon foreign nationals under Article 16(5) of the Return Directive, which has been cited and acknowledged as having direct effect". The General Prosecutor at the Cour d'appel then lodged an appeal in cassation challenging the direct effect conferred upon Article 16 (5) of the directive. The appeal was dismissed via the judgment in question on the grounds, according to the supreme judges, that "[…] Article 16 should be understood to mean [...] that the provisions thereof are clear and precise insofar as paragraph five provides that a person placed in custody should be told how cases are settled, should be informed of his right to contact various organisations and bodies, and should be given the opportunity to exercise that right". The supreme judges added that "[…] the option for Member States under Article 16(4) to make visits by such organisations and bodies subject to authorisation was not sufficient to render said stipulations conditional". Finally, the provisions in question having been ruled as "not having been transposed into domestic law", the legal transposition period having expired on 25 December 2010, they approved the ruling by the Cour d'appel.

This judgment applied that passed by the ECJ in *El Dridi*, which recognised the direct effect of Articles 15 and 16 of the Return Directive (op. cit., point 47). Although France had transposed the directive into national law (see commentary on Law no. 2011-672 on immigration, *Reflets No. 2/2011,* p. 37), the Cour de cassation nevertheless held that the provisions of Article 16(5) were not reflected in French legislation. According to one author, the provisions in question had not been fully transposed by Article R553-4 of the Code governing Entry and Residence of Foreigners and Right of Asylum (CESEDA), pursuant to which "[domestic law] sets out, in particular, the rights and obligations of detained foreign nationals as well as the practicalities for said nationals of exercising those rights" (see S. Slama, *Invocabilité directe de l'article 16-5 sur le droit à l'information des retenus sur les moyens de contacter les organisations et instances de défense des droits de l'homme"* in *Lettre* in *Actualités Droits-Libertés* published by CREDOF, 9 February 2012).

Secondly, in a decision passed on 3 February 2012, the Conseil constitutionnel, having been asked to rule

on a priority question of constitutionality (see *Reflets No. 2/2010,* p. 34), held that imposing a penalty in the event that a foreign national stays unlawfully in France, as provided for in Article L621-1 of the CESEDA, complied with the Constitution against the backdrop of the judgment by the ECJ in *Achughbabian* concerning specifically the interpretation of the Return Directive in the light of said provision of French law pursuant to which staying illegally on French territory was punishable by one year's imprisonment and a fine of €3,750.

In his application, the applicant was challenging this provision of the CESEDA in the light of the Return Directive as interpreted by the ECJ in the aforementioned *El Dridi* and *Achughbabian* cases and of the principle of the need for punishment enshrined in Article 8 of the Universal Declaration of Human Rights and Citizens' Rights of 1789. In the view of the Conseil constitutionnel, on the one hand the first complaint based on a provision of law being incompatible with EU law (in this case, the Return Directive) fell solely within the remit of the administrative and judicial courts insofar as it could not be regarded as a complaint of unconstitutionality. On the other, having done no more than review whether the assessment was clearly incorrect, the Cour constitutionnel concluded that the penalty imposed was clearly proportionate to the offence detailed in Article L621-1 of the CESEDA and, consequently, that Article 8 of the 1789 Declaration had not been breached.

This may be a surprising decision insofar as the Conseil constitutionnel made no reference, in its analysis, to the case law of the ECJ in respect of the Return Directive. Nevertheless, it is established practice at the ECJ that review of the constitutionality of legislation does not include reviewing whether the latter complies with France's international and European commitments (see in particular Decision No. 2010-605 DC of 12 May 2010, *Reflets No. 3/2010,* p. 15). Furthermore, the official commentary on the ruling stated that "the Conseil held that a [.] shift in reasoning from conventionality, based on the Return Directive, to constitutionality, based on the need for punishment, was unjustified." It went on: "The reasoning put forward by the ECJ, based as it is on the provisions contained in the Return Directive, should not be confused with the concept of the need for punishment, which constitutes the standard of review used by the Conseil Constitutionnel.

Cour de cassation, first civil chamber, judgment of 1 February 2012, No. 11-30086, Conseil Constitutionnel, decision of 3 February 2012, No. 2011-217 priority question of constitutionality, www.legifrance.gouv.fr

IA/32949-A
IA/32950-A

[MHD]

Greece

EU law – Principles – Fundamental rights - "Ne bis in idem" principle – Charter of Fundamental Rights of the European Union – International effect following the entry into force of the Lisbon Treaty – Derogations – Conditions – Respect for the principle of proportionality

Criminal justice rulings passed by courts in EU Member States have been granted the authority of *res judicata* in Greece since the entry into force of the Lisbon Treaty. Any derogations may only be introduced via legislation and must comply with the principle of proportionality, in accordance with Article 52(1) of the Charter of Fundamental Rights of the European Union ("the Charter"). These were the main findings of ruling no. 1/2011 of the Greek Court of Cassation, the Areios Pagos, handed down on 9 June 2011 by the latter's Criminal Chamber (full bench).

In the case at hand, the two applicants had been found guilty by the Rome Court of Appeal in 2003 of illegally purchasing, possessing, trafficking and importing narcotics. Via two rulings, a panel of five judges at the Athens Court of Appeal, the Pentameles Efeteio Athinon, had found the same individuals guilty of the same offences but had assigned a different legal classification. In their appeal in cassation, the applicants were claiming that the Athens Court of Appeal had breached the authority of *res judicata* conferred upon the ruling passed by the Italian court. This raised the issue of the scope of said authority which, according to the Areios Pagos, was intended "not only to guard against contradictory rulings but first and foremost to ensure application of the *ne bis in idem* principle".

The ruling in question began by reiterating that under Article 9 of the Greek Penal Code, legal action could not be taken against an individual against whom legal action had already been brought in respect of an act committed abroad, where said individual had

been acquitted by a foreign court or, where s/he had been found guilty, s/he had served his/her sentence in full. Article 8 of the Code also made provision for an exception to this rule in the case, among others, of the crime of illegal trade in narcotics. In this specific case, fresh proceedings before the courts of the home country of a defendant being prosecuted abroad remained possible.

On an international level, the Areios Pagos held that the *ne bis in idem* principle was also enshrined in Article 14(7) of the United Nations International Covenant on Civil and Political Rights and in Article 4(1) of Protocol No. 7 of the European Convention on Human Rights. Nevertheless, according to Greek case law, these two provisions applied only to rulings by courts within the same legal system and had no extra-territorial effect. In this connection, Greece had also expressed reservations in its relations with other contracting States as to the application of Article 54 of the Convention implementing the Schengen Agreement and consequently, of the *ne bis in idem* principle in relation to crimes involving the illegal trafficking of narcotics.

In the view of the Areios Pagos, the Lisbon Treaty radically altered this situation. Accordingly, Article 50 of the Charter upon which Article 6 TEU conferred the same status as treaties, classed the *ne bis in idem* principle as a fundamental right. The Areios Pagos held that this provision was also directly applicable on account of the fact that it was clear, precise and did not require any specific measures to be adopted in order for it to be transposed into national law. The transnational and unconditional value of said provision also meant that it took precedence over any reservations expressed by the contracting States on the aforementioned Article 54 of the Convention implementing the Schengen Agreement.

Continuing its reasoning, the Areios Pagos held that, pursuant to Article 52 of the Charter, any derogations introduced by law to the *ne bis in idem* principle could only be justified if the principle of proportionality was observed, in other words only if such derogations were necessary and reflected general interest objectives. In the view of the Areios Pagos, this was not so in the case of the derogation provided for by Article 8 of the Penal Code insofar as it concerned trade in narcotics, since, given that all the EU Member States shared the same values and legal principles, the criminal penalty under Greek law for the act in question could not be cited as a necessary general interest objective recognised by the European Union.

The Areios Pagos therefore set aside the judgments handed down by the Athens Court of Appeal on account of their being in breach of the authority of *res judicata* conferred upon the rulings by the Rome Court of Appeal.

Areios Pagos (Olomeleia) 1/2011, Peiraïki Nomologia 2011, p. 205, www.nbonline.gr

IA/33056-A

[RA] [MARKEAF]

Social policy – Male workers and female workers – Framework agreement on parental leave concluded by UNICE, CEEP and the ETUC – Council Directives 96/34/EC and 97/75/EC – Right of a male worker to parental leave in the same way as female workers – Civil liability on the part of the State in the event of a violation of said right

In its ruling of 6 October 2010, the Piraeus Administrative Court, the Trimeles Dioikitiko Protodikeio Peiraia ("the TDPP") acknowledged the right of a civil servant and father to paid parental leave to enable the latter to help bring up his child.

In the case at hand, the applicant, an employee in a State hospital, had asked the hospital management for permission to take nine months' parental leave to bring up each of his two children, his wife having not utilised her right to parental leave. In support of his application, he had cited Article 53(2) of the Greek Civil Servants' Code, which, however, only made provision for entitlement to parental leave for female civil servants. His applications had been tacitly rejected, him having been granted only unpaid leave to bring up his first child. The applicant had therefore challenged this tacit rejection decision and had claimed compensation for the harm he had suffered as a result of the hospital's unlawful conduct.

The TDPP first analysed the applicable provisions of the Greek Constitution. It made reference first of all to Article 4, which lays down the principles of equal treatment and fairness, and Article 116(2), which makes provision for positive measures to be adopted to ensure largely equal treatment

between men and women. It went on to cite Article 21 of the Constitution, which sets out the constitutional objectives of safeguarding family, marriage, motherhood and childhood and which underscores the planning and application of demographic policy as a duty of the State. Finally, the TDPP cited Article 25(1) of the Constitution which details the effect and scope of protection of individual fundamental rights.

The TDPP went on to emphasise that pursuant to Council Directive 76/207/EEC and the relevant case law of the European Court of Justice on the issue, the Member States were duty bound to implement the principle of equal treatment between men and women, which requires that there be no discrimination whatsoever between them on the grounds of gender, either directly or indirectly, bearing in mind in particular the marital or family status of the parties involved.

In relation more specifically to the right to parental leave, the TDPP made reference to Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC. This directive seeks to implement the framework on parental leave concluded on 3 June 1996 between the general intersectoral organisations, and enshrines the subjective right of employees, both male and female, to parental leave. These texts also set out the principle of reconciling work and family life as a natural complement to that right and presupposes application of the principle of equal treatment. In the view of the TDPP, the subjective right to parental leave made it possible to reconcile work and family life and encouraged men to take on family responsibilities in the same way as women.

Thus, interpreting the Civil Servants' Code in the light of the constitutional principle of fairness and of the Community principles cited, the TDPP held that the right to parental leave stipulated in Article 53(2) of the Civil Servants' Code should be granted not only to mothers who are civil servants but also to fathers who are civil servants. It therefore granted the applicant compensation for the first period of unpaid parental leave he had taken to raise his child. By contrast, it dismissed his claims for compensation in respect of the the second period of leave not granted and for non-material damage.

Trimeles Dioikitiko Protodikeio Peiraia, judgment of 6 October 2010, No. 4768/2010,

http://www.dsanet.gr/Epikairotita/Nomologia

IA/33057-A

[RA] [MARKEAF]

Hungary

Fundamental rights – Freedom of the press – National media legislation – Certain provisions unconstitutional

In 2010, the Hungarian parliament began an overhaul of media legislation. Within the framework of this overhaul, it adopted Act CIV of 2010 on the freedom of expression and the fundamental rules on media content (the "Media Constitution") and Act CLXXXV of 2010 on media services and mass media ("the Media Act"). Certain provisions of these laws had caught the attention of the international community and had also been examined by the European Commission and the European Parliament. Although these new laws had been amended several times since being adopted, certain aspects of Hungarian media legislation continued to be the subject of considerable debate over the months which followed. The judgment handed down by the Constitutional Court addressed these issues.

Firstly, the Constitutional Court held that as far as the written press and websites were concerned, administrative protection of certain values (such as human dignity, human rights and the right to respect for one's private life) was useless and disproportionately infringed freedom of the press. Taking these considerations as its basis, it excluded these two types of media from the scope of the Media Constitution as from 31 May 2012.

Secondly, it quashed the provision of the Media Constitution requiring journalists to reveal their sources in judicial and administrative proceedings. The provision in question was rooted, as a general rule, in it being in the public interest that journalistic sources be protected – a condition which the Constitutional Court found to be unconstitutional. It also held that it was necessary to put in place additional procedural guarantees where the public authorities sought to obtain information on journalistic sources and that the Hungarian parliament was thus duty bound to determine such guarantees by 31 May 2012.

Thirdly, it held that the power of the National Media and Telecommunications Authority, the *Nemzeti Média és Hírkőzlési Hatóság* (NMHH), to require

that entities within its remit forward it details of proceedings launched should be harmonised with the legal protection of professional secrecy, primarily with the provisions guaranteeing respect for professional secrecy between a lawyer and his/her client, and with the protection of journalistic sources.

Finally, the Media Act established the position of Media and Telecommunications Commissioner (*Média és Hírkőzlési Biztos*), whose role is similar to that of a mediator within the NMHH. The Commissioner is responsible for dealing with complaints lodged by citizens concerning media content or telecommunications services. Although the Commissioner's opinions are not legally binding, complaints may be submitted on a wide range of issues. Having concluded that the existence of such a commissioner disproportionately infringed the freedom of expression, the Constitutional Court quashed the provisions of the Media Act pertaining to the role of the Commissioner as from 31 May 2012.

So to summarise, the judgment handed down by the Constitutional Court invited the Hungarian parliament to review several provisions of the legislation governing the Hungarian media and to amend the legal framework as required by the end of May 2012.

Constitutional Court, judgment of 19 December 2011, No. 165/2011 (XII.20.), www.magyarkozlony.hu/pdf/11306

IA/32696-A

[VARGAZS]

Ireland

European Union – Police and judicial cooperation in criminal matters – Framework Decision on the European arrest warrant and the surrender procedures between the Member States – Grounds for optional non-execution of the European arrest warrant – Reciprocity – Decision to take legal action – Refusal

In this case, the Supreme Court, Ireland's highest court, upheld an appeal against the decision by the High Court to allow a British citizen, Ian Bailey, to be extradited to France. The French authorities had issued a European arrest warrant for Mr Bailey whom they wished to question about the murder, in Ireland, of Sophie Toscan du Plantier, a French national. Ms. Toscan du Plantier had been murdered in Ireland in 1996 and Mr Bailey, who had always maintained his innocence, had been suspected of her murder. He had been arrested on several occasions by the Irish police in connection with the case, held in custody and subsequently released. Ireland's Director of Public Prosecutions had determined – a decision he later upheld – that there was insufficient evidence to prosecute Mr Bailey and the murder remained unsolved. In February 2010, the French investigating judge had issued the European arrest warrant in question.

Having examined Irish law on the European arrest warrant, namely the European Arrest Warrant Act 2003, in the light of the Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, the five Supreme Court judges unanimously opposed Mr Bailey's extradition. Their decision was based on two main arguments.

Firstly, the Supreme Court held that Irish law precluded the extradition of a person to another Member State where the action (or inaction) constituting the crime in question was not a crime in Ireland on the grounds that it had not been committed in Ireland. The Supreme Court noted that this rule pertained to implementation of the principle of reciprocity. Ireland could exercise extraterritorial jurisdiction if the perpetrator of the crime was an Irish national. In the case at hand, France was seeking to exercise extraterritorial jurisdiction on account of the fact that the victim was a French national. Since Irish law made no provision for Ireland to demand extradition of a suspect in the context of a crime in which the victim was an Irish national, the Supreme Court held that extraditing Mr Bailey to France was not permitted given the circumstances of the case.

The Supreme Court went on to hold that proceedings in France as regards the case in question were at the investigation stage and that a decision as to whether to indict Mr Bailey had not yet been taken. In view of this situation, the Supreme Court held that although a decision, equivalent to an indictment, had been taken in France, such a scenario did not necessarily mean that the decision would subsequently be made to try Mr Bailey for murder before the French criminal courts. Under Irish law, such a decision was required to trigger extradition.

Finally, the Supreme Court noted that the case raised issues of law which had not been addressed hitherto but that under the terms of the Lisbon Treaty, it was not possible for it to submit a reference to the European Court of Justice for a preliminary ruling on the interpretation of the aforementioned Council Framework Decision until 2014.

Supreme Court, judgment of 1 March 2012, Minister for Justice, Equality and Law Reform v Bailey ([2012] IESC16), www.courts.ie

IA/32697-A

[TCR]

State aid – Acquisition of impaired loans – Examination by the Commission – State aid – Decision not to challenge – Direct effect – Acquisition of a debt which is not impaired – Whether included

This case concerns the functioning of the National Asset Management Agency (NAMA), the national body responsible for managing impaired assets of financial institutions in Ireland, and its compatibility with European Union law.

The NAMA was set up against the backdrop of the economic crisis currently afflicting Ireland. Its aim was to re-establish the stability of the Irish banking system by permitting participating financial establishments to sell it assets (i.e. debts) the value of which was falling and was uncertain, a situation which was preventing them from consolidating their equity in the long term and, consequently, was hindering a return to normal operation of the financial market. The system involved the State releasing guaranteed bonds to enable the NAMA to finance a relief system whereby assets were released at a higher price than their market value, which distorted competition by giving participating institutions special benefits. Thus, in its decision of 26 February 2010 in case N725/2009, the Commission held that the establishment of the NAMA constituted State aid to participating establishments within the meaning of Article 107(1) TFEU, but that said aid was compatible with the internal market pursuant to Article 107(3)(b) TFEU since it sought to remedy serious disruption to the economy of a Member State, and therefore decided not to object to the system.

In this case, the Supreme Court was asked to rule on the lawfulness of the acquisition by the NAMA of debts whose value had not been impaired. The NAMA had sought to acquire debts which were not unproductive and in respect of which repayments were up-to-date. The applicant debtors were asking for the NAMA to be prosecuted and stopped from acquiring such debts on several grounds, including that the Commission's decision only permitted the NAMA to acquire impaired assets.

In its judgment, the Irish Supreme Court noted that there was nothing in Irish law to prevent the NAMA from acquiring debts which were not impaired. Since the applicants had argued that the Commission's decision only permitted the NAMA to acquire impaired debts, it found that there were grounds for examining whether said decision had direct effect.

According to the case law of the European Court of Justice, a decision by a European institution may have direct effect if it imposes an unconditional obligation which is sufficiently clear and precise. The Supreme Court held that the since the decision in question had been drafted in general terms, it did not meet this requirement. The applicants had submitted a letter to the Commission from the Director-General for Competition which appeared to confirm that the decision only permitted acquisition of impaired debts. However, the Supreme Court ruled that there was nothing in the case law of the European Court of Justice to suggest that such a letter could be used to make a significant amendment or addition to the decision itself. It thus held that the decision did not have direct effect and dismissed the appeal on those grounds.

Supreme Court, judgment of 3 February 2011, Dellway Investments Limited and Others v NAMA and Others (McKillen) ([2011] IESC 4), www.courts.ie

IA/32698-A

[TCR]

Italy

EU law – Primacy – Aid declared incompatible with the single market – Recovery – Authority of res judicata of a judgment by a national court authorising the aid – Principle of primacy irrelevant

Ruling no. 6039/2011 by the Rome Tribunale represents the next (and perhaps final) stage of the *Lucchini* case, which had been examined by the European Commission in 1990 (Decision no. 90/555) and by the European Court of Justice (ECJ) in 2007 (judgment of 18 July 2007, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, case C-119/05, ECR p. I-06199).

The dispute concerned financial aid granted to businesses in Southern Italy pursuant to Act no. 183 of 2 May 1976 ('*Cassa del Mezzogiorno*'), from which the company Lucchini SpA had benefitted following the ruling by the Rome Tribunale of 24 June 1991, the latter having been granted the authority of *res judicata*. Having been asked by the Consiglio di Stato to issue a preliminary ruling on the lawfulness of the recovery of aid already granted on the basis of ruling by the Tribunale but in breach of the Commission's decision, the European Court of Justice had held that the principle of the primacy of EU law precluded application of Article 2009 of the Civil Code enshrining the principle of the authority of *res judicata*, since to apply it would hinder recovery of State aid granted in breach of EU law. Questioning the jurisdiction of the administrative court, Lucchini SpA then challenged the decision by the Consiglio di Stato before the Corte di Cassazione on the basis of Article 111 final paragraph of the Constitution concerning conflict of jurisdiction. Following the Corte di Cassazione's finding that the administrative court had no jurisdiction, Lucchini SpA asked the Rome Tribunale to declare the application for recovery of the State aid granted unlawful.

In March 2011, the Rome Tribunale ruled that the principle of the primacy of EU law could not be relied upon in challenging the definitive nature of the authority of *res judicata*. In the view of the court, the principle of the primacy of EU law pertained solely to the link between sources of law and not to the rules according to which a judicial decision – even if it is based on an error of law – becomes definitive following expiration of the appeal deadline or after it has been upheld in the final instance.

The ruling was based, without explicitly stating as much, on the fundamental principle of legal certainty according to which a judicial ruling is destined to become definitive, whether it is fair or not. Consequently, outside of the instances stipulated in Article 395 of the Civil Code in which review is permitted, *res judicata* covers any potential breaches by courts of both national and EU law. The Italian authorities were thus not entitled to recover the sums, which had been classed by the Commission as State aid incompatible with EU law.

It will be interesting to hear the outcome of this case, in particular on the point of whether the ruling is to become definitive.

Ruling by the Tribunale di Roma of 23 March 2011, no. 6039, www.giurit.it

IA/32866-A

[MSU] [REALIGI]

State liability – Violation of EU law by a public authority – Award of damages – National law requiring an error on the part of the public authorities

In its ruling of 31 January 2012, the Consiglio di Stato set out the conditions under which the authorities are required to paid the injured party damages in the event of a violation of EU law.

The ruling in question had been passed following an appeal lodged by the company Yesmoke Tobacco SpA against the ruling by the court of first instance quashing the decision by the public authorities setting minimum prices for cigarettes. The latter ruling had been handed down following the judgment by the European Court of Justice (ECJ) of 24 June 2010 (*Commission v Italy*, C-571/08, not yet published in the European Court Reports). In its judgment, the European Court of Justice had ruled that in stipulating a minimum sale price for cigarettes, the Republic of Italy had failed to fulfil the obligations incumbent upon it pursuant to Article 9(1) of Council Directive 95/59/EC on taxes other than turnover taxes which affect the consumption of manufactured tobacco, as amended by Council Directive 2002/10/EC.

In its ruling quashing the decision by the public authorities setting minimum prices for cigarettes, the court of first instance did not award Yesmoke Tobacco SpA damages on account of there having been no fault on the part of the public authorities. Yesmoke Tobacco SpA had therefore lodged an appeal before the Consiglio di Stato.

In its ruling, the Consiglio di Stato made reference to the case law of the ECJ arising from its judgment in *Strabag and Others* of 30 September 2010 (C-

314/09, not published) pursuant to which "Council Directive 92/50/EC [..] precludes national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement".

In the view of the Consiglio di Stato, the judgment in *Strabag and Others*, which states that it is possible for a form of "objective liability" to be cited against the public authorities in all instances of a violation of EU law, should only be applied in the field of public procurement.

By contrast, the Italian legal system follows the principles drawn from the prior case law of the ECJ concerning State liability (*Francovich*, 19 November 1991, C-6/90 and C-9/90, ECR 1991 p. I-5357; *Brasserie du pêcheur*, 5 March 1996, C-43/93 and C-48/93, ECR 1996 p. I-1029; *Hedley Lomas*, 8 October 1996, C-5/94, ECR 1996 p. I-2553; *Dillenkofer and Others,* 8 October 1996, C-178/94, C-179/94 and C-188/94 to C-190/94, ECR 1996 p. I-4845).

The Consiglio di Stato held that the scenarios in which the ECJ had found an objective liability on the part of the State in respect of violation of EU law were few and far between and pertained to cases in which EU legislation was directly applicable in the Member States. Moreover, said legislation was extremely detailed as regards not leaving Member States any margin for discretion. In the Consiglio di Stato's view, such a situation occurred, for example, in the field of public procurement.

In other cases, the European Court of Justice itself found that it was necessary to prove the serious and manifest nature of a violation of EU law, the room for manoeuvre of the national authorities and whether or not any error of law is excusable. In such cases, the Consiglio di Stato held, Italian law also requires that the culpable nature of the action of the public authorities be established before any decision can be reached awarding damages to the injured party in the event of a violation of EU law on the part of a public authority.

In this regard, the Consiglio di Stato acknowledged the possibility of establishing the culpable nature of the authorities' action via straightforward presumptions, the unlawfulness of an administrative action being merely one indicator among others of the authorities' liability.

In the view of the Consiglio di Stato, greater emphasis should be place on examining the clarity of the provision of law applicable in the case in question, the simplicity of the facts of the case, the lawful nature of the issue under examination and the discretionary nature of the administrative decision to be adopted. Once it has been established that an authority's actions are culpable, it is the responsibility of said authority to demonstrate absence of fault, excusable error or indeed that no alternative legal conduct is required.

In conclusion, given the absence of proof of the authority being culpable, the Consiglio di Stato dismissed the appeal by Yesmoke Tobacco SpA and upheld the ruling by the court of first instance not to award it damages.

Consiglio di Stato, judgment of 31 January 2012, no. 482, www.lexitalia.it.

[As regards non-fault-based liability on the part of the State, see the following entry concerning a case of late transposition of directives].

IA/ 32870-A

[VBAR]

Measures adopted by the institutions – Directives – Enforcement by the Member States – Late transposition into the domestic legal system – Obligation to make good damage caused to individuals – Conditions – Methods of compensation

The Corte di Cassazione once again ruled on the issue of the liability of the State for late transposition of directives and the classification of such liability within the national legal system.

The case at hand concerned a group of doctors who had not received the additional pay provided for in Council Directives 75/363/EEC and 82/76/EEC concerning doctors' activities during their specialisation period.

In examining whether the State was liable for the late transposition of the directives, the Corte di Cassazione cited the content of one of its previous judgments (no. 9147 of 17 April 2009): liability for non-transposition of a directive should not be governed by Article 2403 of the Civil Code (delict or quasi-delict), the European Court of Justice (ECJ) having stated on several occasions that State liability is not contingent upon evidence of fault.

Instead, liability should be considered as responsibility for violation of an *ex lege* obligation on the part of the State (liability without fault under the terms of Article 1176 of the Civil Code) on account of activity which is unlawful solely from the point of view of the EU legal system. Consequently, liability for late transposition does not give rise to compensation per se but to compensation having the same features as that under national law (in accordance with the case law of the ECJ).

Moreover, in the absence of any provisions in law, the court must calculate such compensation fairly. However, since "fairness" also means "equal treatment", the court is required to determine and justify in law the calculation of the compensation in order to ensure that similar situations are dealt with in the same way, any absence of or insufficient justification running the risk of the decision being referred to the Corte di Cassazione for judicial review.

The judgment not only helps to define the issue of streamlining liability for late transposition of directives into national law but also applies the most recent developments as regards *ex aequo et bono* compensation (see judgment no. 12408 of the Corte di Cassazione of 8 June 2011).

Corte di Cassazione, Civ., judgment no. 23275 of 9 November 2011, www.dejure.it

IA/32867-A

[MSU] [REALIGI]

The Netherlands

Vehicle not registered in the Netherlands but made available to a resident – Tax on use of the Dutch road network payable every three months – Compliance with EU law

In this case concerning a reassessment notice in respect of a tax payable for use of the Dutch road network by a motor vehicle rented and registered in Germany, the Supreme Court, the Hoge Raad, held that the notice was not in breach of European Union law.

The case involved a Dutch national residing in the Netherlands and who was the director and sole shareholder of a company established in Germany. The company had made available a car, rented in Germany, to be used in particular for business purposes in Germany, the Netherlands and Belgium. The fact that a tax had already been levied in Germany was one of the reasons why both the Court of First Instance and the Court of Appeal of 's-Hertogenbosch held that the reassessment notice was in breach of the freedom of establishment and, more specifically, the principle of proportionality. In the view of the Court of Appeal and with reference to the judgments handed down by the European Court of Justice (ECJ) in *Cura Anlagen* (C-451/99, ECR 2002 p. I-3193), *Baars* (C-251/98, ECR 2000 p. I-2787), *N* (C-470/04, ECR 2006 p. I-7409) and *Ilhan* (C-42/08, ECR 2008 p. I-83*, Pub.somm.), the Dutch vehicle-taxation system did not take sufficient account of the actual use by vehicles of the Dutch road network, since the tax was payable every three months regardless of the number of days on which the network was actually used.

The Supreme Court did not share the Court of Appeal's analysis and held that since the tax in question was not exclusively a registration tax but, conversely, was one which was payable every three months and in respect of which the interested party was entitled, if she had used the vehicle in question in the Netherlands for a period of less than three months, to claim reimbursement of a proportion of the tax paid, the tax was not a disproportionate one in breach of EU law.

Hoge Raad, 2 March 2012, Staatssecretaris van Financien /X, www.rechtspraak.nl, LJNBP3858 I

A/33152-A

[SJN]

Czech Republic

Social security – Council Regulation (EEC) No. 1408/71 – Replacement of social security conventions between Member States – Agreement of 29 October 1992 between the Czech Republic and Slovakia – Whether inadmissible – Application of EU law by the European Court of Justice – Excessive powers transferred to the European Union

On 31 January 2012, the full bench of the Constitutional Court, the Ústavní soud, handed down a judgment hitherto unheard of in the context of European justice. In the view of the Constitutional Court, the judgment passed by the European Court of Justice (ECJ) on 22 June 2011 in *Landtová* (C-399/09, not yet published) constituted an action *ultra vires* via which the ECJ had exceeded the powers transferred to the European Union by the Czech Republic. This exceptional judgment by the Constitutional Court came in the context of the latter's longstanding disagreement with the Supreme Administrative Court, the Nejvyšši správní soud, dating back to 2003.

The two Czech courts held differing opinions as to the consequences of the division of the Republic of Czechoslovakia in 1992 in the field of social security, the outcome of the division having been that different amounts were paid out in retirement pensions in the two resulting States (the Czech Republic and Slovakia). The stumbling block for the two courts was the application and indeed the interpretation of the agreement concluded between the newly formed Czech Republic and Slovakia in 1992 ("the Agreement"), which stipulated that insurance periods completed under the Czechoslovak system would be deemed to have been completed in the State in which a worker's employer had been established. Consequently, individuals who had worked for employers established in what later comprised Slovakia were granted pensions calculated in accordance with Slovak rules and which were thus considerably lower than the pensions they would have received under Czech rules. To remedy this injustice, via its extensive case law on the matter, the Constitutional Court formulated an unwritten rule entitling Czech citizens to a supplementary pension intended to make up the difference between the benefits payable under the two systems.

The Supreme Administrative Court with jurisdiction to rule in the final instance on appeals in respect of social security matters repeatedly opposed this rule derived from the case law of the Constitutional Court, considering it to be in breach of the explicit provisions of the Agreement and as forming a basis for preferential treatment of Czech citizens which was unjustified in the light of both the principles upon which modern social security systems were based and of the principle of equal treatment laid down in the Constitution. Whilst it was prepared to accept that the case law of the Constitutional Court was binding as regards pension entitlements arising *prior to* the accession of the Czech Republic and Slovakia to the European Union, it questioned it in connection with entitlements arising *after* accession and had submitted a reference to the ECJ for a preliminary ruling in the aforementioned *Landtová* case on whether the rule established by the Constitutional Court complied with EU law. It should be noted that in *Landtová* the ECJ had held that the case law of the Constitutional Court was in breach of EU law insofar as it was discriminatory and conflicted with the provisions of Council Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. The Supreme Administrative Court therefore concluded that the case law of the Constitutional Court did not constitute a binding precedent for other national courts and that pension entitlements arising after accession to the European Union were to be calculated pursuant to the Agreement and to Council Regulation (EEC) No. 1408/71, which was applicable as from accession (the disputed provision of the Agreement having become part of EU law after it was incorporated into Annex III of said Regulation).

Against this backdrop, the Constitutional Court quickly reiterated its position on the issue. In its judgment of 31 January 2012, it upheld the validity of its consistent practice, recalling all the arguments it had taken as its basis in the past. In its view, entitlement to a supplementary pension was derived from the right to social security, which was guaranteed under the Czech Constitution to "Czech citizens" as a whole, read in conjunction with the principle of equal treatment. However, the criterion cited in the Agreement gave rise to unjustified unequal treatment between those who had completed part of their insurance period in Czechoslovakia, i.e. in their own State, and those who had worked for an

employer established in what was now Slovakia, the result being that the latter suffered discrimination. The Constitutional Court was essentially working on the premise that work performed in what was now Slovakia could not be considered retroactively as work in a foreign State.

In its reasoning, it made reference to the principle under international law that ratification of international conventions may not be detrimental to more advantageous rights provided for under national law. It therefore held that even if by signing the Agreement the Czech Republic had delegated its obligations vis-à-vis citizens in the field of social security to Slovakia, it was nevertheless still required to fulfil them where they were not fulfilled by Slovakia. The supplementary pension was thus intended to adjust the amount of benefit paid out pursuant to the Agreement to reflect the amount the recipient could have received under Czech calculation rules.

With regard to EU law, the Constitutional Court maintained that there was no question of applying it. In the Court's view, the aim of Council Regulation (EEC) No. 1408/71 was to coordinate the Member States' various social security schemes in a bid to ensure that the rights of workers moving between Member States were not undermined. To apply it required a foreign element, i.e. for the worker in question to be covered by several social security systems. However, in the Constitutional Court's view, work performed anywhere on Czechoslovak territory prior to the division of Czechoslovakia should le considered as work within a single State with a uniform social security scheme. Furthermore, the Regulation in question retained certain provisions of the Agreement concluded prior to the date on which the latter entered into force and listed in Annex III thereof, including the aforementioned provision. This provision of the Agreement remains applicable regardless of the two States' accession to the European Union and application of its must comply with the restrictions laid down in the case law of the Constitutional Court.

In the view of the Constitutional Court, the provision of the Agreement sought to determine which of the Czech Republic and Slovakia was responsible for fulfilling pension obligations in respect of periods of insurance completed under the Czechoslovak scheme, and constituted one of the measures for managing the impact of the division of Czechoslovakia, which constituted a specific and quite unique situation. Although in its judgment the ECJ had not drawn attention to the specific nature of this historical event linked to the constitutional identity of the Czech Republic, which was rooted in the history of the joint State of Czechoslovakia, and although it assessed the rights of the Czech citizens in question purely from the point of view of the principle of workers being able to move freely between Member States, the Constitutional Court could reach no other conclusion than that it had acted *ultra vires*. It was forced to reach this conclusion on the basis of its role as the supreme guardian of the Czech Constitution, as defined in its case law concerning the relationship between Czech law and EU law (see in particular *Reflets No. 1/2009,* p. 25, IA/31356-A).

The Constitutional Court also denounced the failure to observe the guarantees of a fair trial before the ECJ insofar as the latter had prevented it from submitting observations in the aforementioned *Landtová* case and thus had failed to observe the *audiatur et altera pars* principle.

In light of all the above, the Constitutional Court upheld the applicant's complaint in the case at hand. It quashed the disputed judgments and rulings by the Supreme Administrative Court and the lower courts and held that the applicant was entitled to a supplementary pension despite the fact that the pension entitlement in question had arisen after the Czech Republic's accession to the European Union. It should be noted that of the 15 judges sitting on the full bench, only one issued a dissenting opinion.

Ústavní soud, judgment of 31 January 2012, Pl. US 5/12, http://nalus.usoud.cz

IA/33058-A

[KUSTEDI]

Romania

Tax provisions – Internal taxation – Pollution tax charged on motor vehicles on their first registration on national territory – Application to imported second-hand vehicles

At the request of the Public Prosecutor's Office, on 14 November 2011 the High Court of Cassation and Justice, the Inalta Curte de Casatie si Justitie, handed down a judgment in the interest of law to standardise national case law concerning reimbursement of a motor-vehicle tax found by the European Court of

Justice (ECJ) to be in breach of Article 110 TFEU.

At the time of its accession to the European Union, Romania abolished taxes on the import of motor vehicles from other Member States. However, at the same time a new chapter introducing a new tax payable upon first registration of a car in Romania was added to the Romanian Fiscal Code. The national courts issued rulings holding that said tax was contrary to provisions of EU law, the result being that the provision imposing the tax on first registration was repealed and was replaced by a new tax known as the pollution tax. Several legislative amendments followed, thus retaining a system of taxation which favoured vehicles manufactured in Romania.

In this context, the ECJ had on several occasions had to rule that successive versions of Romanian legislation introducing a system which discriminated against motor vehicles purchased in another Member State and subsequently registered in Romania were incompatible.

Following the judgments handed down in *Tatu* (C-402/09, 7 April 2011, not yet published in the European Court Reports) and *Nisipeanu* (C-263/10, 7 July 2011, not yet published in the European Court Reports), a divergence emerged in national case law concerning the reimbursement of amounts of said tax paid. The issues of law underlying the differences between the national courts concerned, on the one hand, the possibility of requiring a 'prefect' to register vehicles originating from another Member State without obtaining prior authorisation from the relevant tax authorities and, on the other, the admissibility of legal proceedings for reimbursement of the pollution tax which do not comply with the preliminary procedure laid down in Article 7 of the government's Emergency Ordinance no. 50/2008.

The judgment by the High Court puts an end to the divergences in case law on the matter by imposing a single means of interpreting national measures, thus standardising the solutions to be applied to pending disputes in accordance with the judgments handed down by the ECJ.

In relation to the first issue of law, the High Court found that "against the backdrop created by the judgments of the ECJ, which held that the pollution tax imposed by Emergency Ordinance no. 50/2008 was in breach of Article 110 TFEU, the principle of the primacy of EU law dictated that [the judgments the European Court of Justice] took precedence over national law". According to the High Court, the prefect, who represents the government at local level, must seek to achieve the objectives of the treaties upon which the European Union is based. In the view of the High Court, by requiring owners of motor vehicles to provide proof that the tax had been paid in order to claim reimbursement of it whilst the ECJ had ruled, on several occasions, that the tax itself was incompatible with EU law, the Romanian State was acting in breach of the principle of primacy. With regard to the second issue of law, the High Court recalled the case law of the ECJ according to which taxpayers are entitled to reimbursement of taxes imposed by the Member States where said taxes have been levied in breach of EU law. It held that "any legal action seeking reimbursement of the pollution tax may not be the subject of prior action challenging the decision concerning calculation of the tax, as stipulated in Article 117(1)(d) of the Romanian Fiscal Code".

Following this ruling, a new law was adopted in January 2012 (Law no. 9/2012, Official Gazette, no. 17/2012). In contrast to the other versions, this one introduced the requirement that the pollution tax be paid at the time of first registration on Romanian territory of new and second-hand motor vehicles.

Înalta Curte de Casaţie şi Justiţie, decision no. 24/201 of 14 November 2011, Monitorul official, Partea I, nr. 1 of 3 January 2012

IA/32947-A

[VACARGI]

United Kingdom

Harmonisation of laws – Copyright and related rights – Directive 2001/29/EC – Communication to the public – Concept – Transmission of broadcast works, via a television screen and loudspeakers, to customers in a café-restaurant – Directive 2006/115/EC

This judgment by the High Court concerned the case which gave rise to the preliminary ruling by the European Court of Justice (ECJ) of 4 October 2011 (*Football Association Premier League and Others*, C-403/08, not yet published in the European Court Reports).

The applicant manages the Premier League, the main professional football championship in

England, organised filming of matches and exercised television broadcasting rights for said matches. It grants licences in respect of these rights, on a territorial basis, to television broadcasters which acquire the exclusive right to broadcast matches in a particular region and pledge to prevent the public from viewing said broadcasts outside the given region. The defendants had broadcast Premier League matches in their bars in England by means of satellite decoder cards lawfully placed on the market in Greece. The High Court submitted a request to the ECJ for a preliminary ruling concerning the lawfulness of this practice. In its aforementioned judgment of 4 October 2011, the ECJ responded, in particular, that the concept of "communication to the public", within the meaning of Article 3(1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, should be interpreted as covering the transmission of broadcast works, by means of a television screen and loudspeakers, to customers in a café-restaurant. Article 3(1) grants authors the exclusive right to authorise or prohibit any communication of their works to the public.

When the case in the main proceedings was brought before it, the High Court was required, in the light of the interpretation by the European Court of Justice, to apply the Copyright, Designs and Patents Act 1988 (the "CDPA"). Article 20 of the CDPA transposes Article 3(1) of Directive 2001/29/EC. Pursuant to this article, it appears that broadcasting as described was deemed to be unlawful.

However, the High Court noted that Article 72 of the CDPA which, along with Article 19, transposes Article 8(3) of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, stipulates that the showing or playing in public of a broadcast does not infringe the copyright of the latter if no admission is charged to enter the place in which the broadcast is being shown or played. The High Court recalled its obligation to interpret national law in accordance with EU law, but noted that there were limits to such an obligation. It is clear that Article 3 of Directive 2001/29/EC provides no defence within the meaning of Article 72 of the CDPA. Nevertheless, the provisions of Article 72 are unambiguous and must be understood as a clear indication of the intention of the national legislature to make provision for such a defence. Removing the protection afforded defendants under Article 72, alters the substance of the provision and goes beyond the obligation to interpret national legislation in compliance with EU law. Consequently, the High Court held that Article 72 indicated that broadcasting to a public who had not paid to enter the place in which a work was being shown or played did not infringe copyright.

High Court, Chancery Division, judgment of 3 February 2012, Football Association Premier League Limited v QC Leisure ([2012] EWHC 108 (Ch)), www.westlaw.co.uk

IA/32699-A

[TCR] [EXARCER]

Slovenia

Visas, asylum, immigration – Claim for asylum – Dublin II Regulation – Sovereignty clause – Interpretation in the light of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Non-refoulement principle – Medical reasons – Whether included

In a judgment of 26 April 2011concerning asylum, the Slovenian Administrative Court, the Upravno sodišče Republike Slovenije, interpreted Article 27(2)(a) of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin II Regulation").

The case involved a Moroccan national ("the applicant") against whom a decision ("the disputed decision") had been issued by the Slovenian Internal Affairs Ministry to hold him in custody with a view to returning him to Bulgaria where his claim for asylum was to be examined as to its substance. However, in its decision, the Internal Affairs Ministry made no determination as to the applicant's state of health, despite many claims by the applicant himself concerning his health, even prior to the decision having been taken. In his asylum claim, he had cited several health problems, including partial kidney failure. He also stated that he had not received adequate medical treatment in Bulgaria and that the Bulgarian authorities had lost his medical records. He also claimed that his health would deteriorate if he were to be returned to Bulgaria. In addition, two days before the disputed decision was adopted, the applicant said that he wished to undergo a medical examination in relation to his kidneys.

Firstly, in view of the applicant's allegations, the Administrative Court held that the relevant issue in this particular case was whether, in accordance with the Dublin II Regulation, the Slovenian Internal Affairs Ministry should have adopted a position, in its reasoning for the disputed decision, as to the applicant's claims concerning his health. In this connection, the Administrative Court ruled that Article 3(2) of the Dublin II Regulation was relevant, said article stipulating that each Member State may examine an asylum claim, even if such an examination is not within its remit ("sovereignty clause"). Furthermore, recitals 12 and 15 of the Regulation state that the Member States must respect the conventions of international law by which they are bound and that the Regulation must be interpreted in the light of the fundamental rights and principles enshrined in the Charter of Fundamental Rights of the European Union. In accordance with Article 6(1) and (3) of the Treaty on European Union (consolidated version), the Charter forms an integral part of EU primary law and as such the Regulation should be interpreted in the light of both the Charter and the European Convention on Human Rights ("the Convention").

Secondly, taking as its basis the judgment handed down on 15 December 2010 by the European Court of Human Rights in *M.S.S. v Belgium and Greece* concerning the applicability of Article 3 of the Convention to the sovereignty clause contained in the Dublin II Regulation, the Administrative Court held that the Slovenian Internal Affairs Ministry, which was aware of the applicant's state of health before adopting the disputed decision, should have adopted a position on his health claims in its reasoning for the disputed decision in order to ascertain, in particular, whether the conditions within the meaning of Article 3 of the Convention had been met. Accordingly, in the view of the Administrative Court, the sovereignty clause should be applied where to do so is necessary to protect the applicant's rights.

Finally, the Administrative Court held that the disputed decision entailed a procedural defect insofar as the the Internal Affairs Ministry had failed to adopt a position on the claims concerning the applicant's state of health; the position adopted by the Ministry in its statement in response to the appeal lodged by the applicant did not make up for that defect. Indeed the Ministry claimed in its statement that the applicant should himself have submitted medical documentation concerning his state of health, despite his claim that his medical records had been lost by the Bulgarian authorities. Furthermore, in the view of the Administrative Court, it was not possible, pursuant to the aforementioned judgment in *M.S.S. v Belgium and Greece*, to place an excessive burden of proof on the applicant.

The Administrative Court therefore quashed the disputed decision and referred the case back to the Slovenian Internal Affairs Ministry.

Upravno sodišče Republike Slovenije, judgment of 26 April 2011, SodbaI U687/2011, www.sodisce.si/znanje/sodna_praksa/upravno_sodiscers/

IA/32692-A

[SAS]

Visas, asylum, immigration – International protection – Council Directive 2005/85/EC – Concept of 'safe third country' – Condition of a connection between the claimant and the safe third country – National legislation requiring prior presence on the territory of the safe third country – Return of claimant to said country

In a judgment handed down on 6 October 2011 concerning international protection, the Slovenian Supreme Court, the Vrhovno sodišče Republike Slovenije, ruled on the concept of "safe third country" detailed in Articles 60 and 61 of the Slovenian International Protection Act. This concept corresponds to that cited in Article 27(2)(a) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

The case involved an Iranian national ("the applicant") who illegally entered Slovenia on 19 June 2011 and was arrested by Slovenian police. In accordance with the bilateral agreement concluded between Slovenia and Croatia, the Slovenian police stated that the applicant was to be handed over to the Croatian police because he had entered Slovenia from Croatia. Indeed, the Slovenian police decided, by way of an order, not to process the applicant's claim for international protection because this was the responsibility of the Croatian authorities. Furthermore, before the order was adopted, the applicant claimed that Croatia was not a safe third country for him on account of the fact that he had never entered it.

The Slovenian Administrative Court, the Upravno sodišče Republike Slovenije, upheld the applicant's appeal and the request for enforcement of the order to be stayed. The Slovenian Internal Affairs Ministry then lodged an appeal before the Supreme Court against this decision.

The Supreme Court held, firstly, that the concept of "safe third country" within the meaning of Article 27(2)(a) of Council Directive 2005/85/EC presupposed the existence of a connection between the applicant and the safe third country in question, on the basis of which it would be reasonable for the applicant to return to that country. Furthermore, the International Protection Act required, as an additional criterion, that the applicant have spent time in said country. The Supreme Court stated that Council Directive 2005/85/EC did not specify what form such a connection should take (nature, duration, etc.). However, in the case at hand it is clear that the applicant had entered Slovenia illegally from Croatia. In the view of the Supreme Court, there was thus a connection between the applicant and Croatia, and it was clear that he had been present there, albeit illegally; it was therefore reasonable, the Court felt, for the applicant to be returned to Croatia. In this connection, the Supreme Court held that neither the International Protection Act nor Council Directive 2005/85/EC stipulated any additional provisions in this regard.

Secondly, the Supreme Court found that the concept of "safe third country" within the meaning of Article 27(2)(a) of Council Directive 2005/85/EC made provision for the possibility of the applicant challenging the 'safe' nature of the third country concerned. However, in the case at hand, the applicant had not claimed either that Croatia was *not* a safe country or that he would be subject to torture on cruel, inhuman or degrading treatment or punishment there, or, indeed, that Croatia would fail to examine the substance of his application for international protection, despite his being aware that he could make such claims. In this regard, it was of relevance that the applicant would not be returned to his State of origin but, on the contrary, to a State which respected both human rights and the right of asylum and which applied the relevant Geneva Conventions and the *non-refoulement* principle. In addition, it held that application of the concept of 'safe third country' was not contingent upon the existence of a bilateral agreement between the two States concerned.

Finally, the Supreme Court noted that via the transposition of Council Directive 2005/85/EC into Slovenian law, the International Protection Act provided that the applicant must have been present in the safe third country before entering the State concerned; accordingly, he could not be deported to a country from which he had not entered the State concerned. Neither the International Protection Act nor Council Directive 2005/85/EC laid down any more stringent conditions in this respect. Given that the International Protection Act stipulated that the applicant previously have been present in the safe third country, it followed that there was a connection between the applicant and said country if the former had entered the State concerned from a safe third country. In the view of the Supreme Court, since the the International Protection Act was sufficiently clear and precise as regards the conditions under which an individual claiming international protection should be sent to the safe third country, there was no need to submit a reference to the European Court of Justice for a preliminary ruling.

Vrhovno sodišče Republike Slovenije, upravni oddelek, judgment of 6 October 2011, Sodba I Up 466/2011,
www.sodisce. si/vsrs/odlocitve/20100408152628 07/

IA/32693-A

[SAS]

Sweden

Intellectual property law – Copyright – Violation – Complicity in breaching copyright legislation – Request for a preliminary ruling – Dismissal

In a ruling handed down on 1 February 2012, the Swedish Supreme Court, the Högsta Domstolen, dismissed the application for a judgment allowing an appeal lodged by three plaintiffs in a criminal case concerning the website The Pirate Bay. The case pitted the three plaintiffs against the Public Prosecutor's Office and 14 film- and music-production companies and representatives of gaming-programme (software) and gaming-products owners. After the application was rejected, the judgment by the Stockholm Court of Appeal, the Svea hovrätt, handed down on 26 November 2010 became definitive.

In terms of its substance, the case addressed the issue of the liability of an intermediary managing a website for the illegal downloading of streaming files (torrent files). It pertained, inter alia, to Directive 2000/31/EC on certain legal aspects of information society services and on the interpretation of Articles 12 to 14 thereof. The case involved four individuals who managed a website seeking to create an online file-sharing platform. The defendants had made available to the public a database connected to a catalogue of streaming files. They had also made it possible for users to search for and download streaming files, and offered, via their online file-sharing service, a functionality whereby users could contact each other via a data-tracking function. The site contained films, musical works and computer games. Despite the fact that the main offences could have been committed anywhere in the world, the court of first instance in Stockholm held that the Swedish courts had jurisdiction to settle the case since the works had been made public on the Internet in Sweden and the servers used by The Pirate Bay and its tracker were located on Swedish territory. The court found the defendants guilty of complicity in infringing copyright legislation and sentenced them each to a year in prison. The court held, inter alia, that the act of managing a website offering users highly developed search functions and the opportunity to download and store files easily, and facilitating contact between offenders (the 'downloaders') was sufficient evidence of the intermediaries having encouraged the primary infringement of copyright legislation, a condition which had to be fulfilled in order for them to be convicted. Moreover, the intermediaries had failed to prevent such infringements despite the fact that they had been prompted to do so by the owners of the protected works, conduct which was indicative of their indifference to the problem of illegal online file-sharing. The defendants were also ordered, jointly and severally, to pay damages to the owners of protected works.

The four defendants challenged the ruling before the Stockholm Court of Appeal. They also challenged the jurisdiction of the professional judge presiding over the case before the court of first instance, calling for his recusation. Within the framework of his professional activities, the judge in question belonged to a copyright association for the purpose of expanding his knowledge of this particular field. The aim of the association was to promote knowledge of copyright and to help develop this legal field via seminars, discussions and publications. Two of the lawyers representing the companies were also members of the association. The Court of Appeal therefore began by issuing a ruling as to recusation of the judge in question; in so doing it found no grounds upon which he ought to stand down. However, the defendants then raised other grounds for recusation, following which one lay-judge recused himself. The defendants then claimed before the Court of Appeal that two of the judges at said court should also recuse themselves on account of the fact that they belonged to two organisations seeking to promote knowledge of intellectual property and copyright. However, the Court of Appeal did not share this view and dismissed their application. The Supreme Court subsequently upheld this decision.

The Court of Appeal upheld the ruling by the court of first instance via an interlocutory ruling. It confirmed that the Swedish courts had jurisdiction to settle the matter but underscored the fact that the key element in the case was the situation whereby the 'principal seeder' (i.e. the person who seeded the streaming files) had created streaming files and had made them accessible to individual users via compilations of links and search engines. The server containing the public source was located on Swedish territory and thus the primary offences must be considered as having been committed in Sweden and the Swedish courts must be deemed to have jurisdiction.

However, the Court of Appeal reduced the prison sentences imposed on the defendants: that of the first defendant was reduced to ten months, that of the second to eight months and that of the third to four months, the third defendant's role in the offence having been primarily that of financing it. In the Court of Appeal's view, the latter defendant's link to the activity and the primary offence was too vague for him to be convicted of complicity in the act per se. In stipulating penalties, the Court of Appeal took into account the fact that the aim of generating profit was a significant one, despite it not being the sole one. The Court therefore increased substantially the level of damages that the three defendants were required to pay, jointly and severally, to rightholders.

The Court of Appeal's judgment was appealed before the Supreme Court. The latter deemed the appeal inadmissible, the same court having initially dismissed the application, as mentioned.

In the context of the application for a ruling of admissibility concerning an appeal on a point of law, the three defendants asked the Supreme Court to submit a preliminary question to the European Court of Justice (ECJ). In doing so, they cited the need for clarification of the scope of the concepts of "mere conduit" (Article 12 of the directive), "caching" (Article 13) and "hosting" (Article 14). The Supreme Court dismissed this request stating simply that there was no doubt as to how to interpret the provisions in question.

The ruling by the court of first instance in relation to the fourth defendant acquired the authority of *res judicata*. Proceedings before the Court of Appeal never took place on account of the fact that the defendant failed to appear at the hearing and, subsequently, the application to reopen proceedings had not been submitted within the designated time.

Högsta Domstolen, decision of 1 February 2012, case no. B 5880-10, Svea hovrätt, interlocutory judgment of 26 November 2010, case no. B 4041-09 and Stockholms tingsrätt, judgment of 17 April 2009, case no. B13301-06, www.domstol.se

IA/32695-A

[LTB]

2. Non-EU countries

United States

Constitutional law – Fourth amendment to the United States Constitution (right to respect for private life) – Use of new technologies by police officers – Global positioning system (GPS) – Search – Need for a search warrant in order to install a GPS tracking device on a suspect's vehicle

In a ruling passed on 21 January 2012 in *United States v. Antoine Jones*, the Supreme Court of the United States interpreted the Fourth Amendment of the United States Constitution in a case concerning the use of new technologies in surveillance of suspects. More specifically, the case concerned the placing of a global positioning system (GPS) device on a suspect's vehicle enabling the vehicle to be tracked. The key question posed was whether the installation of the GPS device on the vehicle by police officers required a search warrant pursuant to the Fourth Amendment.

The case involved Mr Jones, the owner of a nightclub in Washington D.C., who was suspected by police of trafficking narcotics. Initially, officers used traditional methods, including visual surveillance and telephone tapping, to find out more about Mr Jones's activities. Subsequently, in 2005, officers travelled to a public car park in Maryland and secretly installed a GPS tracking device on a Jeep Grand Cherokee used by Mr Jones but registered to his wife. The resulting evidence obtained played a crucial role in convicting him for having organised the distribution of cocaine, a crime for which Mr Jones was sentenced to life in prison.

The Supreme Court held that by installing a GPS tracking device on Mr Jones's vehicle and by tracking the movements of said vehicle, the police officers involved were physically occupying private property belonging to Mr Jones for the purposes of obtaining information. In this connection, the Supreme Court stated that the protection afforded under the Fourth Amendment should be that envisaged at the time of its adoption, namely protection of property. Thus, the physical intervention by police vis-à-vis the suspect's vehicle constituted "unauthorised intrusion onto private property" (trespass). The Supreme Court therefore dismissed the US government's argument that movements in a vehicle on the public highway were not protected by the Fourth Amendment to the United States Constitution.

By contrast, the Supreme Court held that although the case at hand pertained only to transmission of electronic signals via the GPS device and not to the intrusion itself, it would nevertheless be applying legislation concerning "reasonable expectation of privacy". In the Court's view, said legislation complemented the Fourth Amendment rather than substituted it.

The Supreme Court therefore held unanimously that the use of the GPS device constituted a search for which a warrant was required and that consequently in the case at hand the Fourth Amendment of the United States Constitution had been violated.

However, the Supreme Court judges were not unanimous in their reasoning for the ruling. Five judges took as the basis for their reasoning legal doctrine concerning "unauthorised intrusion onto private property" (trespass), while four judges based their reasoning on the concept of "reasonable expectation of privacy".

Supreme Court of the United States, Opinion of the Court of 21 January 2012, United States v. Antoine Jones, 565 U.S._2012), www.supremecourt.gov/opinions/11pdf/10-1259.pdf

IA/32684-A

[SAS]

Constitutional law – Amendment to the Constitution of the State of California (Proposition 8) – Concept of "marriage" as a union between a man and a woman – Amendment in breach of the 14th amendment to the United States Constitution (Equal Protection clause)

Proposition 8 is an amendment to the Constitution of the State of California, enshrined by a referendum in 2008, which suspended same-sex marriages and which quashed the ruling by the Supreme Court of California, passed several months earlier, authorising marriage between same-sex couples in California. However, marriages performed during a period of approximately four months between the pronouncement of the ruling by the Supreme Court of California and the entry into force of Proposition 8 had been approved. The Supreme Court of California refused to apply the legislation retroactively, i.e. to annul some 18,000 same-sex marriages performed during 2008 at a time when they had been permitted.

Nevertheless, the Federal Court of San Francisco held, in 2010, following a complaint against Proposition 8 lodged by a lesbian couple, that the ban on same-sex marriages in the State of California was in breach of the United States Constitution. It held that a section of the population could not be deprived, on account of sexual orientation, of a right which it had previously been granted.

Equally, as regards the appeal lodged by those in favour of Proposition 8 against this ruling, the United States Court of Appeals for the Ninth Circuit held, in 2011, that Proposition 8 was in breach of the 14th Amendment to the United States Constitution (Equal Protection clause). Said court found, firstly, that those in favour of Proposition 8 had *locus standi*, the necessary authority to assert the State's interest in defending the constitutionality of the initiative, which California officials had declined to defend in court.

The Federal Court of Appeal went on to hold that by using popular initiative to withdraw from a particular minority group a right it previously possessed, without any legitimate reason, the people of California had violated the Equal Protection clause. It held that it was not possible to reasonably consider that Proposition 8, insofar as it prohibited marriage between persons of the same sex whilst substantial rights and responsibilities conferred upon the latter remained intact, had been adopted to promote the raising of children by their biological parents, to encourage responsible procreation, to make social changes with caution, to protect freedom of religion or to control the education of children in schools. The Federal Court of Appeal ruled that Proposition 8 was thus without purpose and that its only effect was to lower the status and dignity of gay and lesbian people in California and to officially re-categorise their relationships and their families as being inferior to those of heterosexual couples.

Finally, the Federal Court of Appeal dismissed the application by the President of the chamber to be recused on account of his lack of objective impartiality given his personal interest in favour of same-sex marriage. In this regard, the Court held that he was not required to recuse himself from the case purely on account of the fact that he may be personally affected by the outcome of the case.

However, the validity of Proposition 8 will likely be assessed by the Supreme Court of the United States since those in favour of it have already indicated their intent to approach the latter court.

United States Court of Appeals for the Ninth Circuit, Opinion of 7 February 2012, Perry v. Brown (formerly Schwarzenegger), Case No. 10-16696, www.ca9.uscourts.gov/datastore/opinions/2012/02/10/10-16696.pdf

IA/32691-A

[SAS]

Civil law – Bankruptcy Code – Recognition and enforcement of a foreign judicial ruling – German ruling on the interception, by the bankruptcy trustee, of the mail (including the electronic mail) of the bankruptee – Refusal – Clear non-compliance with the United States public policy

Chapter 15 of the United States Bankruptcy Code sets out the conditions which must be fulfilled in order for a foreign legal ruling to be recognised and enforced in the United States. However, Section 1506 of the Bankruptcy Code allows US courts to refuse to recognise and enforce a foreign

legal ruling where such a ruling clearly contravenes United States public policy. On the basis of this provision, the Bankruptcy Court for the Southern District of New York ("the Court"), via its ruling of 22 July 2011, handed down in *In re Toft*, refused to recognise and enforce a ruling by a German court allowing a bankruptcy trustee to intercept the mail (including the electronic mail) of the bankruptee.

The case concerned an orthopaedic doctor ("the bankruptee") against whom bankruptcy proceedings had been opened in Germany. Shortly after the proceedings commenced, the bankruptee disappeared. The bankruptcy trustee had therefore asked the German court to grant permission for the bankruptee's mail (including his electronic mail) to be intercepted. The court subsequently issued an ordinance ("the German ordinance") granting this request.

Since the servers via which the bankruptee accessed the Internet (including his electronic mailbox) were situated in the United States, in accordance with Chapter 15 of the Bankruptcy Code, the German bankruptcy trustee asked for the German ordinance to be recognised and enforced in the United States. More specifically, it requested in particular unlimited access to the bankruptee's electronic mail.

Having acknowledged that it did indeed have jurisdiction in the present case, the Court held, firstly, that the fact that the bankruptee held no assets in the United States and received no income there, was irrelevant; the proceedings brought on the basis of Chapter 15 of the Bankruptcy Code constituted auxiliary proceedings in relation to those under way abroad.

The Court went on to hold that within the meaning of Section 1506 of the Bankruptcy Code, recognition and enforcement of the German ordinance was clearly in breach of United States public policy. It stated that Section 1506 was applied where recognition and enforcement of a foreign legal ruling might undermine the "fundamental principles of law" of the United States. More specifically, and in relation to the present case, the Court held that recognising and enforcing the ordinance in question was likely to infringe United States law on both communications surveillance (the Wiretap Act) and protection of individuals' private life in the electronic communications sector (the Electronic Communications Privacy Act). The Wiretap Act provided protection against intentional interception of electronic communications inasmuch as only interceptions authorised by court order or with the consent of one of the parties were permitted. By the same token, the Electronic Communications Privacy Act only permitted interception of electronic communications on the basis of a court order or a subpoena. The Court also held that to grant the request for recognition and enforcement in the case at hand would have been to compromise the right to a private life enshrined in the United States Constitution and in the Constitutions of the majority of US states.

Finally, in the Court's view, a US bankruptcy trustee was not authorised to intercept a bankruptee's communications. Accordingly, if the German ordinance were to be recognised and enforced in the United States, the German bankruptcy trustee would run the risk of being held criminally liable.

The Court therefore refused to recognise and enforce the German ordinance in the United States.

Bankruptcy Court for the Southern District of New York, Memorandum of Opinion of 22 July 2011, In re Toft, Case No. 11-11049 (ALG), www.nysb.uscourts.gov/opinions/alg/211878_7_opinion.pdf

IA/32690-A

[SAS]

B. Practice of international organisations

International Institute for the Unification of Private Law (UNIDROIT)

International civil service – Contract staff – Recognition of "legitimate expectations" – Conditions – Limitations

The case law of the European Union is not alone in making provision for a comfortable degree of discretion on the part of the management of an international organisation in disputes between it and its staff and civil servants. It is debatable whether an equivalent power is granted under national legal systems. This power remains undiminished even in the presence of "legitimate expectations" – which strongly echo the concept of legitimate expectations recognised under EU law – on the part of applicants.

This issue arose afresh in a case involving the Deputy Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT), hired as a temporary staff member, and UNIDROIT itself. The appellant had initially been hired "for the time being" via an extraordinary budgetary contribution and without any guarantee that the period of appointment would be renewed. Consequently, she could not be integrated into UNIDROIT's organisational structure at the time she was hired. Although her contract had been renewed twice, she was never incorporated into UNIDROIT's organisational structure despite the issue having been raised several times; the upshot of this situation was that the applicant's pay remained at the lower level awarded at the time she was hired. When the time came for the applicant to leave UNIDROIT, by way of compensation for the lower level of pay she had received, the institute's management offered her two days' leave a week for a period of ten weeks together with ten additional days.

Initially, the applicant had opposed UNIDROIT management and had sought a) payment of the difference between the remuneration she would have received if she had been integrated into the institute's structure and that which she actually received, b) payment of the child benefit to which she claimed she was entitled pursuant to the relevant statutory and UNIDROIT provisions and the principle of good faith, and c) compensation for non-material damage she claimed she had suffered on account of the harm done to her personal and professional image and to her dignity. After this claim was dismissed, the applicant lodged an appeal citing the same demands before the UNIDROIT Administrative Tribunal.

Of these various claims, the Tribunal held, on the one hand, that in the absence of any express stipulation to the contrary in the UNIDROIT provisions and bearing in mind that child benefit formed part of the "generally recognised rights" in "service contracts exceeding the minimum duration", the applicant was entitled to receive the child benefit she was claiming. Conversely, the Tribunal only granted the applicant a limited entitlement to compensation for non-material damage. In its view, the non-material damage in question had been suffered on account of the fact that successive statements by UNIDROIT bodies could "legitimately have given rise to expectations on the part of the applicant", expectations which, were they to 'disappear' following a long period, justified compensation for non-material damage. However, significantly, the Tribunal rejected the concept of "legitimate expectations" on the part of the applicant as regards the main claim in her appeal, namely that concerning the level of her pay. In this connection, the Tribunal held that the applicant had formally accepted the terms of her contract, both at the time it was originally drawn up and when it was subsequently renewed. It found that there was no obligation on the part of UNIDROIT pursuant to any reliance by the applicant on the principle of "legitimate expectations", despite acknowledging the fact that such expectations had been "fuelled by the conduct of UNIDROIT bodies".

David Ruzié: "A propos de la notion d'expectative légitime des agents d'une organisation internationale", Journal du droit international, 2011, p. 905 s.

[RA]

World Trade Organisation

WTO – GATT 1994 – Taxes on distilled spirits – Complaint by the European Communities against the Philippines

On 20 January 2012, the WTO dispute-settlement body adopted the report by the WTO Appellate Body concerning the system of taxation imposed by the Philippines on distilled spirits.

The consultation procedure had begun in 2009 following a complaint by the European Communities concerning the Philippines' excise tax regime on distilled spirits, which had been in place since 1997. The European Communities contended that the regime discriminated against imported distilled spirits by taxing them at a substantially higher rate than domestic spirits, a situation which was inconsistent with the obligations incumbent upon the Philippines under the GATT 1994, in particular Article III:2. The United States had then requested to join the consultations, a request to which the Philippines acceded.

It emerged from the report by the Panel dated 15 August 2011 that based on the excise tax under dispute, the Philippines had applied a low flat tax to spirits made from certain designated raw materials, while significantly higher tax rates were applied to spirits made from non-designated raw materials. Furthermore, all domestic distilled spirits were made from one of the designated raw materials, cane sugar, whereas the vast majority of imported spirits are

made from non-designated raw materials (e.g. cereals or grapes). The Panel concluded that through its excise tax, the Philippines had subjected imported distilled spirits made from non-designated raw materials to internal taxes in excess of those applied to "like" domestic distilled spirits made from the designated raw materials, thus acting in a manner inconsistent with Article III:2 first sentence of the GATT 1994. The Panel also found that the Philippines had acted inconsistently with Article III:2 second sentence of the GATT 1994 by applying dissimilar taxes on imported distilled spirits and on "directly competitive or substitutable" domestic distilled spirits so as to afford protection to Philippine production of distilled spirits. The Philippines appealed against this report and the European Union subsequently cross-appealed.

The Appellate Body upheld the Panel's main findings. Nevertheless, its report reversed the Panel's finding that all imported distilled spirits made from non-designated raw materials were, irrespective of their type, "like" all domestic distilled spirits. However, it upheld its findings that all imported and domestic distilled spirits were "directly competitive or substitutable" within the meaning of the second sentence of Article III:2 of the GATT 1994. The Appellate Body also reversed the Panel's finding that the claims by the European Union concerning the second sentence of Article III:2 had been made in the alternative to its claim under the first sentence thereof.

As a consequence, the Appellate Body concluded that the finding that the Philippines had acted inconsistently with sentences one and two of Article III:2 of the 1994 GATT by subjecting imported distilled spirits to dissimilar taxation applied to both the United States and the European Union (case DS 403).

Report by the WTO Appellate Body of 21 December 20120 (case DS 396), www.wto.org

[NICOLLO] [FLUMIBA]

C. National legislation

Bulgaria

New judicial institution in Bulgaria – Specialised Criminal Court

At the time of Bulgaria's accession to the European Union on 1 January 2007, a 'cooperation and verification mechanism' (CVM) was put in place by the EU to assess the country's progress and ensure the smooth functioning of its institutions. The CVM details the targets to be achieved, in particular in the fields of judicial reform and combating corruption and organised crime.

The reports compiled by the European Commission within the framework of the CVM set out recommendations to the Bulgarian government as regards the most efficient measures for it to take to combat organised crime and corruption within the Bulgarian State at the highest level, and stipulate that a system of specialist judges be put in place.

With a view to implementing the Commission's recommendations, Bulgaria embarked upon reform of its judicial system, opting to establish a specific court specialising in combating corruption and organised crime, the Specialised Criminal Court. In this connection, Bulgarian legislation on judicial powers and the Bulgarian Penal Code were amended to achieve better quality justice.

The first ruling by the Specialised Criminal Court was passed in January 2012. The new institution comprises a Specialised Criminal Court of First Instance and a Specialised Criminal Court of Appeal, both of which are based in Sofia. Its rulings may be appealed before the Court of Cassation. A State prosecutor's office has been established for both the Court of First Instance and the Court of Appeal.

One of the key features of the new court is its territorial jurisdiction. In contrast to other courts whose territorial jurisdiction is limited to specific regions, that of the new court covers the entire country as well as crimes committed by a Bulgarian national abroad.

The new court must issue rulings within as short a period as possible. Once the investigation has been completed, the evidence file is forwarded to the prosecutor, who has 15 days within which to exercise the powers conferred upon him under the Code of Criminal Procedure. The President of the court appoints the judge-rapporteur and sets a date for the hearing within 15 days. This change to the law marks real progress in terms of limiting the excessively lengthy criminal trial procedure in Bulgaria, despite

the stipulated deadlines not being mandatory. The deadlines are evidence of the efforts being made to shorten the duration of criminal proceedings in Bulgaria significantly.

The criteria for selecting judges to sit in the Specialised Criminal Court are more stringent than those applicable to other courts. Firstly, judges sitting on the Court of First Instance must have at least ten years' experience, five of which must have been as an investigating judge, prosecutor or judge in a criminal court, while those sitting in the Court of Appeal must have at least 12 years' experience, of which eight must have been in any of the aforementioned roles.

The changes to the Bulgarian Penal Code brought about an additional legal requirement for persons involved in criminal proceedings, namely that the requirement for such persons to appear before the specialised courts takes precedence over any requirement for them to appear before other State courts. A new requirement previously not present in criminal proceedings in Bulgaria was also introduced, i.e. that a witness or expert may be forced to appear by law-and-order forces. Where a witness or expert fails to appear without a serious reasons, the court may order that law-and-order forces be used to bring them to the next hearing, the aim being to ensure that rulings are passed quickly as required.

Finally, the legislative amendments in question highlight the efforts made by the legislature to reform the judicial system in Bulgaria in a bid to combat organised crime effectively at national level.

Judicial Power Act, amended in Bulgarian Legal Gazette No. 1 dated 4 January 2011, in force since 4 January 2011, Code of Criminal Procedure, Chapter 31(a) (Bulgarian Legal Gazette no. 13 of 11 February 2011, in force since 1 January 2012, amended in Bulgarian Legal Gazette No. 61/2011) http://dv.parliament.bg/

[NTOD]

Spain

Sinde-Wert Act on the hosting of protected content on the Internet

On 1 March 2012, the regulation enforcing new legislation aimed at avoiding illegal downloading of copyright-protected content on the Internet, known as the Sinde-Wert Act after the two Spanish ministers involved in putting it in place, entered into force.

Under the terms of the Sinde-Wert Act, claimants wishing to have a website hosting protected content closed down may approach the Spanish Intellectual Property Commission within the Ministry of Culture. This Commission will then ask the site administrator to remove the relevant content. If the administrator refuses, a court must rule within four days on whether or not to block the site in question.

The original wording of the act made no provision for the courts to intervene in the process. Opposition from and moves by Internet users enabled amendments to be adopted preventing the Intellectual Property Commission from itself ordering an Internet site to be blocked.

The new legislation has been the subject of fierce debate in Spain. In February 2012, the Spanish Internet Users' Association, the Spanish Association for the Digital Economy, and the Internet Enterprises Network submitted two appeals to the Supreme Court against the regulation enforcing the Sinde-Wert Act; the first of the two appeals was declared inadmissible.

The new legislation has already been applied, the Intellectual Property Commission having already received 23 notifications.

Real Decreto 1889/2011 of 30 December 2011, por el que se regula el funcionamiento de la Comisión de Propiedad Intelectual, Ley 2/2011 of 4 March 2011 de Economia Sostenible, www.boe.es

[PERREGU]

France

Interconnection of European criminal records: current situation and future outlook

During the plenary meeting of the State partners involved in the project to interlink European criminal records, the Ministry of Justice gave a rundown of the current situation and detailed the latest developments, in particular at European Union level.

Borne out of an initiative between France and Germany in January 2003, the project marks a major step forward in the field of judicial cooperation in criminal matters. Interlinking criminal records across Europe enables the judicial authorities in the various partner countries to exchange excerpts from criminal records (in the form of 'bulletins' containing full details of the forms held within a criminal record) and notices of convictions electronically. In 2006, just four States were interconnected: France, Germany, Belgium and Spain. Other States gradually joined the system, including Bulgaria, Luxembourg, Poland, the Czech Republic, Slovakia, Italy and the United Kingdom. Today, the system comprises 12 interconnected States. In France, the National Criminal Records Service (*Service du casier judiciaire national*) in Nantes is responsible for interconnecting records. All requests for an excerpt from a criminal record must be processed within seven days. In practice, most requests are processed within 24 hours. The computerised procedure uses the secure communication system known S-TESTA (Secured Trans-European Services for Telematics between Administrations).

In the years ahead, the interconnection project is set to be expanded to include the 27 Member States of the European Union. It will enhance the development of a European area of justice. By exchanging information on convictions passed in France and the other Member States, the judicial authorities will be better placed to adapt penalties and tackle cross-border crime, one of the priorities set out in May 2010 in the Stockholm Programme for the area of justice, freedom and security.

The foundation for this cooperation between all Member States was laid down in Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States. The purpose of the Framework Decision is threefold: a) to make provision, following a conviction, for a system enabling the convicting Member State to communicate the relevant data to the Member State of which the convicted person is a national, b) to set out the obligations on Member States as regards retaining data, and c) to establish a framework within which to set up and develop a system via which to exchange data on criminal convictions between Member States.

The aforementioned Framework Decision was implemented via Council Decision 2009/316/JHA of 6 April 2009 establishing the European Criminal Records Information System (ECRIS). The purpose of the latter is to improve communication of data on convictions. The system is a de-centralised one and as such there is no single database of criminal records; the information contained in criminal records continues to be managed by the respective Member States, each of which retain their own criminal-record format. Neither does the system provide direct online access to other Member States' databases.

The system could be improved by enabling States to access each other's data without having to request permission, and compiling a file listing individuals convicted in non-Member States to supplement the existing ECRIS.

Ministry of Justice, press release dated 31 October 2011, www.justice. gouv.fr

[CZUBIAN]

Czech Republic

Act on Corporate Criminal Liability and Related Proceedings

Following seven years of preparatory work, the Czech Republic has finally introduced legislation to enable legal action to be taken against and penalties imposed upon corporations which commit criminal acts. Until recently, Czech criminal law was based on the conventional model of criminal liability linked to fault on the part of a physical person responsible for the crime. In introducing the new legislation, the Czech Republic has addressed the calls by the European Union and international organisations to adopt an effective instrument to combat corporate crime in order to meet the obligations arising under EU law and certain international treaties. On 1 January 2012, Act no. 418/2011 Sb. on Corporate Criminality and Related Proceedings entered into force, thereby introducing a special court process in both material and procedural terms.

Criminal liability, as conceived in law, is based on the principle of speciality insofar as it lists some 80 offences for which corporations may now be prosecuted (including, in particular, tax offences and offences punishable under EU and international law). Fault, the crucial element in the concept of liability on the part of individuals, has been replaced by the idea of imputability. Indeed, in order for a corporation to be held liable for a particular offence, in addition to the material elements of the alleged offence, further conditions must be met (also known as formal and material conditions). Firstly, the offences in question must have been committed in the name of the corporation, in its interests or within the framework of its activities. Secondly, the offence must have been committed by parties falling within one of the categories prescribed by law, i.e. the bodies or representatives of the corporation, by other parties directing or controlling it, by parties exerting a decisive influence on the corporation's management, or, under certain conditions, by the corporation's employees. It is important to underline that ignorance on the part of actual physical persons having acted on behalf of the corporation does not release the latter from any liability. Neither can liability be avoided by the corporation in question being dissolved since the new Act stipulates that in such cases, liability is transferred to the successor. As regards linking the new system of liability with that applicable to physical persons, the Czech legislature opted to keep the two separate. In so doing, it acknowledged that the same conduct may result in parallel liability on the part of both physical person and corporation. Finally, the criminal penalties which may be imposed on a corporation range from a fine to the corporation being dissolved; specific penalties such as banning the corporation from participating in public tender processes or concessions, or even publishing the conviction judgment are also possible.

Zákon č. 418/2011 Sb., o trestní odpovědnosti právnických osob a řízení proti nim,
http://aplikace.mvcr.cz/sbirka-zakonu/

[KUSTEDI]

1. Non-EU countries

United States

New America Invents Act

On 16 September 2011, President Obama signed into law the America Invents Act ("the AIA"), which succeeds the 1952 Patent Act and completely overhauls the United States system of patent law.

Firstly, the AIA expands the definition of prior art used in determining patentability in the United States. In so doing, it replaces the present first-to-invent principle (in place for over 200 years) with a first-inventor-to-file system. Under the latter system, the patent is awarded to the first inventor to file a patent application. In addition, a patent application filed anywhere in the world will also be covered by the first-inventor-to-file system, regardless of the language in which the application is filed.

The new system will enter into force on 16 March 2013.

This definition of prior art is connected in particular to the inventor's publication-conditioned grace period for the first inventor to publish his/her invention. Prior publication does not infringe an inventor's right to a US patent if it is done within one year of filing.

Secondly, the AIA introduces a new procedure known as the post-grant review, which, in some respects, is similar to the European Patent Office's opposition proceedings.

Accordingly, a third party may instigate a post-grant review within nine months of a patent being granted. In his application for a review he may rely on any grounds going to invalidity and may challenge, in particular, novelty, lack of clarity, adequate description of the invention and belonging to a category of patentable products. By contrast, the application may not be based on the absence, in the patent application, of a description of the best mode for accomplishing the invention.

Patents applications covered by the new procedure must be dated after 16 March 2013 (first priority date).

The procedure takes place before a panel of three administrative patent judges at the Patent Trial and Appeals Board. The parties may appeal the final decision before the Court of Appeals for the Federal Circuit.

Thirdly, the AIA replaces *inter partes* re-examination with *inter partes* review. The latter may only be requested nine months after the date on which the patent was issued, to avoid an *inter partes* review coinciding with a post-grant review.

This procedure will enter into force on 16 September 2012.

Finally, the AIA makes provision for a supplemental examination for patent holders by allowing them, in order to avoid a patent not being enforceable, to revise, review or correct information concerning the patent. The supplemental examination is thus designed to enable false statements or inaccurate information to be corrected in communications with the United States Patent and Trademark Office.

This procedure will enter into force on 16 September 2012.

America Invents Act,
www.uspto.gov/aia_implementation/patents.jsp

[SAS]

D. Extracts from legal literature

Protection of personal data and administrative transparency

Although fundamental rights incontestably lie at the heart of European integration[1], at least since the Treaty of Amsterdam, the judgment by the European Court of Justice (ECJ) in *Schecke*[2] breaks new ground in upholding the preeminence of such rights within the EU legal system. "With regard to the validity of Community rules which, in order to guarantee transparency in the use of Common Agricultural Policy (CAP) funds, require that personal data on beneficiaries be published, [...] [said] judgment [...] clarifies issues of a constitutional nature"[3]. Whilst the ruling also "enabled the ECJ to specify the scope of the formal requirements laid down in Directive 95/46/EC[4] [.] , in particular as regards the obligations in respect of the register held by the data-protection officer and the prior checks the Member States must perform"[5], it was also an opportunity for it to "set out the links between various sources of protection of fundamental rights within the EU legal system, in particular the principles arising from the European Convention on Human Rights, the Charter of Fundamental Rights and specific instruments of secondary law "[6].

The ruling passed in *Schecke* is noteworthy in that never before had the ECJ overturned a piece of secondary legislation on the basis that it violated a fundamental right recognised under primary law. "[F]or the very first time, the ECJ has declared invalid a genuine EU legal act on the grounds of incompatibility with higher-ranking European Union legislation [...]. [While] this may seem rather unspectacular given that Article 267(b) TFEU [bestows] the authority on the ECJ to declare invalid any secondary legislation which conflicts with primary EU law [.] , all decisions issued [.] to date have quoted formal reasons [.] . The ECJ has consequently taken another step towards becoming a fully-fledged constitutional court [.] , the fact that it declared secondary legislation invalid on the grounds of a violation of primary law [.]also [meaning] a (further) revaluation of the preliminary ruling procedure, [.] encouraging national courts to refer questions of validity"[7]. The judgment is striking, in particular, "insofar as it invalidates the disputed legislation not only on the basis of the fundamental right to protection of one's private life, but also on that of the fundamental right to protection of personal data under the Charter"[8]. In this respect, "the position adopted by the ECJ is significant: whilst the national court held that the requirement to publish data concerning beneficiaries of State aid [.] constituted an unjustified violation of the fundamental right to protection of personal data, citing, in support of its finding [.] , Article 8 of the European Convention on Human Rights, the Grand Chamber immediately cites Article 6(1) TEU in favouring as the applicable reference framework the Charter of Fundamental Rights, which [.] now has the same legal value as the various treaties" [9]. Although "this is hardly a revolution in terms of protection of fundamental rights within the European Union [.] , acknowledging the right to protection of personal data as being distinct from the right to protection of one's private life clarifies the issue [since] Article 8 of the Charter incorporates all the key elements [of said] right [.] , namely the requirements that data be processed fairly, for specified purposes and on a legitimate basis laid down by law [.] [and] also sets out the rights of citizens to have access to data concerning them and to have such data rectified, and the fact that compliance with the stated rules is to be subject to control by an independent authority. Naturally, these elements were already present in other instruments [.] such as Directive 95/46/EC [.] , Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, and the case law of the European Court of Human Rights concerning Article 8 of the European Convention on Human Rights. However, they were not detailed in said instruments in as clear and concise a manner"[10].

Although the judgment "highlights the significance accorded the Charter of Fundamental Rights [.] since the entry into force of the Lisbon Treaty"[11], "the manner in which the ECJ [.] sets out its supervisory purview underscores the ambivalence of links between the Charter and the European Convention on Human Rights [.] . On the one hand, the preeminance of the Charter is reaffirmed [.] , since [.] the entry into force of the Lisbon Treaty prompted the ECJ to rule on the basis of the Charter's provisions [.] , whilst the national court took the Convention [...] as its substantive basis. However, on the other hand, an analysis of the fundamental right cited reaffirms the authority of the latter: firstly, the ECJ [.] states that whilst specifically guaranteed under Article 8(1) of the Charter (said provision being deemed to have no equivalent in the Convention), the right to protection of personal data "is closely linked to the right to respect for one's private life enshrined in

Article 7" [.] , in line with Article 8(1) of the Convention; secondly, the limitations which may be applied thereto under Article 52(1) of the Charter are subject to conditions derived from both the case law of the ECJ and public-policy caveats such as Article 8(2) of the Convention; thirdly, the connection between protection of personal data and respect for one's private life justifies implicitly and logically that the ECJ is making reference to the rule, laid down in Article 52(3) of the Charter, that the meaning and scope of corresponding rights shall be the same"[12]. Although, pursuant to the latter provision, the ECJ 'should take as its basis the case law of the European Court of Human Rights and Article 8 of the European Convention on Human Rights when determining the scope and meaning of Article 8(1) of the Charter'[13], it is no surprise that it "repeats, along the lines of the judgment in *Osterreichischer Rundfunk*[14], that the fact that the data published pertain to professional activities is irrelevant"[15]. On this point, 'the divergences between the ECJ and the European Court of Human Rights as regards the application of Article 8 of the European Convention on Human Rights are outdated since the ECJ has no hesitation in taking as its basis the case law of the European Court of Human Rights, which holds that "there is no reason in principle to exclude professional activities [...] from the notion of private life"'[16].

However, concluding, on the basis of this case law, that respect for the applicants' right to a private life as regards the processing of their personal data had been infringed, the judgment acknowledged that the publication of the data in question "enabling citizens to participate more closely in the public debate was a general-interest objective recognised by the Union"[17], thus according "the principle of transparency [.] the status of general objective liable to restrict the exercise of fundamental rights"[18]. However, this acknowledgment posed difficulties. "The ECJ raises this to a 'principle' [.] possibly justifying an intervention in EU fundamental rights [yet] [i]f one looks more closely at the (extremely vague) legal basis for the principle of transparency used by the ECJ, it is questionable whether it can be presumed that [.] the masters of the treaties intended to establish a legal principle, let alone define limits to fundamental rights [.] . To what extent the publication of the personal data of beneficiaries of agricultural aid can create decision-making which is as open, and above all else, as close to the citizen as possible, is not immediately apparent. That the publication of such information 'enables' [.] citizens 'to participate more closely in the public debate surrounding decisions on the direction to be taken by the CAP' appears in any case to be wishful thinking [.] . The assertion that the principle of transparency can serve as a means of justifying intervention in fundamental rights is especially surprising insofar as, in the present case, it would not have required recourse to [this] principle [.] at all in order to justify the decision: in [*Osterreichischer Rundfunk*], the ECJ still reached the decision - only with reference to Article 8(2) of the European Convention on Human Rights (in conjunction with what was then Article 6 [TEU]) but without recourse to a 'principle of transparency' - that the economical and proper use of public funds constitutes a legitimate goal which justifies an intervention in the fundamental right to private and family life [.] [19]. In this context [.] the introduction of the 'principle of transparency' as a legitimate goal of the Community proves to be neither [.] necessary nor particular[ly] beneficial"[20].

Indeed, although "the ECJ cites transparency in a bid to enlighten public debate surrounding the use of [.] funds [.] , this objective is not specific enough [.] . The central question [. ,] remains: what is the precise purpose [of] processing the data? Unless this question is answered, it is not possible to adopt a proportionate measure"[21]. "As the Advocate General rightly pointed out, one cannot assess whether the interference is proportionate to the legitimate aim, if one does not specify what precisely the legitimate aim is supposed to be [.] . [Fortunately] [t]his problem is [.] not fatal [.] [as] it is clear that the attacked Union legislation was disproportionate [.] irrespective of the type of transparency one would have chosen"[22]. In this respect, "the examination by the ECJ as to proportionality is to be welcomed" since it states that "even if a substantial proportion of the EU budget is allocated to the CAP [.] , this factor alone does not automatically give rise to the general-interest objective pursued by transparency vis-à-vis the public concerning the fundamental right of all individuals to protection of their personal data. This approach should be underscored at a time when the efficiency afforded by new technologies is becoming an increasing attraction and/or when, on a regular basis, the implementation of a new IT tool serving the general interest [.] is prompting a trend towards minimising the importance of individuals' private lives and protection of their personal data on grounds that efficacy should automatically take priority in

order for the democratic State to function smoothly"[23]. "The ruling in *Schecke GbR* also paved the way for a general rule as regards analysis and the burden of proof when balancing interests in the context of verifying the proportionality of and need for restrictions (on the right to self-determination as regards how one's personal data are used) on the basis of the Charter of Fundamental Rights. This could, inter alia, increase the pressure to justify the timeframes and purposes of the disputed retention of communication pursuant to Directive 2006/24/EC"[24].

"The ECJ has been rigorous in its examination"[25] but the framework of its reasoning remains conventional. "[Whereas] [t]he 'classic' full test of proportionality, [.] used by the German Federal Constitutional Court since the Second World War[26], and later taken over in a number of other national and international systems, tends to encompass [.] three stages [.] [as] after the assessment of appropriateness and necessity comes a third stage [of] value balancing[27] [and whereas] [i]n her Opinion, the Advocate General suggested that the test of proportionality should also include [such] assessment [.] of proportionality in the narrower sense [.] [t]he Court, on the other hand, reaffirmed that the principle of proportionality includes only two stages"[28]. The reasoning cited in this context is also interesting in relation to its interpretation of Article 52(1) of the Charter laying down the conditions under which restrictions may be imposed on fundamental rights. "[I]t appears that one of the conditions of [this] Article [.] , namely 'respect for the essence of [.] rights and freedoms' [.] does not form, at least expressly, a part of the test itself. This might indicate that the Court does not consider this [.] to form a freestanding condition, but most likely to [be] 'consumed' by one of the other conditions currently present in the test [.] . [While] respect for the 'essence' [.] would typically overlap with the third stage of proportionality analysis [.] [t]his may not be fatal. Proportionality analysis, like various other judicial tests, is put in place in order to structure judicial reasoning, not necessarily in order to strictly limit the scope of considerations or arguments at any given stage [and] [i]n functional terms, the 'respect for the essence' could overlap with the assessment of legitimate aim combined with proportionality analysis"[29]. That said, the analysis methodology employed by the ECJ has been criticised. "Neither are the considerations as regards the scope of restriction in the second part of the ruling immediately clear. For no discernable reason, the ECJ ignores the specific restrictions, cited in Article 8(2) of the Charter, on individuals' right to self-determination as regards how their personal data are used and relies solely on the permitted restrictions detailed in Article 52(1) of the Charter, which are applicable to all fundamental rights. This is not a conclusive analysis methodology."[30] By the same token, acknowledgment that the right provided for in Article 8(1) of the Charter is also applicable to corporations may give rise to questions. "The ECJ's position as regards the entitlement of legal persons to enjoy fundamental rights is curious. In German doctrine, the prevailing opinion has always been that only natural persons could rely on the 'new' fundamental right in respect of data protection. [.] . Without addressing the wording of Article (1) of the Charter, which grants all "persons" rather than all "people" the right to protection of their personal data, or the comparable clause in Article 16(1) TFEU, Article 16(2) being limited to protection of natural persons, in the view of the ECJ legal persons should be able to rely on protection of the fundamental right detailed in Article 7(8) of the Charter 'provided that the name of the legal person designates one or more natural persons'. This would suggest that [.] even this approach involves reference to an individual. The dogmatic capacity of this assumption must be investigated further" [31].

Whatever the situation "whilst the ECJ indicates that it is mindful of protection of the private life of and personal data pertaining to the farmers concerned, it does not prohibit publication of the information in question [.] . [I]t goes beyond stating that the measure is disproportionate [and] invites the legislature to rework it, stating that a measure could be adopted which is less detrimental to Articles 7 and 8 of the Charter but which still fulfils the aim of transparency"[32]. This is an ingenious approach. "The Court did nothing more than return the ball to the EU's political institutions. It left a space open for devising a new subsidies publication scheme, which [.] just needs to be explicit about what it intends to do and why"[33]. "Finally, thanks to the key elements cited clearly therein [.] , Article 8 of the Charter serves as a methodological guide [.] which, when used upstream, will help the legislature to ask valid questions and, when used downstream, will set out for the court the criteria by which to assess the constitutionality and lawfulness of public measures. This will only serve to enhance the sustainability of the new tools put in place[.] , which, [.] , ultimately, will help to shore up our democracy"[34].

E. Brief summaries

* *EFTA Court*: On 14 December 2011, the EFTA Court handed down a judgment in a case concerning the compatibility of a rule seeking to prevent the transfer of money acquired on offshore markets with Article 43(2) and (4) of the EEA Agreement. Said article permits protective measures to be taken where movements of capital lead to disturbances in the functioning of the capital market or in the event of difficulties in balancing payments. In the case at hand, the applicant, an Irish national living in Great Britain, was challenging an Icelandic law preventing him from transferring to Iceland Icelandic krona which he had acquired on the Great Britain offshore market. The EFTA Court held that this restriction on the cross-border movement of capital was compatible with Article 43(2) and (3) in certain circumstances.

The EFTA Court held: "The substantive conditions laid down in Article 43(2) and (4) EEA call for a complex assessment of various macroeconomic factors. EFTA States must therefore enjoy a wide margin of discretion, both in determining whether the conditions are fulfilled, and the choice of measures taken, as those measures in many cases concern fundamental choices of economic policy". (point 50)

"For a restriction on the free movement of capital to be justified, the national rules adopted must be suitable for securing the objective they pursue and must not exceed what is necessary in order to achieve it, so as to accord with the principle of proportionality (.) . In addition, measures must satisfy the principle of legal certainty". (point 52)

" (.) it is inherent in the principle of proportionality that derogations from a fundamental freedom can only be upheld if they are necessary. However, (.) is not the question whether the necessity requirement is fulfilled today, but whether it was fulfilled at the relevant time."
(point 54)

EFTA COURT, judgment of 14 December 2011, in case E-3/11, Palma Sigmarsson v The Central Bank of Iceland, www.eftacourt.int

IA/32689-A

[LSA]

* *Germany*: On 28 February 2012, the Bundesverfassungsgericht passed a definitive ruling concerning amendment of the law providing for Germany to issue a guarantee within the European Financial Stability Facility, pursuant to which the Bundestag's right to participate in decisions concerning financial guarantees was altered (see *Reflets* No. *2/2011).*

By way of a reminder, on 7 September 2011 the Bundesverfassungsgericht had ruled that the measures relating to the euro rescue plan were compatible with the Basic Law. However, the court attached to its approval the requirement that in future the German government obtain the consent of the budget committee before issuing a guarantee.

The law intended to implement this requirement and disputed by several members of the Bundestag makes provision, in an emergency, for the rights of the latter to be transferred to a committee comprising nine people. In its ruling of 28 February 2012, the court in Karlsruhe held that the majority of the provisions under said law infringed parliamentary rights enshrined in Article 38 of the Basic Law and that even in an emergency and in situations in which confidentiality was to be maintained, the rights of the Bundestag, in particular its budgetary authority, must be respected. The legislature has now been asked to put in place a procedure which observes the rights of the Bundestag as noted by the Bundesverfassungsgericht.

Bundesverfassungsgericht, judgment of 28 February 2012, 2 BvE 8/11, www.bundesverfassungsgericht.de

IA/33221-A

[AGT]

* *France*: In this judgment, the Cour de cassation applied Article 5(1) of the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as it applied to international jurisdiction in the field of employment contracts. Application of this article is worth looking at since it helps to ensure harmonious interpretation of this connecting factor within the EU.

By way of introduction, the rule concerning conflict of jurisdiction laid down in Article 5(1) of the Lugano Convention, like that in Article 5(1) of the 1968 Brussels Convention (revised) and that in Article 19 of Council Regulation (EC) No. 44/2001 (Brussels I), grants jurisdiction to the courts for the place "where the employee habitually carries out his

work, or, if the employee does not habitually carry out his work in any one country, [.] [to the courts for the] place of business through which he was engaged". Under conflict-of-laws legislation. Article 6(2) of the 1980 Rome Convention on the law applicable to contractual obligations states, in almost identical fashion, this dual connection (see also Article 8(2) and (3) of Regulation (EC) No. 593/2008 (Rome I)). It is thus advisable for these two rules concerning conflict of laws to be interpreted in a coordinated manner, and it was this goal which the ruling by the Cour de cassation sought to achieve.

The dispute which gave rise to the judgment in question involved a challenge by a mechanic residing in France against his former employer established in Switzerland, following the termination of his employment contract. Having worked for customers both in France and abroad, the mechanic had lodged various claims against his former employer before the French industrial relations court. The former employer pleaded that the court had no jurisdiction on the matter and that it was the Swiss courts which in fact had jurisdiction. The Cour d'appel concurred with this position, finding that the worker had not habitually carried out his work in one country (France) within the meaning of Article 5(1) of the Lugano Convention insofar as part of his work had been carried out outside France. It therefore applied the subsidiary criterion of the place in which the establishment through which he had been engaged was located, and in so doing stated that it had no jurisdiction since the establishment in question was based in Switzerland. This judgment was set aside by the Social Chamber of the Cour de cassation, which held that the criterion of the place in which the worker habitually carried out his work should have been used to determine which court had jurisdiction, and not that of the place in which the establishment through which the worker had been engaged was based. Consequently, the latter connecting factor (place in which the establishment through which the worker had been engaged was located) should be interpreted narrowly and pertained only to scenarios in which the first criterion (place in which the worker habitually carried out his work) could not be applied. However, in the case at hand, the Cour de cassation held that the mechanic habitually carried out his work in France insofar as "his residence in France was the place where [he] had established the effective centre of his working activities and from which he had fulfilled the majority of his obligations vis-à-vis his employer ".

In broadly restricting the appeal to the subsidiary criterion of the place in which the establishment through which the worker had been hired was based (see already, on the basis of Article 19 of Council Regulation (EC) No. 44/2001, Cour de cassation, ch. soc., 31 March 2009, no. 08-40367), the resolution by the Cour de cassation tallied with the position adopted by the European Court of Justice in the context of Article 5(1) of the 1968 Brussels Convention (see in particular the judgment of 27 February 2002 in *Herbert Weber*, C-37/00, ECR 2002, p. I-02013), as well as, under conflict-of-laws legislation, with its recent case law concerning Article 6(2) of the Rome Convention (see the judgments of 15 March 2011, *Heiko Koelzsch*, C-29/10 and 15 December 2011, *Jan Voogsgeerd*, C-384/10, not yet published in the ECR).

Cour de cassation, Social Chamber, 25 January 2012, No. 10-28155, www.legifrance.gouv.fr

IL/00791-A

[MHD]

The holder of the copyright for a piece of software intended for use by court bailiffs was accusing one of his clients, who held a licence to use said software, of having obtained from a third party a second piece of software on the basis of the first. According to the holder of the copyright for the original software, he had thus been involved in copyright infringement and unfair competition. His claims had been rejected on appeal based on an exception for interoperability, i.e. the ability to exchange information and mutually to use the information which has been exchanged. The copyright holder claimed, in support of his appeal, that the principle of interoperability permitted only coherent and ongoing communication between two pieces of software and not the replacement of one by the other.

In upholding the judgment handed down by the Cour d'appel , the Cour de cassation employed, for the first time, the concept of interoperability detailed in Council Directive 91/250/EEC on the legal protection of computer programs, now replaced by Directive 2009/24/EC of the European Parliament and of the Council. It therefore dismissed the copyright-holder's claims, underscoring the fact that the purpose of interoperability enabled legitimate users of the software to perform decompilation and thus to use the coding lines and source codes

of the copyright-protected software. The Court thus applied the definition given in Council Directive 91/250/EEC to the letter and reiterated the mandatory value of the exception introduced by it and cited in Article L. 122-6-1 IV of the Intellectual Property Code.

Cour de Cassation, First Civil Chamber, judgment of 20 October 2011, appeal no. 10-14.069, www.legifrance.gouv.fr

IA/32952-A

[ANBD]

The Cour de cassation corrected its case law concerning the assessment of effect on trade between Member States. In so doing, it removed the reference to the priority nature of consideration of the volume of sales affected, making it simply one factor for assessment among others. In its judgment of 31 January 2012 on practices classed as abuse of a dominant position on the mobile telephony market in the French *départements* of Guadeloupe, Martinique and Guyane, the Cour de cassation censured the Cour d'appel by adopting a fresh reading of the affect on trade between Member States.

The Cour de cassation held that the overall volume of sales concerned in relation to the volume of national sales was simply one factor amongst others via which to assess the effect on trade concerned, in particular the nature of the practices or products concerned and the market position of the undertakings in question. The sensitive nature of the direct or indirect effect, potential or actual, on intra-Community trade was due not to a single criterion but to a range of criteria. It thus censured the Cour d'appel, which had based its ruling to uphold the decision by the French Competition Authority solely on the volume of global sales.

The Cour de cassation also reiterated – and underscored – the principle whereby a court which rules to quash a decision on the basis of the provisions of a particular treaty (in this case, Article 101 and 102 TFEU) may not, at the same time, quash the part of that decision concerning the application of provisions of national competition law. In the Cour de cassation's view, in the absence of any effect on intra-Community trade, the relevant articles of the Commercial Code remained applicable to anti-competitive practices performed on national territory. The decision, which had been quashed in favour of applying EU rules, thus remained valid as regards application of provisions of national law.

Cour de cassation, Commercial Chamber, judgment of 31 January 2012, appeals nos. 10-25.772, 10-25.775, 10-25.882, 140, www.legifrance.gouv.fr

IA/32951-A

[ANBD]

* *Hungary*: Pursuant to Law No. CVXI of 2011 on the judicial system, which entered into force on 1 January 2012, the names of the country's regional courts were amended. Based on the system whereby Hungary is split in to administrative regions, 20 regional courts (19 regional courts plus the Capital Court of the city of Budapest) have jurisdiction to rule in the first instance on cases in specific fields laid down by law and to hear, in the second instance, appeals lodged against rulings passed by local courts. Until 2012, these courts were known by the name of their respective administrative region followed by "*megyei bíróság*" ("regional court"). As from 1 January 2012, their names have changed to the city in which they are located followed by "*törvényszék*" ("court").

A bíróságok szervezetéről és igazgatásáról szóló 2011. évi CVXI. törvény, www.kozlony.magyarorszag.hu/pdf/11066

[VARGAZS]

* *Ireland*: European Union (Copyright and Related Rights) Regulations 2012, which entered into force on 29 February 2012, was adopted to ensure compliance with the provisions of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society. This Act, by adding the new Articles 40(5)(a) and 205(9)(a) to the Copyright and Related Rights Act 2000, sets out the right of persons who hold the copyright to a work to ask for an order on application without notice to be issued against intermediaries whose services are used by a third party to infringe said copyright or a related right.

Announcing the adoption of this law, the Irish Minister for research and Innovation stated that the High Court of Ireland was responsible for ensuring that the stipulated measures are

implemented without infringing the right of free enterprise of operators, such as Internet service providers (ISPs), and in compliance with the fundamental rights of the customers of said suppliers, i.e. the right to protection of their personal data and to the freedom to receive and communicate information. He also stated the mandatory requirement that an ISP not be obliged to carry out general monitoring of the data it holds on its system. The measures taken in accordance with the Act must be fair and proportionate, and not prohibitively complicated or costly. He added that the High Court should refer to the interpretation by the European Court of Justice of the aforementioned Directive 2001/29/EC as regards implementation of the Act.

European Union (Copyright and Related Rights) Regulations 2012 (S.I. 59/2012), www.irishstatutebook.ie

[TCR]

* *Italy*: The Consiglio de Stato ruled on the issue of voting rights and the eligibility of EU citizens to participate in municipal elections in the Member State in which they are resident (Article 20(2)(a) TFEU).

The applicants – voters in the town of Galeata – were claiming that the municipal elections held in their town had been unlawful because EU citizens had been allowed to vote and had been deemed eligible, despite holding no identity documentation issued by an Italian authority.

On appeal, the Consiglio de Stato held that the identity documents issued by another Member State should be deemed valid for the purposes of registering on electoral rolls for municipal elections. In the view of the Consiglio di Stato, the fact that legislative decree no. 197/1996, transposing Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, only recognised foreign identity documents in relation to EU citizens' right of free movement was not a determining factor. It held that both the hermeneutical principle of the interpretation of domestic law in the light of EU law and the direct effect of treaties (in particular Article 22 TFEU) required that national law be interpreted such that EU citizens may participate in administrative elections under the same conditions as Italian citizens.

Judgment by the Consiglio di Stato of 30 August 2011, no. 4863, www.dejure.it

IA/32868-A

[MSU] [REALIGI]

The Corte di Cassazione ruled on the application of the 'speciality rule' laid down in Council Framework Decision 2002/584/JHA of 23 June 2002 on the European arrest warrant and the surrender procedures between the Member States. The Italian court interpreted domestic provisions in the light of the case law of the European Court of Justice (ECJ) and, in particular, *Leymann and Pustovarov* (judgment of 1 December 2008, C-388/08, ECR 2008 p. I-8983).

The ruling pertained to a defendant, surrendered to Spain pursuant to a European arrest warrant, who had been acquitted in Spain but had been found guilty in Italy by the court of first instance. In this connection, the Naples court issued an interim order that he be held in custody for having committed the crimes of association with organised crime and extortion. Nevertheless, the same court, acting in its capacity as a review court, issued an order suspending the interim order pursuant to the speciality rule detailed in Article 27 of Council Framework Decision 2002/584/JHA.

The suspension order was challenged before the Corte di Cassazione since, according to the applicant, it should have foreseen that the order would be quashed.

The Corte di Cassazione did not share this theory. It underlined, firstly, that whilst the Framework Decision set out the speciality rule adopted by the 1957 European Convention on Extradition, it nevertheless made provision for certain exceptions, namely the criterion of 'reduced' speciality (individual renounces the speciality rule) laid down in Article 27(3).

Secondly, based on the aforementioned judgment by the ECJ and the obligation to interpret in conformity with directives as established in *Pupino* (judgment of 16 June 2005, C-105/03, ECR 2005 p. I-5285), the Corte di Cassazione held that the decision

to simply suspend the custody ruling was correct and that it was possible for the process to continue since although the Framework Decision prohibits custodial measures it does not rule out the possibility of proceedings continuing.

Corte di Cassazione, Sez. VI penale, judgment of 28 October 2011, no. 39240, www.dejure.giuffre.it

IA/32865-A

[GLA]

* *Latvia*: In its judgment of 10 October 2011, the Latvian Supreme Administrative Court ruled on the validity of the argument based on the right of parents to obtain information on their children compared with the right of children to a private life, in particular as regards the disclosure of a psychologist's report on the opinions of a child who had potentially been the victim of psychological harm and non-material damage inflicted by one of its parents.

In the view of the Court of Cassation, the information imparted by a child about his private life to a third party may be disclosed to the parents insofar as the latter are, where appropriate, the child's representatives in terms of his rights and interests. In the context of a decision concerning whether or not such information should be disclosed, the child's right to protection of his private life should be respected, and his opinion assessed taking into account his age and degree of maturity. The Court of Cassation found that both considerations should be applied jointly, basing its finding on both the provisions of Latvian law applicable in the case at hand (i.e. the Personal Data Protection Act, the Act on Protection of the Rights of the Child, and civil law) and the opinion issued on 11 February 2009 by the Article 29 Data Protection Working Party (a working party set up pursuant to Article 29 of Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data), and Article 24 of the Charter of Fundamental Rights of the European Union and Article 12 of the 1989 United Nations Convention on the Rights of the Child.

Thus, the solution adopted by the Court of Cassation in this judgment ensures that the child's right to a private life is respected, including by his legal representative. Whilst a child may be required to have a legal representative, such a requirement does not mean that the latter may enjoy absolute rights over him. In some cases, the child's rights to protection of data may take precedence over the wishes of a parent or legal representative.

Augstākās tiesas Senāts, judgment of 10 October 2011, no. SKA-190/2011, www.tiesas.lv

IA/32682-A

[AZN]

On 18 February 2012, a national referendum was held on the possibility of introducing Russian as a second official language in Latvia. The proposal being voted upon pertained to the four amendments to the text of the Latvian Constitution, the *Latvijas Republikas Satversme*.

The referendum was organised following a petition signed by 12.14% of voters (the minimum percentage required being 10%). Pursuant to Latvian law, the Latvian parliament, the Saeima, was obliged to examine the proposal. Since the parliament had dismissed the proposal without even submitting it for an in-depth examination by the relevant committees, a referendum had had to be organised. In order for such a proposal to be adopted by the people, it must secure the support of over 50% of voters entitled to vote at the most recent elections. The proposal to introduce Russian as a second official language was rejected by 74.76% of voters. Of note is the fact that turnout for the referendum was high (69.23%).

Following the vote in parliament on the proposal in question, 30 MPs lodged an application before the Constitutional Court challenging the legality of the Initiative and Referendum Act (*Par tautas nobalsosanu un likumu ierosinasanu*) and the decision by the President of the Republic of Latvia to submit to parliament the proposed amendments initiated by the people. In this context, the Constitutional Court stated that the issue raised pertained to the lack of any means by which to halt the referendum procedure on account of the referendum question being unconstitutional. In the same application, the MPs asked for the planned referendum to be put on hold, a request which the Constitutional Court turned down due to lack of justified grounds. The substantive issue, namely the constitutionality of the laws in question, has yet to be resolved.

The referendum has provoked considerable debate surrounding the articles of the Constitution which should not be amended and which should be included in any new version of the latter.

Latvijas Republikas Satversmes tiesa, rīcības sēdes lēmums, decision of 20 January 2012, no. 201203-01, Latvijas Republikas Satversmes tiesa, decision of 20 January 2012, no. 2012-03-01, www.satv.tiesa.gov.lv

IA/32683-A
IA/32683-B

[AZN]

* *Lithuania*: In its ordinance of 26 January 2012, the Lithuanian Supreme Court, the Lietuvos Aukščiausiasis teismas (the "LAT"), ruled on safeguarding employee's rights in the event of the transfer of undertakings.

In the case at hand, the defendant, a transferee undertaking, had refused to continue the employment contract of the applicant, a worker for a transferor undertaking, in the absence of any written agreement as to the retention of such a contract between the employers of the two undertakings.

The LAT held that Articles 3 and 4 of Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses made no provision for any obligation on the part of the prior employer to reach an agreement with the future employer to ensure that employees' employment contracts continued. As a result, national law was not permitted to introduce any such restriction as regards workers' rights.

The LAT held that in the case of a transfer of undertaking, employees' employment contracts must continue and that the rights and responsibilities of the employer arising from said contracts are to be transferred to the new employer, regardless of whether or not any agreement has been reached concerning them between the employers.

Lietuvos Aukščiausiasis teismas, ordinance of 26 January 2012, no. 3 K-3-8/2012, www.lat.lt

IA/32686-A

[LSA]

In its ordinance of 5 December 2011, the Lithuanian Supreme Court, the Lietuvos Auksciausiasis teismas (the "LAT") ruled on an appeal seeking compensation for harm suffered following a traffic accident in another Member State and concerning the application of the right of action provided for in Article 4(4) of Directive 2000/26/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.

In the case at hand, the applicant, the victim's insurance company (having its registered office in Lithuania), had issued a writ against the claims representative appointed in Lithuania by the insurance company of the party responsible for the accident, the defendant, seeking recovery of a proportion of the compensation the company had paid to the victim following a traffic accident in Spain. However, the defendant had refused the claim on the grounds that he could not be held liable in respect of obligations arising from insurance contracts concluded by the insurance company which had appointed him.

Having been asked to rule on the case, the LAT held that Article 4(4) of Directive 2000/26/EC made provision for a right of direct action on the part of the injured party, who had lodged a claim in another Member State, or his/her insurance company against the person who caused the accident or said person's insurance company.

However, the LAT found that neither this provision nor any other provision of the directive gave the insurance company of the injured party any right of action against the claims representative, appointed in the Member State of origin of the injured party, of the insurance company of the person who caused the accident.

In the LAT's view, only the injured party, and not his/her insurance company, had the right to take action against the claims representative. Consequently, the injured party in this case had to take action directly against the insurance company of the person who caused the accident.

Lietuvos Aukščiausiasis teismas, ordinance of 5 December 2011, no. 3K-3-474/2011, www.lat.lt

IA/32685-A

[LSA]

* *The Netherlands*: In a judgment passed on 19 January 2012, the s'-Hertogenbosch regional court found, in a case surrounding a claim for compensation following a delayed flight, that Regulation (EC) No. 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights did not make provision for any entitlement to compensation in the event of a delayed flight. Moreover, the court held that the judgment passed by the European Court of Justice (ECJ) in joined cases *Sturgeon* (C-402/07 and C-432/07, ECR 2009 p. I-10923) in which the latter had held that the right to compensation laid down in Article 7 of Regulation (EC) No. 261/2004 could also be relied upon where passengers were delayed by a period of three hours or more due to a delayed flight, in no way altered this finding. In the view of the s'-Hertogenbosch regional court, the aforementioned judgment by the ECJ could not give rise to any entitlement since said court did not legislate for the EU.

Sector kanton Rechtbank 's-Hertogenbosch, 19 January 2012, Eisers v Ryanair Limited, www.rechtspraak.nl, LJNBV1931

IA/33153-A

[SJN]

* *Czech Republic*: The extended bench of the Czech Supreme Court, the Nejvyšši správní soud, was asked to interpret the concept of "serious threat to public order" which, pursuant to Law no. 326/1999 Sb. on the residence of aliens on the territory of the Czech Republic (the Aliens Act), was one of the rare grounds on which a family member of an EU citizen may be expelled. In the case in the main proceedings, the applicant (a non-EU national married to a Czech national) was challenging the basis for the decision ordering expulsion issued against him by the competent national authorities on account of repeated offences (unlawful residency, failure to comply with an expulsion order, providing false information to the authorities) committed by him and deemed to be a serious threat to public order.

In its resolution of 26 July 2011, the Supreme Administrative Court stated that the concept in question should be interpreted in line with EU law on the matter, i.e. in accordance with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and the case law of the European Court of Justice (ECJ). The judgment is interesting on account of the reasoning cited by the judge, who acknowledged the indirect effect of the directive even in a case to which it did not pertain, since the case in the main proceedings concerned a purely internal situation insofar as the applicant's wife had never exercised her right to free movement.

In the view of the Supreme Administrative Court, EU law could be applied indirectly where national implementing provisions went beyond what was required under the terms of directives. This was indeed the case here, since Law no. 326/1999 assimilated family members of a Czech national to family members of an EU citizen. Making reference to the judgment handed down by the ECJ on 18 October 1990 (*Dzodzi*, C-297/88 and C-197/89, ECR 1990 p. I-3763), it noted that a provision of national law could "trigger" application of EU law, even where the latter did not normally apply in a given situation. Consequently, the concept of "serious threat to public order" cited in the provision of national law in question should be interpreted in accordance with EU law, even vis-à-vis the applicant in the main proceedings. Accordingly, the Supreme Administrative Court interpreted the concept narrowly in the light of the consistent practice of the European Court of Justice and held that none of the acts of which the applicant had been accused constituted a serious, real and present threat to the fundamental interests of the State and that the competent authorities were ultimately required to take into account the applicant's personal situation in line with the principle of proportionality.

Nejvyšši správní soud, resolution of 26 July 2011, 3 As 4/2010-151, www.nssoud.cz

IA/33042-A

[KUSTEDI]

* *United Kingdom*: The High Court of England and Wales was asked to interpret British law in the light of EU law concerning public contracts in the context of a dispute over the supply of trains travelling through the Channel Tunnel. The applicant had lodged an action for damages against the rail operator, Eurostar International Limited, after his tender to supply trains was rejected. The applicant was claiming that the tender process had not complied with the principles of transparency and equal treatment and that the technical specifications used for the process were not precise enough. The High Court held that in the context of disputes between individuals, there was no general obligation under EU law to disapply provisions of national law which were inconsistent with a directive. Were it otherwise, the distinction between horizontal and vertical direct effect of directives would in practical terms be abolished and the difference between directives and regulations would be emasculated. In addition, the fact that a company was able to continue trading only as a result of substantial State aid did not preclude it from being of an industrial or commercial character within the terms of procurement directives. The crucial criterion was the character of the undertaking rather than its profitability, the underlying rationale being that it would serve as an indication of whether the undertaking would be expected to take procurement decisions on economic grounds. In light of the facts of the case, the High Court held that the defendant was not a contracting authority within the meaning of the applicable public-procurement legislation and thus rejected the appeal.

High Court, Chancery Division, judgment of 20 January 2012, Alstom Transport v Eurostar International Limited ([2012] EWHC 28 (Ch)), *www.westlaw.co.uk*

IA/32700-A

[TCR] [EXARCER]

Notice

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The references provided beneath case-law decisions (IA/..., QP/..., etc.) refer to the file numbers in the DEC.NAT. and CONVENTIONS internal databases. The files relating to these decisions can be consulted at the Research and Documentation Service.

The law reports featured in the "Extracts from legal literature" section have been selected with the utmost care. A comprehensive record of published reports can be found in the REPORTS internal database.

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NOTES ***"Extracts from legal literature"***

[1] F. Sudre, "Introduction" in "Realités et perspectives du droit communautaire des droits fondamentaux", F. Sudre and H. Labayle (dir.), Bruylant, Brussels, 2000, p. 7.
[2] Judgment of 8 November 2010, C-92 and 93/09, not yet published.
[3] C. Picheral, "Droit communautaire des droits fondamentaux: Le droit au respect de la vie privée", *Revue trimestrielle des droits de l'homme,* 2011, p. 603.
[4] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ-L 281, p. 31).
[5] D. Simon, "Transparence et vie privée", *Europe,* January 2011, p. 13.
[6] Ibid., p. 12.
[7] S. Huber and H. Kristoferitsch, "Transparency: Let there be light?", *European State Aid Law Quarterly,* 2011, p. 687 to pp. 692-693.
[8] E. Degrave, "Arrêt *Volker undMarkus Schecke et Eiffert:* le droit fondamental à la protection des données à caractère personnel et la transparence administrative", *Journal de Droit Europeen,* 2011, p. 97.
[9] D. Simon, cit. supra, note 5, p. 12.
[10] E. Degrave, cit. supra, note 8, p. 97-98.
[11] D. Dero-Bugny, "Protection des personnes physiques à l'égard du traitement des données à caractère personnel", *Journal du Droit International,* 2011, pp. 492-493.
[12] C. Picheral, cit. supra, note 3, p. 603-604.
[13] D. Dero-Bugny, cit. supra, note 11, p. 493.
[14] Judgment of 20 May 2003, C-465/00, C-138/01 and C-139/01, ECR p. I- 4989.
[15] C. Picheral, cit. supra, note 3, p. 604.
[16] D. Simon, cit. supra, note 5, p. 12. cf. in paticular the judgments of 16 February 2000, *Amann c. Suisse,* ECR 2000-II, section 65 and *Rotaru v Romania,* ECR 2000-V, section 43.
[17] F. Picod, "Invalidité partielle de règlements agricoles pour incompatibilité avec la Charte des droits fondamentaux", *La semaine juridique - ed. generale,* no. 50, 13 December 2010, p. 2344.
[18] D. Simon, cit. supra, note 5, p. 12.
[19] Judgment of 20 May 2003, cit. supra, note 14, point 81.
[20] S. Huber and H. Kristoferisch, cit. supra, note 7, pp. 690-692.
[21] E. Degrave, cit. supra, note 8, p. 99.
[22] M. Bobek, "Annotation on Joined Cases C-92 & 93/09, *Volker und Markus Schecke, Common Market Law Review,* 2011, pp. 2005 to 2015.
[23] E. Degrave, cit. supra, note 8, p. 98.
[24] W. Kilian, "Subventionstransparenz und Datenschutz", *Neue Juristische Wochenschrift*, 2011, p. 1328.
[25] F. Picod, cit. supra, note 17, p. 2344.
[26] Cf. D. Grimm, "Proportionality in Canadian and German Constitutional jurisprudence", *University of Toronto Law Journal,* 2007, p. 383.
[27]Cf. R. Alexy, "Balancing, constitutional review and representation", *I-CON,* 2005, pp. 572-574.
[28] M. Bobek, cit. supra, note 22, p. 2018-2019.
[29] Ibid., pp. 2019-2020.
[30] S. Brink and H.A. Wolff in *Juristenzeitung* 4/2011, p. 207.
[31] A. Guckelberger, "Veröffentlichung personenbezogener Daten der Empfänger von Beihilfen unverhaltnismäßig - Verordnungen teilweise ungültig", *Europäische Zeitschrift für Wirtschaftsrecht*, 2010, p. 946. Similarly, cf. F. Dratwa and J. Werling, "Die erste Grundrechtsprüfung anhand der Charta der Grundrechte der EU oder - Aller Anfang ist schwer", *European Law Reporter* 1/2011, p. 27.
[32] E. Degrave, cit. supra, note 8, p. 98.
[34] M. Bobek, cit. supra, note 22, p. 2021.
[35]E. Degrave, cit. supra, note 8, p. 99.