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REFLETS

Legal developments
of interest to the European Union

Contents

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A. Case Law

I. European and International Courts

European Court of Human Rights

European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) – Prohibition on discriminations - Right to respect for family life – Greek law excluding homosexual couples from entering into a civil partnership – Infringement of articles 8 and 14 of the ECHR

In a decision dated 7 November 2013, Vallianatos e.a. / Greece, the Grand Chamber of the European Court of Human Rights (hereinafter the "ECtHR") ruled that there was an infringement of article 14, combined with article 8, of the ECHR, relative, respectively, to the prohibition on discrimination, including the types of discrimination relative to sex and to sexual orientation, and to respect for private and family life. This infringement results from the fact that Greek law No. 3719/2008, by instituting a new official form of partnership other than marriage, reserved this new form solely for couples of the opposite sex, to the exclusion of homosexual couples.

In addition to its strictly social interest, the decision is distinguished by the fact that, from the viewpoint of admissibility, the application was held to be admissible even though the applicants, mainly persons of the same sex living together as a couple*****, did not initially apply to National Courts, but submitted their application directly to the ECtHR. The objection to admissibility made in this connection by the Greek government with regard to the non-observance of the procedural condition relative to exhaustion of the national appeals before application to the ECtHR was dismissed, on the grounds that the said government was not able to demonstrate that the only legal proceedings could be contemplated in this matter cannot constitute recourse to be exhausted in connection with article 35, paragraph 1, of the ECHR. This legal proceedings is based on article 105 of the law accompanying the Civil Code and concerns the State's civil liability. Application of that liability requires, inter alia, an illegality that would consist in this case of a possible contradiction between the law in question and the national constitution or the ECHR. The ECtHR explains, in this connection, that the appeals to which the said article 35, paragraph 1, of the ECHR refers must be "available and adequate", exist, in other words, with a sufficient degree of certainty not only in theory but also in practice, so as to result in the effectiveness and accessibility required by the ECHR. However, on one hand, according to the ECtHR, the mere allocation of an amount as compensation following a demonstration of such liability on the part of the State pursuant to article 105 of the law accompanying the Civil Code, mentioned above, cannot remedy the continuous infringement of articles 8 and 14 of the ECHR by the defendant State, this due to the persistent prohibition, for homosexual couples, on entering into civil partnerships. In addition, even if one were to suppose that an action based on the said article 105 would be accepted and that damages would be awarded, no obligation would be incumbent upon the defendant State to modify the law in dispute.

On the main issue, the ECtHR begins by noting that sexual orientation falls within the field of application of article 14 of the ECHR relative to prohibition of discrimination. It recalls that the margin of discretion available to the States that are members of the Council of Europe is very narrow when it comes to differences of treatment based on sexual orientation. Consequently, the justified differences must be based on particularly strong and convincing reasons.

To consider the question of discrimination, the Court then establishes, and in advance, the comparable nature of heterosexual and homosexual couples. It considers that this comparability results from the fact that, like heterosexual couples, homosexual couples are able to develop stable relationships. Consequently, the applicants are in a situation comparable to that of heterosexual persons with respect to their need for legal recognition and protection of their relationship as a couple. Those needs could be met by the possibility of entering into a civil partnership – from which, however, the law in question excludes them, and of making their relationship official in this way. In addition to this moral aspect, such a possibility would make it possible to settle a certain number of practical problems, such as property issues, alimony, and succession questions within a framework of official recognition by the State of the relationship of homosexual couples.

The ECtHR then considers the proportional nature of the exclusion of couples consisting of persons of the same sex from the possibility of entering into a civil partnership with the objective put forth by the Greek government of protection of the family and of children. Even if the Court recognises, without difficulty, that the concern for protecting the family in the traditional sense, and all the more emphatically the concern for protecting children, constitutes,

* The only applicant that was a legal entity, an association with the purpose of providing psychological and moral support for homosexual persons, was found to be declared inadmissible from acting on the ground that it could not hold status as victim, since it did not suffer any personal prejudice of a material or moral nature.

in principle, an important and legitimate reason of such a nature as to justify differing treatment, it nevertheless emphasises that this term cannot be considered abstractly, but rather "in taking into account changes in Society, particularly the idea that there is more than one possible way or choice as concerns the way of leading private and family life". In light of the very small margin of discretion possessed by States in this matter, to be admissible the discriminatory measure must be necessary in order to reach the objective pursued, the burden of proof being incumbent upon the defendant government. However, that is not the case in this instance. The ECtHR considers, in this connection, that protection of children born outside marriage does not constitute the main objective of that law any more than protection of the family does. On the contrary, the law targets legal recognition of a new form of cohabitation other than marriage. The ECtHR also notes that couples of the same sex have been excluded from this form even though the explanatory report concerning the law in question does not offer any clarification on this point and the National Commission of Human Rights as well as the Scientific Council of the Greek Parliament had taken note of the discriminatory nature of the legislative bill in question. Finally, the ECtHR refers to the very clear tendency to be seen in the legal orders of the Member States of the Council of Europe to authorise forms of civil partnership for couples of the same sex. In that tendency, Greece and Lithuania are almost alone in holding an isolated position that, even if it does not ipso facto establish an infringement of the ECHR, nevertheless makes the arguments put forth by the Greek government to defend its position less convincing and less solid. The absence of proof as to the justification for the disputed difference in treatment entails, in conclusion, a finding of infringement of article 14, combined with article 8, of the ECHR.

European Court of Human Rights, decision of 07.11.2013, Vallianatos et alia / Greece (Applications No. 29381/09 and No. 32684/09), www.echr.coe.int

IA/33538-A

(RA)

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European Convention of Human Rights (ECHR) – Right to respect for private and family life – Rule (EC) No. 2201/2003 – Jurisdiction, recognition and enforcement of decisions in matters of marriage and in connection with parental responsibility – Unlawful removal of children – Equivalent protection - Inadmissibility

The present decision of inadmissibility is part of the case law of the European Court of Human Rights (ECtHR) concerning the legal opinion of presumption of "equivalent protection" (systematised by the decision of 30 June 2005, Bosphorus / Ireland, application No. 45036/98, see *Reflets No. 2/2005*).

The case concerns the application of rule (EC) No. 2201/2003), relative to jurisdiction, recognition and enforcement of decisions in the area of marriage and parental responsibility, and its provisions relative to kidnapping children. It concerns a situation of illicit non-return of a child moved from Italy to Austria after the parents' separation. Even though, in an initial phase, the child was initially authorised to reside temporarily with his mother in Austria, the competent Italian Court subsequently ordered the child's return on the basis of rule No. 2201/2003, and assigned exclusive custody to the father. In the Povse case (decision of 1 July 2010, C-211/10 PPU, Rec. p. I-6673), which concerned a request for a decision on a preliminary ruling filed by the Austrian court, within the framework of an appeal dealing with enforcement of the Italian Court's decision, the Court of Justice declared that "enforcement of a certified decision cannot be refused, in the Member State of enforcement, on the grounds that, due to a modification of the circumstances occurring after its adoption, it would be such as to seriously impair the child's best interests" and that therefore, such a modification had to be called on in the competent court of the Member State of origin (in this case Italy). Following that decision on a preliminary matter, the Austrian Supreme Court upheld the decision ordering the child's return to Italy.

In its decision, the ECtHR, sitting as a panel of seven judges, ruled that the application filed by Mrs Povse against Austria was obviously inadmissible. Even if the ECtHR conceded that there was interference in exercise of the rights to respect for family life, it found that the said

interference was provided for by law (namely, rule No. 2201/2003), and that it pursued the legitimate objectives of protection of the rights of others (the father) and respect for Union law. As concerns the necessary nature of the interference, the ECtHR recalled its legal opinion concerning equivalent protection granted by the Union by considering that the presumption of respect for the ECHR is applicable in this case, in light of the fact that the Austrian authorities have no margin of discretion (contrary to the MMS case, decision of 21 January 2011, M.SM. / Belgium and Greece, application No. 30696/09, see *Reflets No. 1/2011).* The ECtHR also took note of the difference between the present case and the Michaud case (decision of 6 December 2012 by the ECtHR, Michaud/France, application NO. 1223/11, see *Reflets No. 1/2013),* in which the review mechanisms offered by Union law (the preliminary ruling proceedings) had not been used. Moreover, the ECtHR considered that in the present case, the presumption of equivalent protection had not been dismissed in connection with the circumstances in the case considering that, according to the decision by the Court of Justice on the preliminary question, protection of the parties' basic rights was incumbent upon the Italian court. Finally, the ECtHR recalls that the applicants could, on final instance, file a new application to it against Italy.

European Court of Human Rights, decision of 18.06.2013, Povse / Austria (application No. 3890/11), www.echr.coe.int/echr

IA/33526-A

(IGLESSA)

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European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – Principle of legality of penalties – Right to liberty and to security – Person sentenced for offences connected with terrorist attacks – Retroactive application of a change of case law concerning remission of sentences – Infringement of 7 and 5, paragraph 1, of the ECHR

In this final decision by the Grand Chamber, the European Court of Human Rights (ECtHR) noted the infringement of articles 7 (no penalty without law) and 5, paragraph 1 (right to liberty and security) of the ECHR in the case of Del Rio Prada / Spain. The applicant had been sentenced to numerous penalties of imprisonment for various offences of a terrorist nature connected with the ETA organisation, the total duration of which came to more than 300 years of criminal imprisonment. Those penalties had been made consecutive because of their legal and chronological connection, the duration of imprisonment was set at 30 years, that period being the maximum for sentences at the time. In accordance with the rules relative to application of sentences in effect at that time, the applicant was granted almost nine years of sentence remission for work carried out in detention, 2 July 2008 being the scheduled date for release. However, the Audiencia Nacional asked the prison authorities to modify the proposal for release originating from the prison in which the applicant was incarcerated, setting the date for release in 2017, in application of the case law of the Supreme Court pronounced in 2006 (referred to as the "Parot" legal opinion) and pronounced after commission of the acts and the sentencing). According to that legal opinion, remission of sentences no longer had to be calculated on the basis of the maximum duration of criminal imprisonment of thirty years, but on the basis of each of the sentences pronounced.

The ECtHR considered that in light of the sufficiently precise practice of the prison and judicial authorities before handing down of the decision by the Supreme Court in the year 2006, the applicant could discern the scope of the sentence ordered in light of the maximum duration of 30 years. The ECtHR then held that the application of the "Parot" legal opinion did not solely concern the procedures for enforcement of the sentence ordered, but also included a redefinition of the scope of the penalty imposed, therefore falling within the field of application of article 7, paragraph 1, of the ECHR. That being so, the ECtHR held that the legal opinion in question could not have been anticipated by the applicant, the reason for which that Court declared the existence of an infringement of article 7 of the ECHR. As a result, the applicant had been the object of unlawful imprisonment since 2008, also in infringement of article 5, paragraph 1, of the ECHR. Finally, the ECtHR considered that in light of the circumstances in the case, it was incumbent upon Spain to release the applicant

as quickly as possible and to award her 30,000 euros for the non-pecuniary harm she suffered.

On the day following issue of the ECtHR's decision, Inés Del Rio was released. The decision is thought to have an impact on several pending cases, the majority of which concerns persons who have been guilty of terrorist offences connected with the ETA organisation.

European Court of Human Rights, decision of 21.10.2013, Del Rio Prada / Spain (application No. 42750),
www.echr.coe.int/echr

IA/33527-A

(IGELSSA)

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European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – Right to a fair trial - Civil Proceedings – Attachment of goods – Attachment of the financial resources of an individual before expiry of the appeal time limit – Infringement of article 6 of the ECHR

By means of its decision dated 21 June 2012, the European Court of Human Rights (ECtHR) handed down the Olsby decision, by which it found that the Swedish enforced collection public service (the "Kronofogdemyndigheten") infringed the right to fair trial when it granted an attachment of the funds of an individual, the debtor, before he had the ability to contest the attachment decision and before the period for appealing the said decision had ended. Consequently, the debtor did not have any ability to stop the attachment.

Within the framework of the enforced collection procedure, a letter had been sent to the debtor informing him that the Kronofogdemyndigheten had established an attachment of goods against him. That letter informed him how to proceed in order to contest the said decision as well as the applicable time limit. The debtor followed the instructions that had been given and appealed before the end of the period of 21 days set by Swedish law. However, the Court dismissed his appeal by applying an exception appearing in the law that provided that, if the decision to pay the financial means had already been made and the said decision had become res judicata, there was no longer any possibility of appealing the said attachment decision. The debtor was not informed about that exception. In view of the fact that the payment decision had been made two weeks before the debtor was informed of the appeal period of 21 days, the said period had begun as of the time of service of the information. Under those circumstances, he should actually had filed an appeal at the latest 6 days following its service, and not at the latest 21 days, as indicated in the information. In those proceedings, the only creditor was the Swedish State.

The ECtHR ruled that the Swedish system of enforced collection, according to which, even if the debtor follows the instructions of the Kronofogdemyndigheten and appeals a decision before the end of the indicated appeals period, and according to which he had no means of halting payment of his funds, constitutes a system that does not conform to article 6 of the ECRH. It emphasised that the enforced collection system must concern itself with the interests both of creditors and of debtors. In this connection the debtor must be able to be certain that the time limits provided for by law and mentioned in the decision aimed at him are binding.

European Court of Human Rights, decision dated 21.06.2013, Olsby / Sweden (application No. 36124/06),
www.echr.coe.int/echr

IA/33804-A

(LTB) (GUSTAAN)

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**** Briefs (European Court of Human Rights)***

In a Grand Chamber decision dated 9 July 2013, the ECtHR provided some explanations concerning the conditions under which life sentences can be compatible with article 3 of the ECHR relative to the prohibition of inhuman or degrading treatment.

In criminal matters, even though states remain free to impose life sentences on the authors of particularly serious offences (decision by the ECtHR dated 12 February 2008, Kafkaris / Cyprus, application No. 21906/04), it still remains true that, to be compatible with article 3, a possibility of reconsideration of the

sentence must be offered to the sentenced person. In this connection, in light of the margin of discretion from which the contracting States benefit, the ECtHR did not provide any details concerning the form that such a recondition must take, or about the periods during which it must occur. On the other hand, it indicated that sentenced persons must know, as of the beginning of their sentence, the conditions that need to be met for their release, particularly the time at which a reconsideration of their sentence will take place or could be requested.

In this particular case, the ECtHR held that the United Kingdom infringed article 3 of the ECHR since there is uncertainty about the fact that life sentences could be characterised as unable to be reduced.

Finally, the ECtHR pointed out, in its decision, that article 6, paragraph 2, of framework decision 2002 / 584/ JAI relative to the European arrest warrants and to rendition proceedings among Member States provides that enforcement of a European arrest warrant can be made conditional on the existence of a possibility of review of the sentence or application of clemency measures in the legal system of the Member State of issue.

European Court of Human Rights, Grand Chamber, decision dated 09.07.2013, Vinter e.a. / United Kingdom
(applications Nos. 66069/09, 130/10 and 3896/10).
www.echr.coe.int/echr

IA/33540-A

(NICOLLO) (WAGNELO)

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In a decision dated 2 April 2013, the ECtHR took a stand on the conformity of an Italian rule limiting access to certain types of university teaching in light of article 2 of Protocol no. 1 to the ECHR relative to the right to education. Since this is a question of a right that can be the subject of limitations for legitimate reasons not appearing in an exhaustive list, it may be the subject of restrictions, insofar as they are predictable for the person subject to legal proceedings and there is a reasonable proportionality between the means employed and the objective in question (decision by the ECtHR dated 10 November 2005 Leyla Sahin / Turkey, application No. 44774/98).

In this particular case, the numerus clausus (limitation on number of students), which prevents the applicants from attending courses in medicine or odontology in Italy, had been adopted in order to take into account the universities' material resources and to reach a high level of professionalisation in the medical field. On the face of it, the objectives pursued by the rules in dispute were considered predictable and legitimate. Subsequently, an examination of the proportionality did not disclose anything contrary to the right to education.

In its statement of reasons, the ECtHR, like the Court of Justice when it construes articles 165 and 167 of the TFEU (decision of 13 April 2010 Bressol e.a.; C- 73/08, Rec. P. I-2735), acknowledges that the States may institute a selection mechanism relative to access to higher education. Within that framework, first of all, the numerus clausus is considered an appropriate means for taking into account the universities' material resources. Secondly, on the basis of an analysis calling on economic and social considerations, the numerical clause appeared to be an appropriate instrument for guaranteeing professional possibilities for the selected students, a consideration that is all the more important when certain types of training, such as the ones in the medical field, represent a significant cost to public finance. Thirdly, insofar as the applicants were not deprived of the possibility of enrolling for another program, or studying abroad, the ECtHR considered that Italy had not infringed article 2 of Protocol no. 1 to the ECHR. However, that statement of reasons and the Court's conclusion were the subject of a dissident opinion filed by a section member.

Finally, we should remind you that the Court of Justice had the opportunity to specify that Union law did not require Member States to limit the number of students admitted to medical schools (decision of 12 June 1986, Bertini e.a., 98/85, Rec. p. I-1885).

European Court of Human Rights, Second Section, decision dated 02.04.2013, Tarantino / Italy, (application No. 25851/09; 29284 and 64090/09),

www.echr.coe.int/echr

IA/33541-A

(NICOLLO) (WAGNELO)

EFTA Court

European Economic Area (EEA) – Right of free movement and free residence on the territory of the Member States - Directive 2004/38/EC – Limitation of the entrance right and of the residence right for reasons of public order or of public safety – Individual behaviour – Affiliation with a non-prohibited group – Activities of that group considered a social danger

The EFTA Court was applied to by the Icelandic Supreme Court with a request for an advisory opinion in connection with a dispute between a Norwegian citizen, a member of the Hells Angels motorcycle club, and the Icelandic State. That Norwegian citizen had been refused entry to Icelandic territory, that refusal being based on a report by the Icelandic police services concerning his presumed role in the final phase of accession by an Icelandic motorcycling club to Hells Angels, an international organisation associated with organised crime.

The request for an advisory opinion first of all concerned whether a decision to refuse entry based on article 27 of Directive 2004/38/EC could be based solely on a police report concluding that the organisation to which the individual belongs is linked with organised crime and that in the places where that kind of organisation has managed to establish itself, organised crime is wide spread.

In this connection, the EFTA Court ruled that:

"It is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organized crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met."

Then, with respect to the possible obligation to prohibit the organisation in question, the EFTA Court found that:

"An EEA State cannot be obliged to declare an organisation and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory in accordance with Article 27 of the Directive if recourse to such a declaration is not thought appropriate in the circumstances. However, the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities."

EFTA Court, Judgment of 22.07.13, in Case E-15/12, Jan Amin Wahl v the Icelandic State, www.eftacourt.int

IA/33544-A

[MEYERRA]

International Tribunal for the Law of the Sea

United Nations Convention on the Law of Sea - Protective measures pursuant to article 290, paragraph 5, of the Convention – Freedom of Navigation and Jurisdiction of the State of the Flag – Right to freedom and to safety of persons – Mandatory nature of the protective measures

On 22 November 2013, the International Tribunal for the Law of the Sea (ITLOS) handed down its order in the case of the "Arctic Sunrise" (Kingdom of the Netherlands/ Federation of Russia) as concerns the application for a time limit on protective

measures submitted by the Kingdom of the Netherlands in the previous months, pursuant to the provisions of article 290, paragraph 5, of the United Nations Convention on the Law of Sea (hereinafter the "Convention").

The dispute between the Netherlands and the Federation of Russia originated in the boarding and immobilisation in the port of Murmansk of the Icebreaker "Arctic Sunrise", a ship flying the Dutch flag and operated at present by Greenpeace International, as well as the detention of its crew by the Russian authorities in September 2013. That boarding was carried out in the Barents Sea, following demonstrations by Greenpeace militants against oil and gas exploration projects in the region, considered harmful to the sensitive environment of the Arctic. The thirty members of the ship's crew held now face charges of hooliganism, following the initial charge of piracy, which was decided on and declared by the Investigatory Committee, the main organ responsible for criminal investigations in Russia. The members of the crew, from 19 different countries, were placed in provisional detention in Russia and are subject to seven years of imprisonment if they are found guilty of the charges made.

According to the request for application of a time limit in connection with protective measures, the Netherlands asked the ITLOS to find that the arbitration Court to which the dispute is submitted holds *prima facie* jurisdiction, to urgently order cancellation of the immobilisation of the ship "Arctic Sunrise", release of the crew and the return of the icebreaker to its home port. However, by a note verbale of 22 October 2013 submitted to the ITLOS, the Federation of Russia stated that it did not intend to take part in the proceedings before the ITLOS or to accept the arbitration proceedings already filed by the Netherlands with respect to this case. This declaration was justified on the grounds that the actions criticised and taken by the Russian authorities in this particular case constituted acts of enforcement carried out in the exercise of sovereign rights to Russia's exclusive economic zone as well as within the framework of its jurisdiction, including criminal jurisdiction. The Court of Murmansk, applied to in the "Arctic Sunrise" case, declared that the ship's immobilisation was "necessary for purposes of enforcement of the part of the decision relative to the civil action, of other economic sanctions, or of a possible order for confiscation of the property".

In this connection, in its order, the ITLOS asserted that there was a dispute between the Netherlands and the Federation of Russia relative to the interpretation or the application of the Convention, and in particular a difference of opinion concerning the rights and obligations of the flag state and of the coastal state. Consequently, the provisions of the Convention called on by the Netherlands in the application for a time limit on protective measures seemed to constitute a basis on which the jurisdiction of the arbitration court could be based. Thus the ITLOS considered that the arbitration Court would hold *prima facie* jurisdiction for hearing the said dispute.

With respect to the urgency of the situation, the ITLOS held that, for purposes of protecting the respective rights of the parties to the dispute as well as to prevent serious harm to the sea environment due to immobilisation of the ship and the continued deterioration of its general condition, there is an urgency in this case justifying a time limit for the protective measures, in this case, pending the final decision by the arbitration court.

On that basis, the ITLOS ordered, by 19 votes against 2 (dissenting opinions by the Russian Judge and the Ukrainian Judge) - the immediate withdrawal of the immobilisation of the ship called "Arctic Sunrise" and the release of all of the persons held; - that the said vessel and the said persons be authorised to leave the territory and the maritime zones under the jurisdiction of the Federation of Russia as soon as a surety or other financial guarantee was deposited of an amount of 3.6 million euros on behalf of the Kingdom of the Netherlands.

Finally, we should point out that the required measures are mandatory, pursuant to article 290, paragraph 6, of the Convention, which requires the parties to comply with the said measures without delay.

International Tribunal for the Law of the Sea, order dated 22.11.2013, case of the "Arctic Sunrise", Kingdom of the Netherlands / Federation of Russia, (docket No. 22), www.itlos.org/fileadmin.itlos.documents/cases/case_no.22/Order/A22-

Ord 22 11 2013 orig Fr.pdf

IA/33542-A

(GANI)

International Criminal Court for the Former Yugoslavia

Liability due to complicity by aid and encouragement – Constitutive elements – Specific scope of the aid – Acquittal

On 28 February 2013, the majority of the Appeals Chamber of the International Criminal Court for the Former Yugoslavia (ICTY) acquitted Momčilo Perišić. The former chief of the general staff of the Yugoslav Army had been sentenced to 27 years' imprisonment for having aided in and encouraged the crimes committed by the Army of the Serbian Republic in Sarajevo and Srebrenica and for not having punished the crimes connected with the bombardment of Zagreb. According to the Appeals Chamber, the Chamber of Initial Jurisdiction was guilty of a legal error by failing to consider the question of whether it had been established that the help of the accused was specifically aimed at facilitating the crimes in question.

The Appeals Chamber pointed out that the established precedents hold that the "specific extent" of the aid provided by an accomplice is considered as an element that is required in order to establish liability or complicity by aid and encouragement. However, in this particular case, the Chamber of initial jurisdiction referred to the Mrkšić and Šljivančanin decision on appeal dated 5 May 2009 (IT -95-13/1-A) in order to find that it is unnecessary to prove that the aid was aimed precisely at facilitating the crimes in order to establish the material element of complicity by aid and encouragement. However, the Appeals Chamber held that the Judges in that decision did not intend to depart from case law, in light of absence of a thorough analysis of the issue.

The specific extent of the aid provided tends to establish a link of culpability between the accused as accomplice and the crimes committed by the principal authors. The Appeals Chamber explained that the specific scope of the aid can implicitly take the form of acts that are geographically or otherwise close to the crimes committed by the principal authors. It pointed out that the help provided by Momčilo Perišić for the Serbian Republic's Army was remote from the crimes committed by the principal authors, the Armies being independent and geographically distant. Making an analysis de novo, the Appeals Chamber found that the activities of the Serbian Republic's Army were not all of a criminal nature. The fact that Mr. Momčilo Perišić helped the said Army in war does not in itself establish that he facilitated execution of the crimes. For those reasons, the Appeals Chamber concluded that it was not established that the aid he provided tended precisely to facilitate commission of the crimes.

As concerns Momcilo Perisic's liability as hierarchical superior, the Appeals Chamber found that the conclusion to the effect that he exercised effective control over the soldiers having taken part in the bombardment of Zagreb would not be the only reasonable conclusion resulting from all of the evidence filed in the case. Consequently, the Appeals Chamber unanimously cancelled the declaration of guilt and ordered immediate release of Momčilo Perišić.

The prosecutor / Momčilo Perišić, IT-04-81-A, International Criminal Court for the Former Yugoslavia, Appeals Chamber, 28.02.2013, *www.icty.org*

IA/33534-A

(TCR) (MADDEMA)

Special Court for Sierra Leone

Liability for complicity by aid and encouragement – Constitutive elements – Specific scope of the aid

On 26 September 2013, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) upheld the sentencing of Charles Taylor to 50 years' imprisonment for crimes against humanity and war crimes.

By making that decision, the Appeals Chamber explicitly refused to accept the reasoning of the Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY), which had adopted a more restrictive definition of the concept of aid and encouragement in the

Momcilo Perišić decision of 28 February 2013 (see. p. 10 of the *Reflets* Bulletin). The Appeals Chamber held that it is unnecessary to show that the aid provided by the accused as accomplice is aimed precisely at facilitating the crimes committed by the principal authors.

In that decision, the Appeals Chamber held that customary international law does not mean that the "specific scope" of the aid is an element required in order to establish the element of liability for complicity by aid and encouragement. According to it, in the Perisic decision, the Appeals Chamber of the ICTY merely followed its case law, which does not bind the SCSL. Furthermore, the case law of the SCSL does not clearly indicate that the specific scope is a required element.

The SCSL Chamber of Appeals held that the need for establishing that the accused made a substantial contribution to committing the crimes is enough to guarantee a link of guilt between the accused as accomplice and the crimes of the principal authors. In any event, the physical proximity of the accused is not a relevant element for distinguishing between guilty behaviour and innocent behaviour.

As concerns determination of the appropriate sentence, the Appeals Chamber concluded that the Chamber of Initial Jurisdiction was guilty of an error by considering that aid and encouragement are to be punished, as a general rule, by a milder penalty than other means of committing crimes. The sentence to be imposed must be determined by taking into account all of the circumstances. By considering that Charles Taylor betrayed the trust of the Sierra Leoneans and of the international community, the Appeals Chamber concluded that the sentence of 50 years' imprisonment was fair and reasonable.

The Prosecutor / Charles Ghankay Taylor, SCLS-03-01-A, Special Court for Sierra Leone, Appeals Chamber, 26.09.2013,
www.sc-sl.org

IA/33536-A

(TCR) (MADDEMA)

Economic Community of West African States Court of Justice

Economic Community of West African States Court of Justice (ECOWAS), in its decision dated 22 February 2013, ruled on the complaint filed with it by Simone Ehivet Gbagbo and Michel Gbagbo, respectively, the wife and the son of the former president of the Republic of Ivory Coast, Laurent Gbagbo. The events in the case took place within the framework of the post-election crisis following proclamation of the final results of the presidential election held in Ivory Coast in November 2010, which found the partisans of the former president of the republic opposing the partisans of the new president. In the event, the applicants, both now held in Ivory Coast, demanded their release invoking their arrest, ordered without service of an administrative document, and their detention for an unlimited period by the Ivory Coast authorities.

In the first place, the ECOWAS ordered suspension of the proceedings with respect to Simone Gbagbo, until the end of her involvement with the international Criminal Court (ICC), where she is begin tried for crimes against Humanity committed during the post-election violence.

In the second place, the ECOWAS asserted that the arrest and detention of Michel Gbagbo, carried out in connection with his house arrest, were illegal and constituted an infringement of a person's right to freedom and to security, rights guaranteed pursuant to article 6 of the African Charter on Human and Peoples' Rights. Consequently, the applicant would be justified in applying for compensation as requested. However, the ECOWAS refused to request his release on the basis of the criminal proceedings pending in the national courts, which were filed by the Republic of Ivory Coast against the applicant and following his arrest. Consequently, the ECOWAS could not approve his application for release.

It is appropriate to point out that the applicant had filed an application for annulment to the Court of Justice in 2011 (Court decision dated 25 April 2013, Gbagbo/ Conseil, T-119/11, not yet published in the ECR) and an appeal against the decision by the Court rejecting her appeal on the main issue (case C-397/13 P, Gbagbo/Conseil). The appeal is still pending. The appeal concerned the adoption of restrictive measures by the European Union against the civil war in Ivory Coast, in which the applicant was individually concerned. More particularly, the measures ordered her

financial assets and her economic resources located on EU territory to be frozen. Other Ivory Coast persons and entities were also concerned by the restrictive measures in dispute and they also filed applications for annulment in the Union Court. Among them was the former president of the Republic of Ivory Coast, Laurent Gbagbo (order handed down by the Court on 13 July 2012, Gbagbo/Conseil, T-348/11, Rec. p. II-227 and decision by the Court dated 23 April 2013, Gbagbo/Conseil, C-478/11, not yet published in the ECR) and his second wife, Nadiany Bamba, (court decision dated 8 June 2011, Bamba/Conseil, T-86/11, Rec. p. II-2749, and decision by the Court dated 15 November 2012, Conseil / Bamba, C-417/11, not yet published in the ECR).

Economic Community of West African States Court of Justice (ECOWAS), decision dated 22.02.2013, Simone Ehivet and Michel Gbagbo / Republic of Ivory Coast,
www.courtecowas.org/site2012/pdf_files/decisions/judgments/2013/SIMONE_MICHEL_GBAGBO_c_COTE_d_IVOIRE.pdf

IA/33803-A

(NIKOLAKAKI)

II. National Courts

1. Member States

Germany

Union citizenship – Right to family reunification of minor children of citizens of third party countries – Directive 2003/86/EC - Protection of fundamental rights – Right to respect for family life – Obligation to have regard for the interests of minor children – Stable and regular conditions that are sufficient to maintain themselves - Exceptions

In a decision handed down on 13 June 2013, the Bundesverfassungsgericht (Federal Administrative Court) ruled on the application, in light of Union law and of the case law of the Court of Justice, of the conditions laid down in national law relative to granting a residence permit. Insofar as, as a general rule, article 5, paragraph 1, point 1 of the Aufenthaltsgesetz (law concerning residence) in application of the possibility recognised by article 7, paragraph 1, point c) of directive 2003/86/EC, relative to family reunification, provides that the means of support of the applicant for the permit must be provided independently of possible state benefits, the Bundesverfassungsgericht held that the basic rights and protection of the child's interests, as interpreted by the Court of Justice, may make it necessary to determine the existence of an atypical case requiring an exception to this condition.

The Bundesverfassungsgericht was applied to in connection with an appeal against a decision by the Berlin-Brandenburg Oberverwaltungsgericht (Higher Regional Administrative Court), having confirmed a refusal to grant a residence permit in connection with family reunification to an applicant of Gambian nationality, younger than 13 years of age. In spite of the fact that the applicant's family unit and his focus of interest were to be found in Germany, as the country of residence of his parents and their other two children, the Oberverwaltungsgericht had ruled the circumstances in the case did not justify non-application of the condition relative to the means of support covered by article 5, paragraph 1, point 1, of the Aufenthaltsgesetz. While the applicant's brothers and sisters were born in Germany and had German nationality, the Oberverwaltungsgericht had noted, incidentally, that the decision by the Court of Justice in the Ruiz Zambrano case (decision of 8 March 2011, C-34/09, Rec. p. I-1177) could not be transposed to this particular case. According to the Oberverwaltungsgericht, the effective possession of the rights attached to status as a Union citizen did not depend on issuing a residence permit to their brother, since the latter was not responsible for supporting them, that role begin exercised by their parents, who held valid residence permits. Consequently, the conditions laid down by the Court of Justice, inter alia, in the Zambrano case, mentioned above, and in the McCarthy (decision of 5 May 2011, C-434/09, Rec. p. I-3375) and O and S cases (decision of 6 December 2012, C-356/11, not yet published in the ECR), were not met.

In confirming the finding to the effect that a derivative right of an applicant for obtaining a residence permit could not be deduced, in this particular case, from article 20 TFEU, the Bundesverfassungsgericht emphasised that

Member States' obligation to take into account the nature and of the strength of the family links and of the best interests of the minor child, provided for under articles 5, paragraph 5, and 17 of Directive 2003/86/EC, nevertheless requires an examination case by case in the light, in particular, of the rights granted under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and by articles 7 and 24 of the Charter of Fundamental Rights. The Bundesverfassungsgericht noted in that connection that it is appropriate, in particular, to determine whether a family reunification in a third party state could be contemplated and could reasonably be required of the family concerned. However, the Bundesverfassungsgericht was unable to carry out that examination in this particular case because of the insufficient facts established by the appeal court.

Nevertheless, the Bundesverfassungsgericht found that independently of the higher rules of law and in particular of Union law, extraordinary circumstances requiring a finding of an exception to the condition of sufficient resources resulted from the fact that the applicant's family resided legally in Germany, moreover, without having been sanctioned for an infringement of the obligations incumbent upon it pursuant to the German social security law. According to the Bundesverfassungsgericht, since the applicant was younger than 13 years of age at the time of the hearing before the Oberverwaltungsgericht, the state's fiscal interest must yield, in such a case, in the face of the child's interests and in the face of the right to family life.

Bundesverfassungsgericht, decision of 13.06.2013,
10 C 16/12,
www.bverwg.de

IA/33280-A

(BBER)

Protection of personal data (information) - Fundamental rights – Processing and transmission of such data – Directive 95/46/EC – Article 7, point f) – Unauthorised collection of personal data not accessible to the public – Surveillance by GPS – Establishment of a travel profile

In a decision handed down on 4 June 2013, the Federal Supreme Court of Germany, the Bundesgerichtshof, ruled that surveillance of persons using GPS (Global Position System) trackers installed in cars is reprehensible, in principle.

In this particular case, the accused, a private detective and his employee, were mandated to watch several persons in order to establish certain facts with an eye on a potential dispute. Thus, the persons watched included the commercial partners, the employees or the wives of the principals. The accused had discreetly installed some GPS trackers in the cars used by the persons in question. This use of GPS had made it possible to locate the cars and thus to determine the exact place at which the said persons were located. The court of first instance had sentenced the two accused to serve several months for having collected personal information for a consideration and without authorisation by establishing the profile of the exhaustive travel carried out by targeted persons.

The Bundesgerichtshof, essentially upholding that decision, which had been appealed by the accused, confirmed above all that the court of first instance had properly concluded that the information gathered by the GPS trackers is considered as personal data in the meaning of the federal law concerning data protection (Bundesdatenschutzgesetz, hereinafter the "BDSG").

These data indirectly constitute behavioural data, even if they initially refer to the geographical space of an object, the car in this event.

On the other hand, the Bundesgerichtshof disputed the reasoning concerning articles 28 and 29 of the BDSG calling for legal authorisations for collecting personal data, since the court in first instance had failed to interpret them in light of article 7, point f), of Directive 94/46/EC relative to protection of individuals in connection with processing of personal data and the free circulation of such data. Article 28 of the BDSG aims at allowing collection of the personal data subject to the sole condition that the person responsible had collected the said information for commercial purposes and in his interest alone, whereas article 29 of the BDSG allows such collection

when the processing of the said data has been carried out for commercial purposes and management thereof has the sole purpose of making them available to third parties (data transmission). However, even if article 28 of the BDSG only takes into account of the legitimate interest pursued by the person responsible for the said data handling, article 7, point f), of Directive 95/46/EC also takes into account the legitimate interest pursued by the third party to whom such data are communicated.

Recalling that in the ASNEF case the Court of Justice pointed out (decision of 24 November 2011, C-468/10, Rec. p. I-12181) that an authorisation provided for under provisions of the Member States in connection with protection of personal data can be no less than the one established by Directive 95/46/EC, the Bundesgerichtshof considered that it was appropriate to apply those articles of the BDSG in accordance with the interpretation adopted by the Court. Article 7, point f), of directive 95/46/EC requires the legitimate interest of the person responsible for collecting the data and the rights of the targeted person, enshrined in article 7 and 8 of the European Union's Charter of Fundamental Rights, to be weighed against one another.

The Bundesgerichtshof held that sole establishment of the facts with a view to a potential dispute for the principal does not outrank the interests of the targeted persons. To the contrary, the principal's interests can prevail if the targeted person is specifically suspected, if the principal has only this way to establish proof, if the way of having installed the GPS tracker is not illegal (see the case in which the principal's car is equipped with a GPS tracker) and if the establishment of the profile of the trips is such as to constitute a significant evidentiary element. The Bundesgerichtshof referred the case to the court in first instance to have it rule, in this particular case, as to whether surveillance by GPS and consequently, such a broad collection of personal data are justified.

Bundesverfassungsgericht, decision of 04.06.2013, 1 StR 32/13,
www.bundesverfassungsgericht.de
IA/33706-A

(HOEVEME)

**** Briefs (Germany)***

Applied to in connection with an appeal filed by a German citizen aimed at a grant of training assistance for a professional training course attended in the Netherlands, the Bundesverfassungsgericht ruled out application of article 5, paragraph 5, first sentence, of the Bundesausbildungsförderungsgesetz (federal law concerning individual training encouragement, hereinafter the "BAföG"), insofar as the said provision makes a grant of aid conditional on a provision that attendance at training sessions abroad is required by the applicable training program. In basing itself on the objective of promoting the mobility of students, provided for under article 165, paragraph 2, second dash, TFEU, the Bundesverfassungsgericht considered, in particular, that the said article 5, paragraph 5, of the BAföG unjustifiably limits the rights to move and reside freely. Consequently, the Bundesververwaltungsgericht ruled that the German provision was incompatible with articles 20, paragraph 2, point a) and 21, paragraph 1, TFEU.

Bundesverwaltungsgericht, decision of 16.05.2013,
5 C 22/12
www.bverwg.de
IA/33279-A

(BBER)

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By means of a decision dated 05 July 2013, the Amtsgericht Nürtingen (District Court in the Land of Baden-Württemberg) dismissed an application by passengers who had experienced substantial delay because their flight had been postponed to the next day, setting aside the interpretation adopted by the Court of Justice of rule (EC) No. 261/2004) establishing common rules relative to compensation and assistance for passengers in the event of a boarding refusal and of cancellation or substantial delay of a flight, and the rights of air passengers to compensation in the event of a substantial delay.

In its decision, the Amtsgericht Nürtingen based itself on the Court of Justice's decision in the case of International Air Transport Association e.a. (decision of 10 January 2006,

C-344/04, Rec. p. I-403), in which the Court held that "even if the preamble to a Community act is such as to specify the content thereof, it cannot be called on to depart from the very provisions of the act in question". According to the Amtsgericht Nürtingen, the Court of Justice had apparently not followed its own case law in the field of interpretation.

Amtsgericht Nürtingen considered that the case law of the Court of Justice relative to rule (EC) No. 261/2004 is incompatible with the principle of separation of powers, since European legislators would have clearly expressed their desire not to grant any compensation in the event of delay, but only in the event of a flight cancellation. As such, the distinction made by European legislators in article 1 of rule (EC) No. 261/2004 between the two categories would be irrelevant if their different legal effects were equalised by judicial decision.

Finally, the Amtsgericht Nürtingen returned to a decision by the Stüttgart Court of Appeal that had cancelled a previous decision handed down by the same court in a similar case. Noting that the Court of Appeal had not responded to its arguments to take into account not only the passengers, but also the air carriers experiencing an economic sacrifice in the event of flight delays, a sacrifice non-existent in the event of cancellation, the Amtsgericht Nürtingen therefore maintained its case law.

Amtsgericht Nürtingen, decision dated 05/07. 2013,
46 C 520/13,
http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=Amtsgerichte&Art=en&Datum=2013-7&nr=17071&pos=0&anz=2
IA/33707-A

[HOEVEME]

Austria

Road transport – Directive 1999/62/EC – Assessment of lorries for use of certain infrastructures – Difference of charges applicable to certain vehicles in accordance with a complete or partial portion of the Brenner Motorway – Indirect discrimination based both on the nationality of the carriers and on the origin or destination of the shipment – Justification - Inadmissibility

In its decision dated 2 October 2012, the Supreme Court ruled in a dispute concerning discrimination, based on nationality, in the road transport sector. The Supreme Court found that rules relative to toll rates providing for different charges in light of whether the vehicle used a complete or a partial circuit on the Brenner motorway, particularly the charging of a double toll for night travel covering the complete route, represented indirect discriminationin accordance with nationality.

The applicant, a transport company with its registered office in Germany, used the entire Brenner motorway for its lorries, the authorised maximum weight of which exceeded 3.5 tonnes, and had to pay the prescribed toll. The defendant levied the toll in accordance with the provisions of the federal law of 3 June 1964 concerning financing of the Innsbruck-Brenner motorway. The Court of Justice had already found that the toll system on that route is unacceptable in light of articles 7, point b), of Directive 93/89 and 7, paragraph 4, of directive 199/62 (decisions of 26 September 2000, Commission / Republic of Austria, C-205/98, Rec. p. I-7367, and of 5 February 2004, Rieser C-157/02, Rec. p. I-1477), but, following the modification of national legislation, the Vice-President of the European Commission had indicated to the Austrian Federal Transport Minister in 2001 that ‚on the basis of the modified rates, the discrimination problem seemed to have disappeared.

With its complaint, filed in the Handelsgericht Wien (Commercial Court of Vienna), the applicant party asked the ASFINAG (the Austrian Company for Financing Motorways and Expressways) to pay a compensatory amount for the charges that it considered excessive. The charges were said to have been illegal, due to a lack of legal foundation, and were said to be in contradiction to directive 93/89/EEC relative to application by the Member States of taxes on certain vehicles used for carrying merchandise by road, as well as of tolls and use rights collected for use of certain infrastructures, and directive 1999/62/EC (which had replaced the latter directive). According to the applicant, national

regulation always gives rise to discrimination, since use of the complete route (which would be the case for the majority of foreign carriers) would be more expensive than use of a single portion of the road (which would most often be the case for the Austrian carriers). In any event, discrimination would occur because of the additional amount in the event of use of the complete route during the night, which is not charged for use of a single portion of the route. In this dispute, the Supreme Court had to settle the issues of whether the national toll system had a legal basis, if it was a question of discrimination, and if so, whether an individual could call on this in view of the fact that the basis for charging the toll amounts had been, according to the ASFINAG, private contracts relative to use of the roads, and finally how the amount of damages for discrimination suffered, if any, should be calculated.

The Supreme Court found that it can be seen from a comparison between the average rate for the portions of the route and the rate for the complete route that the first rate is higher than the second one. The applicant is therefore not entitled to any reimbursement in this respect. It is quite different when it comes to night trips for which the rate is doubled, but this is only for the complete route. This circumstance results in indirect discrimination against vehicles not registered in Austria and an infringement of directive 1999/62/EC. The defendant party is obliged in this connection to reimburse the applicant party. Economic or budgetary considerations cannot justify the deferring treatment established, in light of the importance attached to the principle of non-discrimination in the common transport policy. As the Court of Justice had already noted, the provisions of a directive that could have a direct effect could also be called on against an entity such as the defendant party because the close links between that company and the State in management of the Austrian motorways.

Oberster Gerichtshof, decision of the OGH 02.12.2012, 10 Ob 28/12h,
www.ogh.gv.at

IA/28745-A

[FRODLSU]

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Fundamental rights – European Union's Charter of Fundamental Rights - Right to effective remedy and to access to an impartial court – Absence of a public hearing – Absence of referral of a preliminary ruling to the Court of Justice in connection with proceedings relative to an asylum request – Extra-contractual liability of the State for damage suffered by a removed asylum seeker – Absence

In its order dated 19 June 2013, the Constitutional Court made a decision on the issue of whether absence of a public hearing as well as a failure to submit a preliminary matter to the Court of Justice dealing with an examination of the admissibility of proceedings relative to an application for asylum in light of article 47 of the Charter of Fundamental Rights could trigger a "Staatshaftung" (State's liability in tort for damages suffered).

The dispute concerned the appeal filed by a Turkish citizen whose fourth request for international protection had been rejected, on last instance, by the Constitutional Court, without holding any hearing for arguments, as well as concerning the appeal by an Armenian citizen, filed under similar circumstances. At the time at which the proceedings took place, the two applicants had been removed.

Following their appeals to the Constitutional Court, the applicants requested that the Republic of Austria be sentenced to payment of a pecuniary compensation in the context of "Staatshaftung" because of an infringement of Union law by the Constitutional Court itself, in connection with the said proceedings relative to the asylum applications.

The Constitutional Court found that it was not incumbent upon it, in proceedings based on "Staatshaftung", to reconsider its own decisions or the decisions made by other Supreme Courts. The only task incumbent upon it related to determining whether a characterised infringement of Union law had been committed. An appeal concerning the State's liability is admissible only in the event of a manifest and sufficiently characterised infringement of Union law. Even an infringement of the obligation to refer a preliminary ruling to the Court of Justice does not as such trigger State liability of the Republic of Austria. Consequently, the complaints were rejected by the Constitutional Court.

Verfassungsgerichtshof, order dated 19.06.2013, A 2/213-6, A 3/2013-4,
www.vfgh.gv.at/

IA/33200-A

[FRODLSU]

Belgium

Union citizenship – Right of freedom of movement and freedom of residence on the territory of the Member States – Directive 2004/38/EC – Beneficiaries – National rules and regulations modifying the family reunification conditions – Modifications of another national rule or regulation – Nullity of the said modifications

The law relative to family reunification of 8 July 2011, which came into effect on 22 September 2011, had strengthened the conditions required for family reunification, particularly with respect to housing and income. That law modified certain provisions of the law of 15 December 1980 on access to the territory, residence, and establishment and removal of foreigners (hereinafter "the law of foreigners"). On 26 September 2013, the Constitutional Court handed down an opinion cancelling three provisions of the law of foreigners, having been the object of the above-mentioned modifications.

First of all, article 40 bis, section 2, paragraphs 1 and 2, point c) of the law concerning foreigners required in particular that both parents, applicants to benefit from the right concerning family reunification, be older than 21 years of age. The Constitutional Court cancels the said provision "in that it does not provide that the same exception relative to the age condition applies to family reunification of citizens of the Union and their partners". The Constitutional Court specifies that the age condition of 21 years of age in itself is justified. However, as concerns the exceptions to that condition, there is no reasonable justification for a distinction between a citizen of a third party state (non-member state) and a Union citizen. Consequently, this represents an infringement of the principle of equality.

Secondly, the Constitutional Court annuls article, section 2, paragraph 2, of the law of foreigners relative to the residence right of the family members who are dependents of the reunifying party, in particular, "in that it does not lay down any procedure making it possible for members of the family of Union citizen not covered by the definition appearing in article 2, point 2) of directive 2004/38/EC (relative to the right of Union citizens and of the members of their families to move and reside freely on the territory of the Member States) and who are targeted by article 3, paragraph 2, point a) of the said directive to obtain a decision on their application for family reunification with a Union citizen that is based on consideration of their personal situation and which, in the event of refusal, is grounded". Article 3, paragraph 2, point a) of directive 2004/38/EC specifies that the host state must promote entrance and residence for members of the family not covered by the definition appearing in article 2, point 2) who, in the country of origin, are dependents of or constitute part of the household of the Union citizen, beneficiary of the residence right on a principal basis. However, the members of the family of a Union citizen who is resident in Belgium may not call directly on that provision in order to obtain a residence right, or to call on judgmental criteria that should, according to them, apply to their request, as can be seen from the Rahman case (decision of 5 September 2012, C- 83/11, not yet published in the ECR). Furthermore, the Constitutional Court points out that in that same case, the Court of Justice brings out the fact that the Member States must facilitate the residence of such persons, and thus must see to it that their national legislation lays down criteria enabling such persons to obtain a decision on their request to be admitted and to take up residence. That decision must be based on a thorough examination of their personal situation. In the event of refusal, the said decision must give reasons. The Member States hold a broad judgmental power, but the Constitutional Court considers that the system provided for by the law of foreigners does not meet those conditions. According to that Court, only legislative intervention can remedy the unconstitutionality established.

Finally, the Constitutional Court also cancels article 40 ter, paragraph 2, of the law of foreigners relative to the conditions of family reunification of the members of the family of a Belgium citizen "insofar as it does not provide an exception to the condition of the means of support when the reunifying party is a Belgian citizen who is being joined only by his or her

minor children or those of his or her spouse or those of his or her partner when the partnership is considered equivalent to marriage in Belgium".

Constitutional Court, decision of 26.09.2013, No. 121/2013,
www.const-court.be
www.legalworld.be

IA/33708-A

[NICOLLO]

Cyprus

Police and judicial cooperation in criminal matters - European arrest warrant – Crimes committed before Cyprus joined the European Union – Constitutional conflict

On 2 September 2013, the Supreme Court handed down its decision in the Michaelides cases. It concerned two appeals from the district court of Limassol, in which the two applicants attacked their rendition to Greece, following an application in connection with the European arrest warrant procedure. Those two cases result from a case of corruption in Greece (the Tzohazopoulos case), said to have involved Cyprus's former Minister of Internal Affairs Mr Michaelides, and his son. Because of that, Greece asked the authorities of Cyprus, by means of those two cases, to turn over Mr Michaelides and his son.

The difficulty in those cases was that, since Cyprus joined the EU on 1 May 2004, even though the Constitution has been revised and a law has been adopted for transposing the European Union's rules and regulations relative to European arrest warrants into national law, the said provisions of national law were not retroactive Consequently, the law of Cyprus did not include the alleged crimes committed for the period prior to the Country's membership within the framework of a European arrest warrant. Consequently, while those cases took place, the applicants protested, before the District Court as well as in the Supreme Court, against the legality of a decision relative to their rendition, since the crimes in question took place before 1 May 2004.

It is interesting to emphasise that during the time of those two cases, Parliament adopted the seventh revision of the Constitution so as to remove the constitutional obstacle to delivery of the suspects under a European arrest warrant for a crime committed before 1 May 2004. The applicants asserted that the said new revision specifically targeted them, and consequently, infringed their fundamental rights.

In rejecting that argument and issuing European arrest warrants, the Supreme Court noted that the seventh revision of the Constitution represented a stage required for bringing national legislation into agreement with the country's obligation pursuant to Union law.

To support this position, the Supreme Court referred to the Council's evaluation report concerning Cyprus dated 12 December 2007, which emphasised the obligation of Cyprus to conform fully to Council framework decision 2002/584/JAI of 13 June 2002 relative to the European arrest warrant and to procedures relative to delivery between Member States. In addition, the Supreme Court emphasised that the applicant's complaint could not be accepted, on the grounds that the legislative bill for the seventh revision of the Constitution was submitted to the Parliament of Cyprus by the Ministry of Justice one year before the European arrest warrant request made by the Greek Authorities.

Supreme Court, second instance, decision dated 02.09.2013, No. 221/2013, Christodoulou Michaelides / Advocate-General of the Republic of Cyprus,
www.cylaw.org/cgi-bin open.pl?file=apofaseis/aad/meros_1/2013/1-201309-221-13.htm

IA/33539-A

(LOIZOMI)

Croatia

European Union – Police and judicial cooperation in criminal matters – Framework decision relative to the European arrest warrant and to procedures relative to rendition between Member States – State of enforcement – Requirement of Dual Criminal Liability – Time limit on criminal prosecution

Since Croatia became a member of the European Union, the Supreme Court of the Republic of Croatia (Vrhovni sud Republike Hrvatske) has handed down three decisions concerning interpretation of articles 10 and 20, paragraph 2, point 7, of the law concerning judicial cooperation in criminal matters with the EU Member States (hereinafter the "law"), which is the enforcement document relative to the council's framework decision 2002/584/JAI dated 13 June 2002 relative to the European arrest warrant and to rendition procedures between Member States.
First of all, we should emphasise the fact that the Supreme Court does not make any reference to the relevant provisions of the framework decision.

In the first two cases, the Croatian Judicial Enforcement Authority had executed the European arrest warrant issued against applicants for having been guilty of an infraction, the "prevara", covered by article 10, paragraph 2- 8, of the law, corresponding to the "fraud" covered by article 2, paragraph 2, -8, of the framework decision (an infringement for which dual criminal liability is not verified). In the two cases, the applicants had objected to enforcement on the grounds that the criminal proceedings against them would have be time-barred according to Croatian law, the law of the State of enforcement, thus calling on article 20, paragraph 2, point 7 of the law corresponding to article 4, paragraph 1, point 4, of the framework decision.

In those two cases, the Supreme Court rejected the applicants' argument, holding that at the time of deciding on enforcement of the European arrest warrant in cases in which dual criminal liability has not been verified, the Croatian judicial enforcement authority must not consider whether criminal prosecution is time-barred pursuant to national legislation.

In the third case, which concerned a European arrest warrant issued by the German Judicial authorities for the infractions of organised theft and robbery covered by articles 242, 243, 244 and 244a, combined with articles 25 and 53 of the German Penal Code, the applicant had objected to enforcement of the European arrest warrant by the competent Croatian authority, indicating that criminal prosecution was time-barred in accordance with Croatian law. The Supreme Court began by verifying the condition of the dual criminal liability relative to the infractions, since they did not fall within the field of application of article 10, paragraph 2, of the law. After having established dual criminal liability, the Supreme Court, by comparing the limitation periods under Croatian law and German law, rejected the applicant's arguments, noting that the infractions were not time-barred pursuant to German law.
Vrhovni sud Republike Hrvatske, order dated 20.09.2013, VSRH Kž eun 11/2013-4,
www.vsrh.hr,

IA/33613-A

Vrhovni sud Republike Hrvatske, order of 24.10.2013, VSRH Kž eun 14/2013-4,
www.vsrh.hr,

IA/33615-A

Vrhovni sud Republike Hrvatske, order dated 26.07.2013, VSRH Kž eun 2/2013-4,
www.vsrh.hr,

IA/33621-A

[GRGICAN]

**** Brief (Croatia)***

In its decision dated 22 May 2013, the Croatian Constitutional Court (Ustavni sud Republike Hrvatske) rejected an appeal filed by a teacher of religion who had been dismissed by the state schools after he had been deprived of his licenciate of sacred theology for infringement of canon law.

According to several provisions of an international agreement on cooperation and education in culture, concluded between the Republic of Croatia and the Vatican (the "Vatican agreement"), a theologian may teach religion and Catholic education in the schools provided he is mandated by the Catholic authorities (licenciate of sacred theology). The licence is issued after an evaluation of the candidate's eligibility in light of canon law. That licence may be withdrawn at any time if the candidate no longer meets the canon law criteria.

Having obtained the licenciate of sacred theology, the applicant taught the Catholic religion in two state schools. During that teaching period, he was civilly divorced after

having been married by the church, and he entered into a second civil marriage. That marriage led to revocation of his licenciate of sacred theology, since it had been concluded before the applicant obtained the divorce from his first marriage by the church, which was viewed as an infringement of canon law. Following the revocation of his licence, the two schools dismissed the applicant in application of the employment law (the "ZR").

We should emphasise the fact that the ZR contains rules that are generally applicable to employment and dismissal of workers, but it does not contain any specific rules applicable to teachers of religion.

Considering that the applicant had not infringed any State law by his divorce and subsequent marriage, the majority of the judges of the Constitutional Court held that by dismissing him, the schools had not infringed either the right to private life enshrined in article 35 of the Constitution and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or the right to marry enshrined in article 12 ECHR, since the State did not place any barriers to entering into his two marriages or his divorce. Reaffirming that it cannot consider the constitutionality of the provisions of the Vatican agreements and that it must respect the liberty of religious organisations recognised by article 40 of the Constitution, the majority of the Constitutional Court held that the dismissal, because of the loss of the licenciate of sacred theology, did not create any particularly serious prejudice for the applicant. Consequently, no infringement of article 54, paragraph 1, of the Constitution relative to employment law was established.

The dissenting minority opinion, while reiterating the extraordinary nature of the work relationship of religion teachers, which depends on the existence of a licenciate of sacred theology, found that the State had infringed article 35 of the Constitution and its positive obligations to provide a legislative framework that would guarantee benefit of working conditions based on the principles of accessibility of the law, of predictability, of legal security and of legitimate trust by such teachers, in accordance with its international obligations.

Ustavni sud Republike Hrvatske, decision dated 20.09.2013, U-III/702/2009,
www://narodne-novine.nn.hr/clanci/sluzbeni/2013_06_69_1377.html

IA/33622-A

[GRGICAN]

Spain

Free provision of services – Television radio broadcasting activities – Directive 2010/13/EU –National rules and regulations placing limits on the time devoted to televised advertising – Concept of "clock hour"

By means of its decision issued on 10 July 2013, the Tribunal Supremo (Supreme Court) held that the restrictions on the broadcasting time devoted to televised advertising imposed by the enforcement rule (Real Decreto 1624/2011) of the general audio-visual communication law 7/2010 (Reglamento de desarrollo de la Ley 7/2010, General de la Communicacion Audiovisual) were compatible with Union law.

The rule in question sets a maximum of 12 minutes of televised advertising per "clock hour" and imposes a restriction of 5 minutes per "clock hour" for self-promotion, sponsorship and advertising in connection with radio broadcasting of sporting events. The applicant, the Mediaset audio-visual group, which protested against several articles of the said rule, asserted, on one hand, that the Spanish regulation was more restrictive than that of directive 2010/13/EU, dealing with coordination of certain legislative, regulatory and administrative provisions of the Member States relative to providing audiovisual media services, insofar as the concept "clock hour" , contained in the Spanish regulations for establishing a limit on televised advertising, self-promotion, sponsorship and audiovisual commercial communication, was too restrictive. Under those circumstances, the applicant also maintained that another interpretation was possible, that of the "accrued hour", since the directive does not require that the hour included must necessarily be a "clock hour".
In that connection the Supreme Court held that the rule simply develops one of the possible interpretations of directive 2010/13/EU, that

of the "clock hour", to which, moreover, the directive refers in article 23. It also emphasised that, since directive 2010/13/EU allows freedom of interpretation for the Member States, the option chosen by the Spanish legislators provides a more reliable and more precise measure for establishing a uniform system for all operators.

In addition, the applicant protests against the fact that the five-minute restriction per "clock hour" established by the Spanish rule relative to self-promotion, sponsorship and advertising in connection with radio broadcasting of sports events was contrary to the directive, since the latter excludes, from the time restriction, self-promotion, sponsorship and advertising at the time of radiobroadcasting of such events.

On that point, the Supreme Court pointed out that even though the restriction of five minutes per "clock hour" is stricter than the conditions called for under the directive, that limitation is authorised by this text. The fact is that directive 2010/13/EU allows each Member State to lay down stricter rules in this matter.

Tribunal Supremo, Sala de lo Contencioso Administrativo, Sección Primera, decision dated 10.07.13 (Rec. 160/2012),
www.poderjudicial.es

IA/33384-A

[MAGAZJU]

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Transport – Air transport – Rule No. 261/2004 – Measures relative to assistance and handling passengers in the event of a substantial flight delay – Exemption from the compensation obligation – Conditions – Extraordinary circumstances – Concept – Air traffic controllers' strike – Inclusion

Applied to in connection with a dispute concerning the compensation to be granted to passengers in the event of cancellation of a flight, the Audiencia Nacional cancelled the decision by the Juzgado de lo Contencioso Administrativo that had sentenced the public company managing Spanish airports (AENA) to payment of compensation to the tourism operator Viajes Iberia for the damage caused by closing Spanish airspace during the first few days of December 2010, following a strike by air traffic controllers.

While the Juzgado de lo Contencioso Administrativo considered that compensation was appropriate on the basis of rule (EC) No. 261/2004, establishing common rules relative to compensation and passenger assistance in the event of a boarding refusal and of cancellation or substantial delay of a flight, on the other hand, the Audiencia Nacional ruled by basing itself on recital No. 14 of the said rule, which excludes liability of air carriers in cases in which an event is due to extraordinary circumstances that could not have been avoided, even if all reasonable measures had been taken, that there was no need, in that particular case, for compensating the tourism operator concerned.

The Audiencia National also recalled that a flight cancellation does not entitle passengers to compensation if the air carrier is able to prove that the cancellation was due to extraordinary circumstances that could not have been avoided, namely, circumstances beyond the effective control of the air carrier. In that connection, the Audiencia National referred to the joint cases of the Court of Justice, Nelson and TUI Travel (decision of 23 October 2012, C-581/10 and C-629/10, not yet published in the ECR), as well as to the Mc Donagh case (decision of 31 December 2013, C-12/11, not yet published in the ECR).

In basing itself on this case law, the Audiencia National held that the behaviour of the air traffic controllers, due to its premeditated, intentional, collective and simultaneous nature, constituted an extraordinary circumstance, since the Spanish administration, which had not been informed in advance about the said strike, found itself in a situation in which air traffic was impossible without endangering individual safety.

Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección Octava, decision dated 10.07.2013, (Rec. 35/2013),
www.poderjudicial.es

IA/33385-A

[MAGAZJU]

**** Brief (Spain)***

The Constitutional Court rejected a constitutional appeal to guarantee fundamental

rights filed by a worker who had been dismissed for having sent sensitive information to competitors by means of the company e-mail system. The First Chamber of the Constitutional Court unanimously ruled that the interception of the messages by the company did not constitute an infringement of the worker's constitutional right to confidentiality of communications and to privacy. The Court bases its reasoning on the content of the applicable collective bargaining agreement, which prohibits "use of the computer resources belonging to the company (…) for purposes other the ones connected with the content of the work performed (…). The Court held that in light of that explicit prohibition on using email outside work, the worker could not reasonably and legitimately have had any expectation regarding the confidentiality of such communications, and that for that reason the electronic communications in question were not covered by the constitutional protection of the right to secrecy of correspondence. The Court emphasised that this predictability of checking by the company constitutes the element that makes the difference between this case and other decisions in which the European Court of Human Rights has established the existence of an infringement of private life. In view of this remark, and of the fact that the employer's intervention had been neither excessive or disproportionate with respect to its business interest, the Constitutional Court ruled that there was no infringement of the constitutional right to privacy.

Tribunal Constitucional. Sala Primera, Sentencia núm. 170/2013, dated 07.10.2013 (Rec. 2907/2011),
www.tribunalconstitucional.es/Documents/NOTA_INFORMATIVA_60_2013/2011-02907STC.pdf

IA/33376-A

[IGLESSA]

In plenary assembly and in connection with a constitutional appeal relative to the guarantee of fundamental rights, the Constitutional Court ruled that the strengthened protection against dismissal granted by the rules relative to the status of workers to pregnant women does not apply during the trial period. The Court considers that this strengthened protection provided for by the workers' status in comparison with situations of dismissal (which is construed by constitutional case law as an objective guarantee, in the sense that it entails the nullity of dismissals of pregnant workers, even if the employer was unaware of the fact) is not applicable by analogy to situations of extinction of the employment contract during the trial period. Consequently, the Constitutional Court held that the Supreme Court decision that was the object of the constitutional appeal, since the nullity of the dismissal can derive only from an infringement of fundamental rights originating from discrimination (which did not arise in connection with the circumstances in the case in view of the fact that the knowledge of the pregnancy on the employer's part had not been proven), did not entail an infringement of the right to non-discrimination because of sex and that therefore there was no infringement of the right to effective judicial protection.

Tribunal Constitucional. Pleno, Sentencia núm. 173/2013, dated 10.10.13 (Rec. 3773/2011),
www.tribunalconstitucional.es/Documents/NOTA_INFORMATIVA_64_2013/2011-03773STC.pdf

IA/33377-A

[IGLESSA]

Estonia

Judicial cooperation in the civil and commercial matters – Jurisdiction of the ordinary courts and enforcement of decisions – Rule (EC) No. 44/2001 – Contractual jurisdiction – Scope – Judgment of the existence of a contract

On 25 September 2013, the Civil Division of the Supreme Court handed down a decision in a case concerning judgment of the existence of a franchise contract and on application of rule (EC) No. 44/2001 concerning the jurisdiction of the ordinary courts, and recognition and enforcement of decisions in the civil and commercial matters (hereinafter the "Brussels I rule").

The applicant, an Estonian company, had filed an action against a Polish company in the Estonian court of first instance to protest against the cancellation of a contract unilaterally carried out by the defendant.

According to the applicant, the parties had concluded a definite-term agreement

concerning the resale and franchising of the defendant's products. Such an agreement resulted from a "letter of intent" established between the defendant and the members of the applicant's executive committee. The applicant sold the defendant's products in Estonia for several years.

The defendant asserted that the application had to be rejected since its registered office was located in Poland, and, on the other hand, because of the absence of a contract between the parties, the applicant not being a party to the letter of intent.

The Estonian Court of first instance rejected the application and ruled that the Polish Court held jurisdiction for hearing the dispute pursuant to article 2 of the Brussels I rule.

The applicant applied to the Court of Appeal, which cancelled the decision in first instance. The Court of Appeal noted that the parties had concluded an agreement and that, the defendant having admitted that the applicant had sold the defendant's products in Estonia, the applicant's commercial activity had indeed taken place in Tallinn, Estonia. Consequently, it found that the Estonian Court of first instance held jurisdiction for hearing the dispute pursuant to article 5, paragraph 1, section a), of the Brussels I rule.

The defendant filed an appeal for quashing to the Supreme Court.

The latter ruled that it was appropriate to apply that Brussels I rule in order to determine court jurisdiction, since it was a question of a cross-border situation. It then added that insofar as the Brussels I rule henceforth replaces, in relationships among the Member States, the Convention of 27 September 1968 concerning jurisdiction of the ordinary courts and enforcement of decisions in the civil and commercial matters (hereinafter the "Convention"), the interpretation provided by the Court of Justice concerning the provisions of the said Convention also applies to the ones of the said rule, when the provisions of those instruments of the Union law may be characterised as equivalent (see the case Zuid-Chemie BV, decision of 16 July 2009, C-189/09, Rec. P. I-6917, point 18). In the cases targeted by article 5, paragraph 1, of the Convention, the national judge's competence for deciding questions relative to a contract includes the power of judging the existence of the elements constituting the contract itself (see decision of 4 March 1982, Effer SpA, C-38/81, Rec. p. I-825, point 7). Consequently, the Supreme Court concluded that the appeal relative to judging the existence of the contract could be considered as a contractual matter provided for in article 5, paragraph I, of the Brussels I rule.

It also considered that the franchise contract in dispute was a services contract in the meaning of article 5, paragraph 1 point b), of the said rule. Consequently, it held that the Court holding jurisdiction for hearing any request based on the contract was that of the place of the principal supply of the services (see the decision of 11 March 2010, Wood Floor, C-19/09, Rec. p. I-2121), in this particular case, the Estonian court of first instance initially applied to in connection with the dispute.

Supreme Court, Civil Division, decision dated 25.09.2013, case No. 3-2-1-84-13,
www.riigikohus.ee

IA/33378-A

[TOPKIJA]

Finland

Union law – Rights conferred on individuals – Infringement by a Member State – Obligation to remedy the prejudice caused to individuals – Remedy procedures

The two Finnish Supreme Courts recently took a stand on the procedures and the legal basis of applications for compensation against the State for the damage caused by infringement of Union law.

First of all, such a recourse was accepted by the Supreme Administrative Court by means of its decision KHO 2012:104. Previously, such applications to the Supreme Administrative Court were based on the law relative to compensation for prejudice (412/1974) and they were rejected on the grounds of lack of jurisdiction. On the other hand, in this case it was a question of a procedure known as "administrative dispute", its legal basis being section 12 of the law concerning administrative proceedings (586/1996). The Supreme Administrative Court pointed out that the

issue concerned procedures for exercising recourse against the State in the event of an infringement of Union law that had not been settled in a decisive way, either by legislation or by case law. Thus it held that, to be in a position to guarantee access for an applicant to justice and effective judicial recourse, it was appropriate to accept the application. In that case, an individual, a man, requested compensation for the prejudice suffered due to the discriminatory method of calculation resulting in lower disability indemnity than for a woman of identical age and circumstances. Subsequently, the Supreme Administrative Court stayed the proceedings and applied to the Court of Justice for a decision on a preliminary ruling (case pending X., C-318/13).

Secondly, in the KKO 2013:58 case before the Supreme Court, a company applied for compensation for the prejudice caused by an assessment decision, basing itself on the law concerning compensation for prejudice. About 3000 euros in VAT, based on the vehicle tax, had been levied on the applicant in 2003 for importing a vehicle from Belgium to Finland. After the exhaustion of the ordinary appeals against the said decision (the Administrative Court having reduced the amount of VAT and the Supreme Administrative Court having rejected its appeal application), the applicant applied to the courts with an application for compensation. The Court of First Instance accepted its request and sentenced the State to pay as damages the amount of VAT finally imposed (about 2500 euros), a decision upheld by the Court of Appeal.

In the Supreme Court, the defendant party, as a preliminary point, raise the issue of jurisdiction, arguing that it was a question of an administrative dispute that should have been taken to the Administrative Courts and of res judicata, stating that the decision by the Supreme Administrative Court had ended the case. Those arguments were rejected.
The Supreme Court based itself on the Tulliasiamiesand Siilin (decision of 19 September 2009, C-10/08, Rec. p. I-7487) and Commission/Finland cases (decision of 19 March 2009, C-10/08, Rec. p. I-39) and their national follow-up. In the first case, the Court of Justice held that the assessment system should not be discriminatory and in the second case it concluded that there had been a shortcoming on the State's part because of the discriminatory nature of the said system. Consequently, the Supreme Court stated that the infringement of article 110 TFEU was demonstrated to a sufficient extent to make the State liable, so it ordered compensation for the prejudice suffered. It is interesting to note that to be able to follow up the applicant's applications, the Supreme Court had to rule out a provision of the law concerning compensation for prejudice that limited the liability of public entities.

Korkein hallinto-oikeus, decisions dated 28.11.2012, KHO:2012:104 and 07.06.2013, KHO:2013:105,
www.kho.fi

QP/08000-A8
QP/08000-A9

Korkein oikeus, decision dated 05.07.2013, KKO:2013:58,
www.kko.fi

IA/33370-A
[PEDERVE]

**** Brief (Finland)***

By means of its decision on a preliminary ruling dated 3 July 2013, the Supreme Court modified the treatment of the lis pendens effect and the principle ne bis in idem in various proceedings (administrative and criminal) in connection with tax fraud. According to the new rules, when, in administrative tax procedures, a decision has been made on a fiscal sanction (either by ordering it, or by deciding not to order it), criminal charges of tax fraud based on the same facts can no longer be filed or else the handling of such accusations must be abandoned. Previously, the principle ne bis in idem applied to proceedings succeeding each other in time; it was only a fiscal decision having become final (after expiry of the period for appeal) that prevented indictment. This change was due to the opinions of the Constitutional Parliamentary Committee issued in connection with two legislative procedures, one of which concerned coordination of procedures for imposing fiscal or customs and penal sanctions. The new law governing this point went into effect on 1 December 2013 (781/2013). We should point out that the Swedish Supreme Court, three weeks previously, had handed down a similar

decision (case B 4946-12), after the Court handed down its decision in the Åkerberg Fransson case (decision of 26 February 2013, C-617/10, not yet published in the ECR).

Korkein oikeus, decision dated 05.07.2013, KKO:2013:59,
www.kko.fi

IA/33371-

[PEDERVE]

France

Liability for defective products – Directive 85/374/EEC – Service provider's liability for damage caused within the framework of provisions of services, such as hospital care, by defective devices or products – Service provider not holding status as producer in the meaning of article 3 of the said directive.

In the Dutrueux case (decision of 21 December 2011, C-495/10, not yet published in the ECR), the Court of Justice, applied to in connection with a preliminary ruling by the French Council of State, had provided two important indications in connection with liability for defective products in connection with provision of health care. On one hand, directive 85/374/EEC relative to liability for defective products is not applicable to cases of claiming liability of a service provider that, in connection with provision of health care, uses a defective product that it has not produced. On the other hand, the said directive does not rule out liability of a service provider in connection with a no-fault liability framework, insofar as the victim, or the service provider, remains able to call on the liability of the producer on the basis of the said directive.

In implementation of this decision in France, recent case law demonstrates a convergence between the administrative courts and the judicial courts as to a broad acceptance of the concept of "use" of a defective product. However, there is still a notable divergence between the two types of jurisdiction with respect to the treatment of liability charges against a health care provider when it has used a defective product.

Thus, in the first place, the Court of Cassation and the Council of State agree in holding that use of a defective product is not limited to the use of devices or of medical items required for performance of a care service (for instance, heating mattresses used in an operating theatre, as in the case having given rise to the reference in the Dutrueux matter), but also covers the cases of implantation of devices in patient's bodies, such as testicular prostheses (Civ. 1ere, 12 July 2012, No. 17.510, see *Reflets No. 3/2012*, p. 14), dental prostheses ((Civ. 1ere, 20 March 2013, appeal No. 12.12.300) or knee prostheses (EC Section, 25 July 2013, Felempin, No. 33922). Due to this broad interpretation of the concept of "use", inaugurated by the Court of Cassation and which the Council of State had not explicitly supported in the section decision of 25 July 2013, the health care service providers can therefore not be considered as suppliers able to incur liability on the basis of article 3, paragraph 3, of directive 85/374/EEC, both with respect to products used by the practitioner for the needs of an operation (heating mattresses, compresses, surgical equipment) and those intended for implantation in the patient's body (prostheses, cardiac stimulator). The rule regarding their liability in the event of use of a defective product is determined by national law.

In this connection, in the second place the section decision made by the Council of State on 25 July 2013 confirmed the divergence between administrative and judicial jurisdictions as regards the rules relative to liability of health care service providers. First of all, in the Dutrueux case, the Council of State had maintained a system of liability without fault. Then, considering that the liability of health care service providers using defective products can be called on only when there has been a fault (Civ. 1ere, 12 July 2012, No. 17.510, see *Reflets No. 3/2012*, p. 14), the Supreme Court of Cassation departed from its prior case law relative to liability without fault of healthcare service providers in the event of implantation of medical devices. In light of the section decision of 25 July 2013, the conclusion is that even if an alignment on the broad interpretation of the concept of use was made, on the other hand, with the confirmation of maintenance of a system of liability without fault in the event of use of defective products, support for that position remains only partial. Consequently, for the victim, it is easier to obtain compensation for prejudice because of a defective product suffered in connection with

care provided in the public hospitals than in connection with treatment by a liberal practitioner or in a private clinic (see *Reflets No. 3/2012, pp.14-15)*

Council of State, Section, decision dated 25.07.2013, No. 339922,
www.legifrance.gouv.fr

IA/33610-A

[WAGNELO]

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Space of liberty, security and justice – Fundamental rights – Prohibition of torture and inhuman or degrading sentences or treatment – Systemic shortcomings of the asylum procedure and of conditions for hosting applicants in a Member State – Prohibition, for the other Member States of transferring a person requesting asylum to that State – Consequences – Obligation of the Member State applied to either to consider the asylum application itself, or to identify another responsible Member State

In a series of cases, the Council of State, ruling in summary proceedings, heard several cases relative to transfers of asylum seekers – or request for readmission - to Hungary. Even though that State is a member of the European Union, and, moreover, is a party to the Geneva Convention of 28 July 1957 concerning the status of refugees, supplemented by the New York protocol, and of the ECHR, one could not all the same deduce from all this, in accordance with the principles laid down by the European Court of Human Rights (ECtHR) as specified by the Court of Justice for purposes of application of rule (EC) No. 343/2003 relative to criteria for determination of the State responsible for the asylum request (" Dublin II rule"), that there is an unquestionable presumption of respect for fundamental rights.
In this connection, it is appropriate to recall the fact that in the N.S. case (decision of 31 December 2011, C-411/10 and C-493/10, not yet published in the ECR), some important indications were provided in connection with transfer of asylum seekers to the responsible Member State, as determined in application of article 5 of the Dublin II rule. In the tradition of the ECtHR (decision dated 21 January 2011, MSS/Belgium and Greece, application No. 30696/09, see *Reflets no 1/2011,* p.2), the Court of Justice held that a Member State contemplating a transfer of an asylum applicant must first make sure that, in the responsible State, there is no systemic fault in the asylum procedure and in the conditions relative to receiving asylum seekers.
In an initial order, handed down on 5 March 2013, the Council of State first of all found that a citizen of a non-member state whose application for residence on the basis of asylum was rejected did not prove, other than by making vague allegations, his conditions of detention in Hungary or the circumstances under which his application would not be considered in accordance with the guarantees required by observance of a right to asylum. Under those circumstances, the Council of State held that there could not be any obviously illegal impairment of the right to asylum (EC, 3 March 2013, No 366340).

On the other hand, in two other orders, the Council of State concluded that readmission would represent an obvious infringement of the right to asylum (EC, 29 August 2013, No. 371572 and CE, 16 October 2013, No. 372677). This finding is based on taking into account the applicant's arguments relative to their conditions of detention in Hungarian camps as well as of a risk that their asylum applications would not be considered in accordance with the guaranties provided in this matter. Furthermore, the weakness of the administration's arguments was emphasised. The fact is that in one case, it limited itself to indicating that Hungary is a member of the European Union and a party to conventions concerning the protection of refugees (EC, 29 August 2013, No. 371572), and in the other it did not make the verifications required by the circumstances, particularly by failing to request details from the Hungarian authorities (EC, 16 October 2013, No. 372677). In those two cases, by ordering issue of a provisional residence authorisation in connection with asylum, the Council of State acted in accordance with the principles laid down by the Court of Justice in the above-mentioned N.S. decision, as spelled out recently in the Puid case (decision dated 14 November 2013, C-4/11, not yet published in the ECR).

In a fourth order, handed down in November 2013, the Council of State held that the readmission to Hungary of citizens from Kosovo did not constitute a serious and

obviously illegal attack on the right to asylum. To reach that conclusion, the Council of State pointed out first of all that in addition to being a member of the Union and a party to the above-mentioned conventions, Hungary transposed directive 2013/33/EU establishing the standards for receiving persons requesting international protection. In addition, it can be seen from the investigation of the case that the French minister obtained an assurance from the Hungarian authorities that an asylum application, filed within the framework of free admission, was the object of the examination required by the "Dublin II rule" (EC, 6 November 2013, No. 373094).

Council of State, order dated 05.03.2013, No. 366340,

IA/33619-A

Council of State, order dated 29.08.2013, No. 371572,

IA/33614-A

Council of State, order dated 16.10.2013, No. 372677,

IA/33612-A

Council of State, order dated 06.11.2013, No. 373094,

IA/33620-A
www.legifrance.gouv.fr

[ANBD][WAGNELO]

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Free movement of persons – Taxation legislation – Taxation of unrealised capital gains on securities in the event of transfer of the taxation residence to another Member State – Transfer to a Member State of the Union – Transfer to the Swiss Confederation – EC-Swiss agreement concerning the freedom of movement of persons

By means of a decision dated 12 July 2013, the Council of State was led to invalidate one aspect of the exit tax installed by the corrective finance law for 2011, pursuant to which the transfer of the taxation residence outside France, occurring on 3 March 2011, entails being taxed by income tax and being subject to the social deductions on the unrealised capital gains on ownership rights, values, securities or rights.

The exit tax mechanism, in question in this decision, followed an initial similar arrangement applied until 31 December 2004, which had been found to be contrary to Union law by the Court of Justice. The fact is that in the case of Lasteyrie du Saillant (decision dated 11 March 2004, C-9/02, Rec. p. I-2409), the Court had ruled that the principle of freedom of establishment prevents a Member State from instituting, for purposes of preventing a risk of tax evasion, a mechanism for immediate taxation of the capital gains not yet made in the event of transfer of a taxpayer's taxation residence outside the said state.

The new system introduced in 2011 was characterised by some important differences compared with the previous system, particularly by providing for an automatic mechanism for suspension of payments in the event of transfer of the place of residence to a Member State or to a State that is a party to the agreement concerning the European Economic Area with which France has entered into an administrative assistance convention with a view to combatting tax fraud and tax evasion. In this connection, the Council of State's decision notes that a Member State is entitled to tax and unrealised capital gain on its territory even if it has not actually been made, provided it does not require immediate payment at the time of transfer to another State of the Union. Thus the Council of State implicitly echoed the National Grid Indus case (decision dated 29 November 2011, C-371-10, Rec. p. I-2273, point 49 and 85). Then as concerns the proportionality of the tax inspection mechanisms in light of article 49 TFEU (freedom of establishment), the Council of State pointed out that "if the taxpayer having transferred his or her place of residence outside France is required to declare, every year, the amount of the taxable capital gains and of the tax subject to a time extension for payment, that fact cannot be considered in itself as making it subject to disproportionate treatment in comparison with the objective pursued". Consequently, the exit tax system as such, was validated.

However, the Council of State criticised one particular aspect of the exit tax, as concerns a gift of securities. The fact is that the text

provided that the suspension of payment would expire at the time of a gift of securities for which capital gains have been established, unless the donor shows that the donation is not made for the sole purpose of avoiding tax. This obligation to demonstrate a purpose that is not solely for taxation arrangements makes the taxpayer that has transferred his place of residence abroad subject to different treatment in comparison with a resident placed in the same situation, who is not required to provide such proof.

Thus, the Council of State pointed out that "even if, in connection with the struggle against tax evasion, particular obligations can be made incumbent upon taxpayers having transferred their taxation residence outside France, the obligations laid on them to demonstrate the absence of arrangements solely aimed at avoiding tax, without the taxation authorities having to provide in this connection the slightest indication of abuse, goes beyond what is normally implied by the prevention of tax fraud". In fact, "the administration has the means needed for obtaining from the competent authorities of a Member State, particularly within the framework of the directives relative to mutual assistance of the competent authorities of the Member States in the field of direct taxes, the information relative to a donation of transferable or other securities". Consequently, the Council of State concluded that the principle of freedom of establishment prevents "requiring a taxpayer having transferred his or her domicile outside France to prove that the donation he or she makes is not made for the sole purpose of avoiding tax to be able to benefit from maintenance of the suspension of payment and from exemption from tax or from being able to obtain a refund if it had been paid".

On the other hand, in a second decision handed down on the same day, the Council of State upheld the validity of the exit tax mechanism in light of the agreement of 21 June 1999 between the Swiss Confederation and the European Community concerning free movement of persons.

Calling on reasoning already expressed by the Court of Justice, for instance, in the Grimme case (decision of 12 November 2009; C-351/08, Rec. p. I-1777, points 27 and 29), the Council of State points out first of all that since the Swiss Confederation did not join the Union's interior market, the interpretation of Union law concerning freedom of establishment cannot be transposed automatically to the interpretation of the agreement of 21 June 1999, in the absence of an explicit stipulation in the agreement. Then, examining the provisions of the General Code of Taxation in light of the stipulations of the agreement of 21 June 1999, the Council of State concluded that by providing that the suspension of payment is granted to taxpayers transferring their taxation residence to Switzerland only in response to a specific request, and that they must designate a representative established in France authorised to receive the useful communications from the taxation authorities and provide guarantees of such a nature as to guarantee collection of the tax, the General Code of Taxation does not impair the right of establishment and to free movement guaranteed by the agreement of 21 June 1999, or the principles of free movement of persons and of workers.

Thus that decision emphasises the limits on the guarantees offered by the agreement of 21 June 1999 between the Swiss Confederation and the European Community concerning free movement of persons, particularly when it contrasts directly in this way with the guarantees offered by Union law.

Council of State, decision dated 12.07.2013, No. 359994,

IA/33618-A

Council of State, decision dated 12.07.2013, No. 359314,

IA/33617-A
www.legifrance.gouv.fr

[MEYERRA]

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Free circulation of merchandise – Directive 2007 / 46 / EC – Safeguard clause – Directive 2006/40/EC – Damage to the environment

In a dispute between the company Mercedes-Benz and the minster of ecology, of sustainable development and of energy relative to a refusal to register certain models of that company's

vehicles on the grounds that they use a cooling gas emitting a substantial amount of CO_2 into the atmosphere, the Council of State, in connection with summary proceedings, was led to consider the relationship between the principle of free circulation of merchandise and the requirement to protect the environment.

In accordance with the provisions of directive 2007/46/EC, which, in particular, lays down the rule applicable to circulation of motor vehicles, a vehicle type that is the subject of acceptance, i.e., is judged to conform to the requirement laid down in the directive, issued by the competent authorities of a Member State, cannot be rejected for registration in another Member State. However, if a vehicle that the object of acceptance seriously compromises road safety or markedly harms the environment or public health, the temporary safeguard clause provided for in article 29 may be called on.

In this particular case, the competent German authority had granted an extension of the acceptances previously delivered for the vehicles in dispute. They used an old cooling gas emitting a large amount of CO_2 into the atmosphere. In the event, that extension of the acceptances followed doubts expressed by the constructor as concerned the potential danger represented by the substitute cooling gas, less polluting, which should be used in accordance with the provisions of article 5, paragraph 4, of directive 2006/40/EC relative to vehicles' air conditioning systems.

Nevertheless, the French authorities rejected extension of the acceptance on the basis of directive 2006/40/EC, on the grounds that not only was use of the old cooling gas harmful to the environment and to efforts to reduce the greenhouse gas effect, but also gave rise to a distortion of competition among European constructors.

Within the framework of the consideration of the legality of the decision in dispute, the judge in summary proceedings noted that the safeguard clause can be called on only for the reasons exhaustively listed in article 29 of directive 2007/46/EC. Within that framework, only the consideration of an environmental type can justify its use. On the other hand, the ones relative to the conditions of competition on the market cannot be called on for that purpose.

In the analysis of the merits of calling on the environmental grounds, even if it was admitted that new vehicles using the old cooling gas cause more pollution than the ones that use the substitute gas, the Council of State, after having pointed out, on one hand, that the latter account for a only a tiny part of the French automobile fleet, and, on the other hand, that the obligation to use the substitute cooling gas is the object of gradual implementation finishing in 2017, held that putting the vehicles in dispute into circulation cannot, as such, constitute a serious nuisance for the environment in the meaning of article 29 of Directive 2007/46/EC. Consequently, since serious uncertainty concerning the legality of the decision and the urgency had been demonstrated, enforcement of the decision in dispute was suspended.

The Council of State's order was handed down before the European Commission made a decision, within the framework of pilot infringement proceedings against the German authorities (European Commission, 16 July 2013, MEMO/13/689).

Council of State, order dated 27.08.2013, No. 370831,
www.legifrance.gouv.fr

IA/33611-A

[ANBD] [WAGNELO]

**** Briefs (France)***

In these two cases, citizens of two non-member states (China and Morocco) with unauthorised status on French territory had been placed in police custody for infringement of the legislation concerning foreigners.

Both of them were then the subject of a decision to place them in administrative detention, and protests against those measures were then filed, first of all with the judge of custody and release, and then in the Supreme Court of Appeal, in light of Union law, which could be called on in this particular case.

In referring, in light of and in the grounds for its decision, to directive 2008/115/EC relative to the common standards and procedures

applicable in the Member States to return of citizens of third party countries in irregular status, as well as to the decisions by the Court of Justice in the cases El Dridi (decision of 28 April 2011, C-61/11, PPU, Rec. p. I-3015) and Achughbabian (decision of 6 December 2011, C-329/11, not yet published din the ECR), the Court of Cassation held that the citizens of non-member countries could not be subject to a sentence of imprisonment when the said penalty is handed down on the sole ground of an unauthorised residence on the territory provided those citizens have not first been the subject of a coercive measure provided for under article 8 of the said directive, or, in the event of being placed in detention, have not come to the end of the maximum duration of their period of detention as provided for by the measure ordering it.

By refraining, in each of those two cases, from checking, in light of the elements in the dossier, on whether the applicants were in one of the two situations mentioned above, which could rule out an extension of their detention, the Court of Cassation held that the judges of the merits had deprived their orders for extension of the administrative detention measures of any legal basis and it therefore quashed the said orders.

Court of Cassation, *Civil Division 1, decision dated 11.09.2013, No. 12-21.450*,
IA/33606-A

Court of Cassation, *Civil Division 1, decision dated 12-14.765,*
www.legifrance.gouv.fr

IA/33607-A

[DELMANI]

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Article 3 of the law of 13 July 1983 dealing with the rights and obligations of civil servants requires that the permanent positions be given solely to civil servants. However, many provision departing from this principle particularly present in articles 3 of the law of 26 July 1984 and 4 of the law of 11 January 1984 containing statutory provisions, relative, respectively, to the territorial civil service and to the State's civil service, now enable public persons to call on contractual staff, and particularly on staff under fixed-term contracts

In this particular case, a civil servant of the city of Marseille had been employed by means of a fixed-term contract and was successively extended in his position in that way, as "regional attaché" from June 1991 to December 2004. In September of the latter year, the said civil servant had been informed of the desire to no longer renew his contract. Applied to by the applicant, the Administrative Court as well as the Court of Appeal had ruled that all of the said special provisions were incompatible with the objectives of directive 1999/70 of 28 June 1999 concerning the CES, UNICE and CEEP framework agreement concerning fixed-term work, particularly that relative to prevention of improper use of fixed-term contracts

In referring, in light of and in the grounds for its decision, to that directive, the Council of State partly invalidated the analysis made by the Judges of the merits concerning the compatibility of the said special provisions.

On one hand, the Council of State pointed out that the first two paragraphs of article 3 of the law of 26 January 1984 precisely laid down the conditions under which public persons could employ non-tenured agents (seasonal or occasional need), the duration of the said contracts (maximum durations of one year, of six months or of three months, depending on the situation), and the limited possibilities for renewal (renewable once for certain kinds of contracts). In light of all of these elements, the Council of State held that the said provisions of the law of 26 January 1984 were compatible with the objectives of the directive 1999/70/EC.

In addition, the Council of State ruled that paragraph 3 of the said article, in combination of article 4 of the law of 11 January 1984, did not limit the duration of the contracts or the number of possible renewals, while excluding conclusion of limited contracts, moreover, without offering any elements that could result in a characteristic proper to such activities that could justify their exclusion. In light of those elements, the Council of State held that the said recruiting procedures were incompatible with the objectives of directive 1999/70/EC.

The Council of State referred the case to the Marseille Court of Appeal for a new examination of the merits.

Council of State, 3rd and 8th sub sections taken together, decision of 12.06.2013, No. 347406,
www.legifrance.gouv.fr

IA/33608-A

[DELMANI]

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Even if, since the effective date of the law of 12 May 2010, online gaming and gambling are open to competition (Law 2010-476, JORF, 13.05.2010, see *Reflets No. 3/2010,* pp. 34-35), it is different with operation of these kinds of activities when they call on a physical network and which, most often, are subject to a system of exclusive rights, particularly as concerns sporting forecasts for which the Française des Jeux holds a monopoly (article 18 of decree No. 85-390). That monopoly, disputed by a company established in the United Kingdom that wished to open some shops and sales outlets on French territory, was ruled to conform to articles 43 and 49 of the EC treaty (European Commission, 30 December 2011, No. 330604), recently confirmed in connection with an application to reopen civil proceedings (Council of State, 10 July 2013, No. 357359).

This case enabled the Council of State to recall and to apply the principles laid down by the Court of Justice with respect to restrictions applied to gambling, a field in which the Member States have ample room to manoeuvre in determining the appropriate level of protection, provided they respect certain conditions, recently spelled up in the Liga Portuguesa case (decision dated 8 September 2009, C-42/07, Rec. p. I-7633). In that case, the obstacle to freedom of establishment and to free provision of services appeared to be justified by the pursuit of various objectives, such as the prevention of fraud, prevention of risks of fraudulent operation of gambling for criminal purposes and prevention of dependency phenomena. In addition, since the restrictions were not considered disproportionate with respect to those objectives, the restrictions were held to conform to the requirements of the treaty, as construed by the Court.

Council of State, 2nd and 7th subsections together, decision dated 10.07.2013, No. 357359,
www.legifrance.gouv.fr

IA/33616-A

[WAGNELO]

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The Council of State was applied to with an appeal filed by a music teacher belonging to the regional civil service on the subject of rejection of a work authorisation for three additional years beyond the age limit of 65 years of age provided for under the statutory provisions.

The legality of that refusal was considered, in particular, in light of the requirement laid down in directive 2000/78/EC providing a general framework on behalf of equal treatment in the fields of employment and work, the subject of which, recalled in article 1, consisted in particular of combating age discrimination. Within that framework, article 6 specifies that the differences in treatment based on age do not constitute discrimination insofar as they are objectively and reasonably justified by a legitimate objective of employment policy, of the labour market and of professional training, and provided the means applied for reaching it are appropriate and necessary. On that basis, as interpreted by the Court of Justice (decisions of 16 October 2007, Palacios de la Villa, C-411/05, Rec. p. I-8531, and of 21 July 2011, Fuchs e.a., C-159/10 and C-160/10, Rec. p. I-6919), the Council of State held that the age limit imposed by the provisions governing the Civil Service do not constitute discrimination in the meaning of directive 2000/78/EC, since the differing treatment in dispute is aimed at promoting access to employment by better distribution of the latter between generations.

Insofar as the argument relative to disregard of the provisions of national law was ruled out, the appeal was rejected.

We may indicate that contrary to the request filed by the applicant, the Council of State did not consider it necessary to refer a preliminary ruling to the Court of Justice for interpretation of directive 200/78/EC.

Council of State, 3rd and 8th subsections together, decision dated 22.05.2013, No. 351183,

www.legifrance.gouv.fr

IA-33609-A

[WAGNELO]

Greece

European Union – Monetary union – Government deficits – Memorandum between Greece and certain Eurozone countries with a view to dealing with an excessive government deficit – Law providing for dismissal as of right of the civil servants made subject to the preretirement provisions and elimination of their positions under the institutional act – Constitutionality check – Non-conformity to the Constitution

In a decision handed down on 27 September 2013, the Symvoulio tis Epikrateias (Council of State, hereinafter the "SE") made a check on the Constitutionality of law 4024/2011 relative to pensions, to the sole pay and status regime of civil servants and to other provisions relative to implementation of a framework of medium-term financial policy covering the period 2012-2015. This check was carried out within the Framework of consideration of an application for annulment filed by the National Confederation of Civil Servants and aimed at a ministerial decision that was adopted on the basis of the said law and which concerns determination of the elimination of the positions under the institutional act of the civil servants dismissed as of right and receiving pre-retirement, in accordance with special rules in comparison with the provisions of common law. Following that consideration, the SE determined the non-conformity to the Constitution of the above-mentioned law, which was used as a basis for adoption of the decision under attack.

To reach that conclusion, the SE initially affirmed, certainly, that, in principle, legislators are entitled to remove the positions of civil servants under the institutional act within the framework of civil service organisation. Some reasons relative to auditing public finance may constitute one criterion, among others, in this connection. However, according to the SE, articles 4 and 103 of the Constitution relative, respectively, to equal treatment and to the legal and permanent nature of the civil service, oppose allowing , with the objective of reorganisation of the civil services and of rational management of public finance: 1° Making civil servants necessarily subject to temporary transfer on the basis of criteria having nothing to do with their qualifications and aptitudes, and 2° Having such a temporary transfer followed by the elimination as of right of positions under the institutional act previously held by the civil servants temporarily reassigned. According to the SDE, since the positions under the institutional act of the civil service are created by law for purposes of rational organisation of the State administrations, their elimination must comply with the same criteria. Thus in the event, the modification of the status of the civil servants affected by law 4024/2011 is not based on a redefinition of state functions and an administrative reorganisations of its administrations, and does not entail a stable and permanent modification of the general rules relative to the employment relationship in the public sector and the procedure for termination of that relationship. The result is that the elimination in dispute of the positions under the institutional act does not constitute the consequence of such a reorganisation. For its part, a reduction of State expenditure appears to be only the secondary effect resulting from this elimination of positions, and not the effect of an administrative reorganisation with a stable, general and permanent nature.

Furthermore, the SE continues, the dismissal or temporary transfer of a civil servant may not, as a general rule, according to article 103 of the Constitution, take place without a prior judgement by a specific service committee to that effect. However, the sole fact of completing a period of work, even if considerably long, in the event, service of thirty five years, does not meet those conditions, unless it is accompanied by reaching a certain age limit. The result of this is that, by providing for various possibilities of mandatory temporary transfer for different groups of civil servants as well as the resulting elimination of the positions under the institutional act held by the civil servants temporarily transferred, article 33 of the said law 4024/2011 infringes the above-mentioned articles 4 and 103 of the Constitution.

On the other hand, the SE rejected, as inadmissible, the argument relative to the infringement of the legitimate trust of the civil servants temporarily transferred. The reason for the rejection was the lack of status for acting of the applicant union, given that the decision under attack affects only the civil servants targeted and not the union as such.

In conclusion, the incompatibility of the said article 33 of law 4024/2011 with the constitution entailed cancellation of the ministerial decision under attack for lack of a legal basis insofar as the said decision is based on that provision.

Symvoulio tis Epikrateias, Plenary assembly, decision dated 27.09.2013, No. 3354/2013, *www.lawdb.intrasoftnet.com/nomos*

IA/33537-A

[RA]

*** Briefs (Hungary)**

In proceedings relative to enforcement of a decision originating from a Belgian Court on a custody matter, the Kúria (Hungarian Supreme Court) indicated that enforcement by such a decision by another Member State should not be rejected since the child had not been heard by the said jurisdiction, whereas the possibility of such a hearing was provided for under the Belgian procedural rules.

In its decision, the Kúria called on article 24 of the Charter of Fundamental Rights relative to the rights of children as well as article 23, point b), of rule (EC- no. 2201/2003 concerning children's right to be heard. In light of these provisions, the Kúria explained that the Belgian court guaranteed the child's right to be heard even if the hearing could not be held for specific reasons relative, in particular, to the child's state of health.

In order to decide on the need for a preliminary ruling put to another Court in the above-mentioned case, the Court also quoted the Aguirre Zarraga case (decision of 22 December 2010, C-491/10 PPU, Rec. I-14247) in which the Court indicated that in the event of recognition or of rejection of a decision in connection with parental responsibility, it could be appropriate to make sure that the child has had the possibility of being heard. Consequently, the Kúria considered that referral of a preliminary ruling to another court was unnecessary in the present case.

Furthermore, the Kúria also considered the need for application of the public policy provision appearing in article 23, point a), of the rule. In its grounds, the Kúria referred to the legal opinion to the effect that non-recognition of a decision in connection with parental responsibility could be justified if it is characterised as a demonstrated infringement of public policy of the Member State of enforcement. According to the Kúria, the different procedural rules of the original Member State as well as the absence of hearing the child do not justify rejection of enforcement of the said foreign decision.

Kúria, No. Pfv.II.21.068/2013/2011, *www.lb.hu/sites/default/files/hirlevel/hirlevel-1310.pdf*

IA/33383-A

[TANAYZS]

Ireland

Free movement of persons – Judicial cooperation in civil matters – Insolvency proceedings – rule (EC) No. 1346/2000 – Applicability – Company with its registered office in a non-Member State – Jurisdiction of the national Judge – Debtor's centre of principal interests – Concept

The High Court ruled that it held jurisdiction for initiating insolvency proceedings against a company with its registered office in a non-member state, on the basis of the rules of jurisdiction laid down in rule (EC) No. 1346/2000 relative to insolvency proceedings. The company concerned has its registered office in the British Virgin Islands, but is registered in Ireland as a foreign company having established a branch there. That was the first time since the rule went into effect that the H14igh Court was asked to initiate insolvency proceedings against a company with its registered office in a non-member state.

According to the company, the High Court would hold jurisdiction pursuant to a provision of national law, namely, section 3454 of the Companies Acts, 1963-2012, the rule being inapplicable once the company's registered office is located in a non-member sate. However, certain company creditors protested that the High Court lacked jurisdiction, asserting that the rule applies once the centre of the debtor's principal interest in located in a Member State. According to those creditors, the centre of principal interest of the company in question is in England, and therefore the High

Court of England would hold jurisdiction in that case.

As to the question of the relevant criterion for delimiting the field of territorial application of the rule, the High Court accepted the reasoning of the Chancery Division of the High Court of England in the decision in re Brac Rent-A-Car International Inc [2003] 1 WLR 1421. According to the Chancery Division, pursuant to recital 14 of the rule, the rule applies once the debtor's principal centre of interest is to be found in a Member State, whatever the place of the registered office may be. As to what elements are relevant in determination of the place of the said centre of interest, the High Court mentioned two cases of the Court of Justice: the case of Interredil Srl in liquidation (decision dated 20 October 2011, C-396/09, Rec. P. I-19915) and the Eurofood IFSC case (decision of 2 May 2006, C-341/04, Rec. p. I-3813). According to that case law, the centre of the debtor's principal interests in the meaning of the rule is an autonomous concept of Union law. As is indicated by recital 13 of the rule, that place must be determined by emphasising the place of central administration of the company, as it can be established by objective elements verifiable by third parties.

In that particular case, the High Court stated that the evidence provided by the company reversed the simple burden of proof provided for in article 3, paragraph 1, of the rule, according to which a company has its centre of principal interest at the place of its registered office. The effective centre of management and control of the said company as well as of management of its interest is located in Ireland. The elements taken into account by the High Court included the following: the place of performance of the company's operations, the place at which the company's employees are located, the location of the company's premises, the national authorities with which the company is registered and the bank in which the company holds its bank account. Thus, the High Court rejected the creditors' argument to the effect that the Company's centre of principal interest was to be found in England, where a company having the same sole partner in common is registered.

High Court, decision dated 16.05.2013, Harley Medical Group (Ireland) Ltd v Companies Acts ([2013] IEHC 219),

www.courts.ie

IA/33709-A

[TCR] [MADDEMA]

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Social policy – Equal treatment with respect to employment and work – discriminationin accordance with age – Inapplicability of national law – Direct effect of directive 2000/78/EC

The Equality Court ruled that the Offaly Civil Defence discriminated against two volunteer trainers by forcing them to retire without any objective justification, for the simple reason that they were more than 70 years of age. It ruled that the defendant acted in infringement of directive 2000/78/EC creating a general framework in favour of equal treatment in connection with employment and work. The Equality Tribunal pointed out that the situation of the applicants in this case differs from that if the applicants in similar cases because of the inapplicability of national law, which give rise to acknowledgment of the direct effect of the directive.

The employers, subject to Irish law, are entitled to establish the retirement age on the basis of section 34 (4) of the Employment Equality Acts, 1998-2008. However, in this case the Equality Tribunal found that the employer had not "set" the retirement age clearly and that therefore the said provision did not apply. Noting that the Court of Justice has held that non-discriminationin accordance with age is a "general principle of community law" in the Mangold case (decision of 22 November 2005, C-144/04, Rec. p. I—9981), the Equality Tribunal recognised that the directive had a direct effect.

The Equality Tribunal mentioned article 6, paragraph 1, of the directive, which allows the Member States to institute differences of treatment based on age when they are objectively and reasonably justified by a legitimate objective. In order to interpret the concept of objective justification, the Equality Tribunal referred to the Wolf case of the Court of Justice (decision of 12 January 2010, C-229/08, Rec. p. I-1). In that case, the Court of Justice had held that a national rule setting an age limit for recruitment of firefighters did not constitute discrimination because of the

position's great physical demands. In light of that decision, the Equality Tribunal stated that an employer could set the retirement age in accordance with the requirements of the job position. However, in this particular case, the defendant had not put forth any justifications based on the requirements of the teacher's position.

Equality Tribunal, Judgement dated 28.03.2013, Patrick Dunican & Thomas Spain v Offaly Civil Defence (Decision E 2013 - 027),
www.equalitytribunal.ie

IA/33710-A

[TCR] [MADDEMA]

** Briefs (Ireland)*

The High Court ordered six suppliers of Internet services to block access to the sites "The Pirate Bay" in application of section 40(5A) of the Copyright and related Rights Act, 2000. Section 40(5A) was inserted by the European Union (Copyright and related Rights) regulations, 2012, which were adopted in order to transpose directive 2001/21/EC concerning harmonisation of certain aspects of copyright and of neighbouring rights in the information company. The law transposing the directive was adopted following the decision of 2010, EMI Records (Ireland) Limited and Others / UPC Communications Ireland Limited (2010) IEHC 377, in which the High Court had refused to order blocking access on the grounds that directive 2001/21/EC had not yet been transposed into Irish law. That was the first time that the High Court ordered suppliers of Internet services to block access for users pursuant to section 40 (5A).

High Court, decision dated 12.06.2013, EMI Records Ireland Ltd & ors v UPC Communications Ireland Ltd & ors ([2013] IEHC 274),
www.courts.ie

IA/33711-A

[TCR] [MADDEMA]

Italy

Reconciliation of legislation - Vehicle civil liability insurance – Extent of guarantee in favour of third parties provided by mandatory insurance – Exclusion clauses – Accident caused by an uninsured driver – Passenger victim of the accident, insured as driver of the said vehicle, having given the uninsured driver permission to drive it – Inadmissibility

The Court of Cassation handed down a decision concerning vehicle civil liability in the event of a traffic accident in which one person died and others were seriously injured. The beneficiaries of the deceased person asked the Tribunal de Venezia (Court of Venice) to sentence the vehicle owner and his insurance company to payment of damages as compensation for the pecuniary and non-pecuniary harm suffered. The insured owner argued that he could not be held liable since he was not the driver of the vehicle at the time of the accident, he himself having suffered, because of the accident, serious bodily injury and pecuniary and non-pecuniary harm as a third party passenger. In first instance, the Court applied article 32 of law No. 142/92, modifying law No. 990/69. The latter excludes, in the event of an accident, coverage of the insured owner when he is not the driver of the vehicle. The modification in question had been made in order to bring national law into conformity with directive 90/619/EEC, and had therefore abrogated any such exclusion. In application of the new provision, the Court rejected the requests of the applicants and sentenced the insurance company to make payment for the damages caused to the owner as a third-party passenger of the vehicle. On appeal, the Corte D'Appello di Venezia (Venice Court of Appeal), applied to by the insurance company, set the decision aside and accepted the appeal, considering that the new provision was inapplicable insofar as it had not yet gone into effect. An appeal was filed against the decision by the Corte D'Appello, in connection with which the victims of the accident asked the Court of Cassation to refer a preliminary ruling to the Court of Justice concerning the conformity of the national law applied by the Corte D'Appello to Union law. The Court of Cassation decided not to refer the matter to the Court of Justice since the latter had just made a decision on the same legal point to be settled in the dispute on the main issue, in the case of Churchill Insurance Company and Evans (decision of 1 December 2011, C-114/10, not yet published in the ECR). According to the

Court of Cassation, there are some important consequences of the latter decision, the most important one being that any clause of an insurance policy by which the obligation to compensate a victim of an insured accident who is not the driver of the vehicle at the time of the accident must be considered as void. The fact is that such a clause would be contrary not only to the Union directives concerning automobile civil liability insurance, but also to the right to health, as enshrined as a fundamental right by the Constitution (article 32) and by the Charter of Fundamental Rights of the European Union (article 3). Moreover, the above-mentioned Churchill Insurance Company and Evans decision affirms a principle to the effect that a passenger who is a victim of an accident is always entitled to full compensation for his prejudice, except when he is aware of illegal use of the vehicle. Finally, the Court of Cassation emphasises the link that exists between article 32 of the Constitution and article 3 of the Charter. The appeal was rejected with respect to the remainder.

Court of Cassation, sez. III, decision dated 30.08.2013, No. 19963,
www.cortedicassazione.it

IA/33530-A

[MSU]

**Briefs (Italy)*

The Competition Authority (AGCM) established an infringement of article 101 TFEU consisting, in particular, of an understanding among the maritime transport companies Moby, GNV, SNAV and Forship, aimed at fixing and increasing the price of ferry boat tickets between certain continental Italian ports and Sardinia.
In particular, the AGCM, in accordance with the case law of the Court of Justice in this matter (inter alia, the decision by the Court of Justice of 31 March 1993, Ahlström Osakeyhtiö e.a./Commission, 89/85, 104/85, 114/85, 116/85, 117/85, 125 à 129/85, Rec. p. I-1307 and the decision by the Court dated 8 July 2008, BPB/Commission, T-53/03, Rec. p. II-1333 and of 29 June 1995, ICI/Commission, T-36/91, Rec. II-1847), noted the existence of a concerted practice. That practice was disclosed both by the existence of parallel behaviour among the said companies, having no reasonable economic justification other than implementation of an understanding, as well as by some other precise, serious and concordant evidence, disclosing the existence of contacts and of an exchange of sensitive commercial information among the companies concerned which could be used in order to adapt their behaviour to the market, and consequently, which could have reduced or even eliminated the degree of uncertainty and of autonomy required on a competitive market. In spite of the oligopolistic nature of the market in question and of the existence of other factors partly explaining the generalised increase of prices, carried out by the companies in question (such as an increase of the cost of production and particularly of fuel), the level of the increase was considered excessive (between 60% and 90% in one year, according to the company concerned), disclosing an anomaly on the market. The offence was characterised as serious in light of its nature, of its extent (it concerned the most important routes between certain Italian continental ports and Sardinia, constituting a significant part of the relevant market), and its duration. Some substantial fines were imposed on the companies concerned.

Autorità garante della concorrenza e il mercato, decision dated 11.06.2013, No. 24405,
www.agcm.it

IA/33531-A

[MSU]

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In this decision, the Court of Cassation pointed out, applying the solution adopted by the Court of Justice in the recent case of Folien Fischer and Fofitex (decision dated 25 October 2012, C-133/11, not yet published in the ECR), that the scope of article 5, point 3, of rule (EC) No. 44/2001 concerning judicial jurisdiction, recognition and endorsement of decisions in the civil and commercial matters must be extended to actions for negative determination of infringement of industrial products covered by a European patent proposed by a foreign company.

The facts in dispute originated in an action for negative finding of infringement of industrial products covered by a European patent submitted to the Italian judge by a German Company against two American companies. The latter had disputed the jurisdiction of the

Italian judge, since the action had been filed by a foreign company against two companies that, themselves, were foreign, and did not have a branch in Italy. According to the said companies, article 5, point 3, of the rule which applied to the present case did not provide for any criterion making it possible to assign the case to the Italian Judge. On the other hand, the German company supported the jurisdiction of the Italian judge with respect to the Italian and German parts of the patent.

The Court of Cassation, in supporting the above-mentioned decision by the Court of Justice, acknowledged the jurisdiction of the Italian judge, who is the judge of the place at which the offence can occur, and it extended the scope of article 5, point 3, of rule (EC) No. 44/2001 to also take in the foreign part of the European patent.

Corte di Cassazione, sezioni unite, decision dated 10.06.2013, No. 14508,
www.dejure.giuffre.it

IA/33532-A

[GLA]

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In its decision, the SCourt of Cassation ended to the judicial conflicts concerning the effects of the "Kafala", namely, an adoption procedure belonging to Muslim law, which prohibits full adoption and which can be defined as guardianship without descent.
The facts in dispute relate to an appeal presented as being against the refusal by the Italian Consulate in Casablanca to grant an entrance visa for the family reunification requested by two Italian citizens on behalf of the minor of whom they had taken charge within the framework of a Moroccan judicial Kafala. The Court of First Instance ruled that the application was justified. On the other hand, the Court of Appeal set aside the decision because the minor could not be considered as being a member of the family pursuant to directive 2004/38 /EC relative to the rights of Union citizens and of members of their families to move and to reside freely on the territory of the Member States. The Court of Cassation, receiving an appeal, settled the case even if the Children's Court had just pronounced adoption of the minor by the two Italian citizens since a question of broad interpretation of the concept of family member arose.

In its reasoning, the Supreme Court of Appeal took into account, in the first place, the best interests of the child guaranteed by article 24 of the Charter of Fundamental Rights and by international law, and, in the second place, the risk of reverse discrimination insofar as only foreign citizens could be reunited with the minors entrusted to them, contrary to the Italian citizens. Finally, the Court, dealing strictly with the above-mentioned question, extended to minors included under the Kafala procedure the concept of "other beneficiaries" provided for under legislative decree No. 30/2007 transposing the directive 2004/38/EC. The Court of Cassation indicated that the interpretation making it possible to consider the said minors as members of the family follows the same orientation as the communication of the Commission, of the Parliament and of the Council concerning the guidelines aimed at improving the transposition and application of directive 2004/38/EC. The fact is that according to that communication, "children and adoptive parents may have rights pursuant to the directive, in accordance with the strength of the links uniting them in the case in question".

Consequently,, the Court of Cassation concluded that the Italian authorities bore an obligation to allow family reunification of a minor entrusted to an Italian citizen, residing in Italy, by means of the Kafala procedure pronounced by a foreign judge in the event that the minor is a dependant or lives in the country of origin with the Italian citizen or else in the event of serious health considerations requiring personal assistance for him or her.

Corte di Cassazione, sezioni unite, decision dated 16.09.2013, No. 21108,
www.dejure.giuffre.it

IA/33533-A

[GLA]

Netherlands

Free circulation of persons – Workers – Equal treatment – Right of a child of a migrant worker to student financial assistance – Workers who have waived their original nationality – Effect – Absence

In its decision dated 18 June 2013, the Court of Appeal for social security and civil service matters ruled that the child of a Latvian citizen residing and working in the Netherlands is entitled to student financial assistance in the Netherlands, independently of the fact that the said Latvian citizen waived her Latvian nationality when acquiring Dutch nationality.

The request for student financial assistance had been rejected by the competent Dutch authorities on the grounds that the child did not have Dutch nationality and could not be treated as a Dutch citizen in connection with financing studies pursuant to a treaty or of a decision by an international organisation, since his mother had explicitly waived Latvian nationality when she acquired Dutch nationality. Consequently, she was said to have lost her status as a migrant worker in the meaning of Union law, as well as the rights relative thereto.

In referring to point 64 of the submissions made by Advocate-General Sharpston in the joint cases Kahveci and Inan (submissions dated 20 October 2011, decision dated 29 March 2012, C-7/10 and C-9/10, not yet published in the ECR), in which it was maintained that the fact of having waived his original nationality in acquiring the nationality of the Member State receiving him may constitute an indication that the person concerned no longer wishes to call on the rights granted by Union law, the Court of Appeal for Social Security and the Civil Service ruled that it did not appear that the Latvian citizen, by waiving her Latvian nationality, no longer wanted to call on the rights granted to her by Union law. According to the Court of Appeal for social security and the civil service, it seems that she only waived her Latvian nationality in order to prevent the Latvian authorities from depriving her of that nationality on their own initiative, which would have resulted in greater difficulty in (possibly) again requesting Latvian nationality.

The Court of Appeal for Social Security and the Civil Service concluded that the rejection, in this particular case, of the request for student financial assistance is contrary to Union law, in view of the fact that one cannot validly maintain that the child can no longer be considered as a child of a migrant worker having to be treated as a Dutch citizen pursuant to articles 7, paragraph 2, and 12 of rule (EEC) No. 1612/68 relative to the movement of workers in the Union.

Centrale Raad van Beroep, decision dated 18.06.2013, 11-3796 WSF-T,
www.rechtspraak.nl

IA/33705-A

(SJN)

*** *Brief (Netherlands)***

In a case concerning the rejection of an asylum application submitted by a Russian citizen, the judge in summary proceedings of the Court of First Instance of The Hague ruled that the interested party could not be removed to Poland before the end of a period of four weeks following the decision on its merits.

The decision to reject the application for asylum was based on the fact that the Russian citizen had already filed an asylum application in Poland, the state responsible for considering the interested party's asylum request pursuant to rule (EC) No. 343/2003, establishing the criteria and mechanisms for determination of the Member State responsible for considering an asylum application filed in one of the Member States by a citizen of a non-member country ("Dublin II" rule). However, the judge in summary proceedings ruled that it could be seen from the report "Migration is not a crime", delivered by the interested party, that there are shortcomings in the Polish asylum procedure. It can be seen from the said report that Poland has already removed citizens of non-member countries before they had an opportunity to submit their cases to a judge.

In light of the reasonable chance of success for the interested party in the proceedings on the merits, he may not be removed before the decision on the merits.

Rechtbank's-Gravenhage, decision dated 18.06.2013, AWB 13/11314,

IA/33704-A

(SJN)

Poland

Union law – Primacy – Effectiveness – Resolution of a supreme administrative court committing all administrative courts contrary to a decision by the Court of Justice – Inapplicability of the national procedural provisions concerning the binding force of such a resolution

On 8 November 2010, the Supreme Administrative Court adopted a resolution (I FPS 3/10) ruling that the insurance relative to the property under lease and the provision of services concerning the leasing itself are so strongly interconnected that they must be considered as constituting a single service for the purposes of value added tax.

In that connection, it is appropriate to explain that article 187, paragraph 2, of the law concerning proceedings in the administrative courts grants a resolution handed down by a panel of seven judges of the Supreme Administrative Court with binding force in the case concerned by the said resolution. Moreover, the resolutions issued by such a panel indirectly commit all administrative courts in other cases. In addition, article 269, paragraph 1, of the law mentioned above provides that a panel of an administrative court that does not agree with the position taken in such a resolution must apply to the Supreme Administrative Court with a preliminary ruling.

Then, in the BGŻ Leasing case (decision of 17 January 2013, C-224/11, not yet published in the ECR), the Court of Justice, in interpreting the directive 2006/112/EC relative to the common system of value added tax, adopted a different solution by ruling that "the provision of services concerning the insurance relative to the property that is the object of leasing and the provision of services concerning the leasing itself must, in principle, be considered as providing distinct and independent services for purposes of value added tax. It is the responsibility of the court to which the case is referred to determine whether, in light of the particular circumstances of the case on the main issue, the operations in question are so interconnected that they must be considered as constituting a single service or whether, on the contrary, they constitute independent services"

In light of the conflict between the decision made by the Court of Justice and the prior resolution handed down by seven of its judges, the Supreme Administrative Court took a stand, in several of its decisions, on the relationship between the procedural provisions concerning the binding force of its resolutions and the obligations of the national courts resulting therefrom (see the decision of 27 June 2013 handed down following the preliminary ruling BGZ Leasing, I FSK 720/13, as well as the decisions of 12 June 2013, I FSK 146/13 and 9 May 2013, I FSK 147/13).

In its decision 1 FSK 146/13, mentioned above, the Supreme Administrative Court emphasized that the resolution in question entails a limitation on the rights granted under Union law. Consequently, it held that in such a situation of incompatibility of the resolution with the interpretation of Union law provided by the Court of Justice, the principles of effectiveness and primacy of Union law allow a national court not to apply the procedural provisions of the national law and to settle the case by relying directly on the decision by the Court of Justice. In addition, it held that such a solution guarantees effective protection of the individual.

Moreover, in its decision 1 FSK 720/13, handed down following the BGŻ Leasing decision, the Supreme Administrative Court confirmed that when there is a contradiction between a resolution of its seven judges and it is possible to settle a case on the basis of the decision by the Court of Justice, a national court is not obliged to apply to the panel of the Supreme Administrative Court in connection with the same legal question.

Nevertheless, we should point out that in the latter case, one of the panel judges expressed a dissenting opinion. He emphasized that the principles of legal security and of procedural autonomy require that a resolution contradictory to Union law be eliminated from the legal order. Consequently, if a resolution of the Supreme Administrative Court conflicts with the case law of the Court of Justice, the court must refer, to the former, the issue of the conflict before settling the case.

Naczelny Sąd Administracyjny, decision dated 27.06.2013, I FSK 720/13

www://orzeczenia.nsa.gov.pl/doc/2A7018F79D

QP/07122-P1

Naczelny Sqd Administracyjny, decision dated 12.06.2013, 1 FSK 146/13
www//orzeczenia,nsa.gov.pl/doc/60B5C5928E

IA/33380-A

Naczelny Sqd Administracyjny, decision dated 20.05.2013, I FSK 147/13,
www//orzeczenia.nsa.gov/.pl/doc/3C6CD02EED

IA/33381-A

(BOZEKKA)

Portugal

European Union – Economic and monetary policy – Economic and financial adjustment programme – National provisions approving the state budget – Constitutionality of those provisions aimed at implementation of the economic and financial adjustment programme negotiated with the European Commission, the European Central Bank and the International Monetary Fund – Principles of equality and proportionality – Infringement

By means of its decision No. 187/2013 of 5 April 2013, the Constitutional Court was called on to make a decision concerning the constitutionality of certain provisions of law No. 66-B/2012 of 31 December 2012, approving the state budget for 2013. That decision was handed down in connection with an application for a review of constitutionality filed by the President of the Republic, a group of members of parliament (consisting of members of three left-wing political parties) and the Mediator.
Adopted within the framework of the implementation of the programme of economic and financial adjustment negotiated between the Portuguese State, on one hand, and the European Commission, the European Central Bank and the International Monetary Fund on the other, the said law called for several austerity measures in line with the state budgets for 2011 and 2012.

In plenary assembly, the Constitutional Court declared the unconstitutionality of four provisions of the said law. They concerned: *i)* the suspension or reduction of payment of the annual holiday bonus or of any payments corresponding to the fourteenth month of salary paid to civil servants (art. 29): *ii)* application of the treatment called for in the said provision to the civil servants holding an education and research contract (art. 31); *iii)* partial suspension of payment of the annual holiday bonus to retired civil servants receiving a pension (art. 77), and iv) introduction of a levy on the unemployment and sickness allocations (art. 117).

With respect to articles 29 and 31, the Constitutional Court held that the suspension or reduction of payment of the annual holiday bonus or of any allowance corresponding to the fourteenth month of salary paid to the civil servants, combined with the reduction of salaries since 2001, the career freeze affecting the public administration and the other general austerity measures imposed on all taxpayers, such as the increase in income tax, constituted an attack on the principle of equality as enshrined in article 13 of the Constitution. According to it, the imposition of all of these austerity measures on the civil servants implied an excessive sacrifice on their part in comparison with the private sector employees and could no longer, in 2013, be justified by considerations of effectiveness and rapidity of the said measures, which weighed particularly on the civil servants' salaries. Moreover, the said provisions also attacked the principle of proportional equality insofar as the difference in treatment between the civil servants and the private sector employees did not conform to the principle of proportionality.

The Constitutional Court adopted similar reasoning with respect to article 77 of the law. This provision, concerning the partial suspension of payment of the annual holiday bonus to retired civil servants receiving a pension, was held not to conform to the Fundamental Law on the grounds that it called for differentiated and non-proportional treatment between, on one hand, the retired public sector civil servants and, on the other hand, the retired employees who had not suffered from any measure for suspension of payment of the annual holiday bonus and the recipients of other income who had not been subjected to any reductions resulting from the austerity measures. The considerations

mentioned above apply, according to the Constitutional Court, a fortiori to article 77, in that this differentiated treatment as between the retired civil servants and the retired employees of the private sector cannot be justified by the existence of a link with the' public sector. Consequently, the court ruled that this provision also infringed article 13 of the Constitution.

Finally, with respect to article 117 of the law, which provided for introduction of a levy on the unemployment and sickness allowances, thus de facto reducing the monthly amount of those payments, the Constitutional Court held that this provision was contrary to the principle of proportionality, on the grounds that a measure imposing a levy on persons receiving an allocation providing the minimum for survival is neither adequate or reasonable for the pursuit of the objectives targeted by the law and could impair the right to decent existence.

This decision by the Constitutional Court drew the attention of the national and foreign press because of the modifications that had to be made in the national austerity programme after it was handed down, as well as due to the budgetary implications of the said decision. The statements to the press made on the day of issue of the decision by the presiding judge of that court are a good illustration of the impact produced by the decision:
"I am going to say something that is very simple and very elementary, but at the same time very strong and which nobody can forget: it is the laws, including the budget law, which must conform to the Constitution, and not the Constitution that must conform to any law".

Constitutional Court, decision dated 05.04.2013, No. 187/2013, Diario da Republica No. 78, Series 1 dated 22.04.2013.
www://dre.pt/pdf1sdip/2013/04/07800/0232802423.pdf

IA/33382-A

(MHC) (RC)

Czech Republic

Consumer protection - Unfair terms in the contracts entered into with consumers – Directive 93/13/EEC – Unfair terms in the meaning of article 3 – Obligation incumbent upon the national judges to examine, on his own initiative, the unfair nature of a term included in a contract submitted for their judgment – Consumer credit contract guaranteed by a promissory note – Arbitration clause – Nullity

By means of its decision dated 20 June 2013, the Nejvyšši soud (Supreme Court) provided some important explanations concerning the application of the national provisions relative to protection of consumers against improper contractual clauses. Applied to for quashing in connection with an action for cancellation of an arbitration award, the Nejvyšši soud was led to deal with the nullity of an arbitration clause contained in a consumer credit contract.

What was involved in this particular case was a credit that the applicant, an individual, had obtained from a consumer credit company and on conditions providing, inter alia, for a guarantee by means of a promissory note signed in blank by the applicant, a penalty clause, a clause concerning a transfer from remuneration, and finally an arbitration clause. The latter stipulated that any disputes arising in connection with the credit contract, including disputes relative to the promissory note guaranteeing the obligations arising under the said contract, would be settled by the designated arbitrator and in accordance with the principles of equity. The arbitration award made a few months after conclusion of the contract was in fact based on the exchange claim of the lender, which the latter had taken to the appointed arbitrator, the claim having ballooned to almost ten times the amount initially borrowed. The lower courts to which the applicant applied for cancellation of the said award had rejected his application because of the abstract nature of promissory notes and because arbitration clauses as such were not prohibited by Czech law and could not be considered improper in the meaning of directive 93/13/ECC concerning improper provisions in contracts entered into with consumers.

In this connection the Nejvyšši soud recalled the case law of the Court of Justice relative to directive 93/13/ ECC, particularly the obligation incumbent upon national judges to judge, on their own initiative, the unfair nature of the contractual provisions. However, the national provisions transposing the said

directive did not mention, unlike the directive, in the indicative list of unfair terms, the provisions imposing on a consumer not meeting his obligations an compensation of a disproportionately high amount, or clauses removing or providing an obstacle to the filing of legal action or of appeals by the consumer, by forcing the latter to only apply to an arbitration jurisdiction not covered by the legal provisions. However, in light of the national courts' obligation to construe national law in light of the text and of the purpose of the Union directives, the Supreme Court found that it was incumbent upon it to analyse the provisions of the contract in light of the conditions set forth in article 3, paragraph 1, of directive 93/13/ ECC.

Under those circumstances, the Nejvyšši soud pointed out, first of all, that both the credit contract and the credit conditions as well as the arbitration clause, established in separate documents, were forms established in advance by the lender in which the details identifying the applicant were entered. Thus, the applicant had had no influence on the designation of the arbitrator. It was therefore a contract that had not been the subject of individual negotiation.

Secondly, the high court questioned the lender's good faith, particularly in light of the required guarantee means, which at first sight appeared to be excessive compared with the value of the credit provided, and in light of the absence of any advance check by the lender on the applicant's solvency. It pointed out that the signature of the promissory note to guarantee a contractual obligation as well as the assignment of jurisdiction to the arbitrator for settling disputes about such a note had, in spite of the abstract nature of the promissory notes, to be judged in the context of the credit contract.

Thirdly, the Nejvyšši soud held that since the arbitrator was called on to settle the dispute on the basis of the principles of equity and without the applicant's having been able to obtain a review of the sentence handed down, the arbitration clause in question had entailed the existence of a significant procedural disadvantage for the applicant. Principles of equity do not require taking into account the cause of the said promissory note, namely, the guarantee of the consumer credit, as would have been required by the applicable provisions of the Code of Civil Procedure if legal proceedings had taken place.

In light of all of the foregoing, the Nejvyšši soud ruled that the arbitration clause in dispute was improper and void, and that therefore the arbitration award should also be considered as void. It cancelled the decisions handed down by the lower courts and referred the case to the judge in first instance.

Nejvyšši soud, decision dated 20.06.2013, No. 33 Cdo 1201/2012,

www.nsoud.cz

IA/33603-A

(KUSTEDI)

Romania

Constitutional Court – Check on Constitutionality of the Code of Insolvency – Scope

By means of a decision dated 29 October 2013, the Constitutional Court declared the unconstitutionality of the government's emergency order No. 91/2013 concerning the procedures for preventing insolvency and on insolvency, commonly called the "Insolvency Code".

That code, which went into effect on 25 October 2013, was adopted by means of an emergency order in light of the requirements for speed and legislative consolidation set forth in its recitals. It codified the standards relative to creditors' proceedings in a single legal instrument, including the mechanisms for preventing insolvency (the ad hoc mandate and the preventive arrangement with creditors), the bankruptcy of insurance/reinsurance companies and of credit institutions, and the provisions of private international law in this matter. The objective was to reinforce the effectiveness and the dynamism of the proceedings, a balance between the interests of creditors and debtors, and the degree of recovery of liabilities.

That being so, the form and certain provisions of the new legislative bill brought some virulent criticisms, its adoption by means of an emergency order having been considered as an unprecedented action in the legislative process.

The People's Advocate (the Mediator) applied to the Constitutional Court, pointing to the unconstitutionality of article 348 of the code, in accordance with which its provisions, except for the ones relative to groups of companies, were applicable to the creditors' proceedings in progress at the time the code came into effect. He also attacked the constitutionality of article 81, paragraph 3, concerning the suspension of the audiovisual transmission licenses of the companies carrying on activities in that sector, following the initiation of the proceedings and until confirmation of the reorganization plan.

The Constitutional Court accepted the criticisms made by the People's Advocate and declared the unconstitutionality of the provisions attacked in light of the supremacy and of the non-retroactive nature of the law enshrined in articles 1, paragraph 2, and 15, paragraph 2, of the Constitution. It criticized the lack of clarity and of predictability of the provisions under attack and its indirect effects on other basic rights, such as freedom of expression and the right to information. On the basis of the finding of an infringement, inter alia, of the said fundamental rights, the Court applied article 115, paragraph 6, of the Constitution, in accordance with which emergency orders must not prejudice the rights and freedoms provided for under the Constitution. It also stressed the fact that the order also failed to meet the requirements laid down in law No. 24/200 concerning legislative techniques, due to the absence of an indication of the relevant grounds for the emergency or the extraordinary situation justifying the use of such a law-making instrument.
In doing this, the Constitutional Court expanded the scope of the examination it was called on to make, and it ruled that the Insolvency Code as a whole was contrary to the Constitution.

The decision, in turn, gave rise to some debates. We will also point out that it was the subject of a dissenting opinion by one of the members of the Court, who stated that the examination by the Court should have been limited to the provisions that could not be dissociated from the articles that were found to be unconstitutional. In that member's opinion, the consideration of the order as a whole was tantamount to the Court's taking up the case ex officio, something prohibited under article 146, point d), of the Constitution. The dissenting judge also argued for the constitutionality of the document under attack, adoption thereof, in his opinion, being based on the existence in this matter of cumbersome and sometimes contradictory rules having negative economic effects.

As the Court itself emphasised, the decision concerning the unconstitutionality of order No. 91/2013 as a whole resulted in a return to the prior status quo, so that the previous legislation concerning creditors' proceedings was again applicable.

Constitutional Court, government's emergency order dated 29.10.2013, No. 91/2013, www.ccr.ro/files/products/Decizia 447-2013 opinie.pdf

IA33602-A

(CLU)

United Kingdom

European Parliament – Elections – Voting right and eligibility – Beneficiaries – National law providing for persons sentenced to imprisonment to lose their voting rights – Absence of proceeding to judgement relative to a finding of incompatibility of the measure with the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) – Absence of an autonomous voting right in Union treaties

In a decision dated 16 October 2013, the Supreme Court unanimously rejected an application by two prisoners asserting the illegality of the loss of voting rights in the European and municipal elections of persons serving prison terms. Emphasising that the British Parliament had already been applied to in connection with modification of the law in question, the Supreme Court also found that the applicants could not derive an individual voting right in terms parallel to those resulting from article 3 of Protocol no. 1 to the E HR from Union law.

The withdrawal of prisoners' voting rights has applied in the United Kingdom since passage of a law of 1870 concerning loss of entitlement. That law already extended previous legal rules

relative to the forfeiture of certain prisoners' rights. In that connection, the European Court of Human Rights (ECtHR), in a decision handed down in 2004 in the case of Hirst vs United Kingdom (application No. 74025/01), held that depriving prisoners of voting rights was contrary to article 3 of Protocol no. 1 to the ECHR. That decision was then upheld by the Grand Chamber of the ECtHR in 2005. A third decision was handed down along the same lines in 2010 (Greens and M.T. vs United Kingdom, applications Nos. 60041/08 and 60054/089). However, the UK government did not rush to modify the law. On the contrary, in February 2011, the House of Commons, by a vote of 234 to 22, adopted a motion favourable to maintaining the prohibition. However, following an ultimatum from the Council of Europe calling on the United Kingdom to conform to the above-mentioned decisions, the British government presented another text to Parliament on the eve of the deadline referred to in the said ultimatum, proposing several options. No decision has been made yet, the parliamentary committee responsible for considering the text not having yet issued its opinion.

It was under those circumstances that the applicants submitted their application in the case on the main issue. In this case, the applicants had been sentenced to life imprisonment, the first one for the rape and murder of his niece in 1977 and the second one for a murder committed in 1998. Having lost in the lower courts (see Reflets No. 1/2011, pp. 37-38), they appealed to the Supreme Court. In support of their application, they pointed to an infringement both of the ECHR and of Union law. In its decision, the Supreme Court concluded, first of all, that it should reject the first argument drawn from the infringement of article 3 of Protocol no. 1 to the ECHR. It specified that the incompatibility of the loss of voting rights with the ECHR had already been determined by a national court in 2007 and that a reform of the law in dispute was in progress in Parliament. Consequently, the Court held that there was no purpose in again taking note of the incompatibility of the national measure calling for excluding voting rights for prisoners. It also explicitly turned down the Attorney General's proposal to reject application of the principles in the Hirst decision to the facts in the case.

With respect to the second argument, drawn from the infringement of Union law, the applicants had maintained that articles 39, 40 and 52 of the Charter of Fundamental Rights as well as article 20, paragraph 2, point b TFEU grant a right to vote in the municipal and European elections to any Union citizen and that the said right is directly effective. Thus the national courts would be bound, pursuant to Union law, to leave the' internal provisions in question unapplied. In this particular case, that conclusion, according to the applicants, would result from the case law of the Court of Justice, and in particular from the cases Spain / United Kingdom (decision of 18 November 2006, C-145/04, Rec. p.I-7917) and Eman and Sevinger (decision of 12 September 2006, C)300/04, rec. p. I-8055).

Rejecting this argument, Lord Mance found that the Court of Justice did not go so far as to import the principles of the Strasbourg case law concerning article 3 of Protocol no. 1 to the ECDR into the voting right in European elections. In his opinion, the transposition into Union law could give rise to conflicts and to uncertainties.

That being so, according to Lord Mance the decisions made by the Court of Justice in connection with elections have enshrined a right to equal treatment in terms of the national electoral right, and not a voting right. However, the determination of the eligibility conditions relative to the European and municipal elections is incumbent upon the national parliaments. Thus, basing itself on the principle of the acte claire, Lord Mance decided not to refer a preliminary ruling to the Court of Justice.

Supreme Court, decision dated 16.10.2013, R (on the application of Chester) v Secretary of State for Justice; McGeoch v Lord President of the Council (2013) 1 WLR 1076,
www.bailii.org

IA/32647-A

(PE)

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Court proceedings – Criminal proceedings – Freedom of religion or of conviction – Right of the accused to cover her face by wearing a niqab in court

In connection with a case concerning threats made against witnesses, the Crown Court handed down a decision concerning the right of a party to the proceedings to cover her face (with a niqab) in court.

Even if the court's indications are limited to the right of the accused in a case in the Crown Court, the decision examines the situation in the other courts, such as family or employment courts, as well as the situation of the other parties to the proceedings, such as the witnesses, the jurors and the lawyers.

The Crown Court ruled that for purposes of identification before the court, for instance, before the reading of the indictment, issue of a verdict or of a sentence, it is appropriate to deal with this issue at a public hearing and to ask the accused to remove her niqab. If she refuses, testimony by a policewoman who has identified the accused in private and with her face uncovered must be allowed.

The Crown Court considers that, generally speaking, the accused must be in a position to wear the niqab during hearings. However, it insists on the judge's role in informing the accused about the possible consequences of such an action.

Similarly, for purposes of visually identifying the person responsible for an offence, it may prove necessary to order her to remove her niqab.

According to the Crown Court, an accused person must remove her niqab at the time she is questioned. To avoid making her feel uneasy, the court may allow the use of screens or testimony given by means of audiovisual techniques. In the event that the accused refuses to remove her niqab, she may not be questioned and give her version of the facts. Moreover, some very firm instructions must be given to the jury concerning the said refusal.

The Crown Court stressed that these indications concerning the right of a party to the proceedings to cover her face apply to both men and women of all faiths or without faith.

Crown Court, decision dated 16.09.2013; in The Queen v D ® (2013) Eq. L.R. 1034,
www.westlaw.co.uk

IA/33702-A

(VHE)

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Judicial cooperation in civil matters – Jurisdiction, recognition and enforcement of decisions in connection with marriage and parental responsibility – Rule (EC) No. 2201/2003 – Concept of the child's "habitual residence" – Necessary presence in the country of residence?

This Supreme Court decision concerns the question of whether the High Court of England and Wales holds jurisdiction for ordering the "return" of a child who has never been to the United Kingdom. The Supreme Court proves to be divided concerning the interpretation of the concept of "habitual residence".
The child in question, Haroon, was born in Pakistan on 20 October 2011. Of British nationality, he is the fourth child of parents who were married in Pakistan in 1999 and who have resided in England since the year 2000. His father and his three brothers and sisters were born in England and have double British and Pakistani nationality. His mother was born in Pakistan and is entitled to permanent resident status in the United Kingdom.

Prior to Haroon's birth, in 2008, the mother moved to a shelter with her first three children, due to marital difficulties. In October 2009, she arranged a three-week visit to her father in Pakistan, with her children. There, her father, her husband and her family pressured her to reconcile with her husband and forced her to give them the children's passports. As of February 2010, when the mother became pregnant with Haroon in Pakistan, she contacted the shelter and asked it to help her return to England. In May 2011, she managed to return there and filed an action in the High Court to obtain return of her four children.

The High Court ruled that the four children usually resided in the United Kingdom. Its decision was based on the fact that the mother had not chosen for the children to reside in Pakistan and Haroon was born to a mother habitually residing in the United Kingdom, but who was held in Pakistan against her will. On the other hand, on appeal, the Court of Appeal found that a grant of usual residence requires a physical presence. A single judge settled the

dispute differently. He considered that a child born to a mother residing in the United Kingdom but spending a holiday abroad has his or her habitual residence in the United Kingdom as of the time of his or her birth, and not beginning with the date he or she physically enters the country.

Before the Supreme Court, the mother indicated Haroon's nationality as the basis for alternative jurisdiction enabling the court to order his return to the United Kingdom.

It was on that basis that the Supreme Court decided that the High Court held jurisdiction for ordering Haroon's return, and it referred the case to that court to determine whether it was appropriate to exercise that exceptional jurisdiction.

As to the question relative to the concept of "habitual residence", a majority of four judges of the Supreme Court considered themselves unable to handle the case on the grounds that Haroon did not usually reside in the United Kingdom, without even referring a preliminary ruling to the Court of Justice. The Supreme Court's consideration of the matter determined that rule (EC) No. 2201/2003 relative to jurisdiction, recognition and enforcement of decisions in connection with matrimonial matters and parental responsibility applies independently of the fact that there is an alternative jurisdiction in a non-member state and it is highly desirable that the criterion adopted by the Court of Justice for determining the habitual residence also apply to the Family Law Act 1986, the Convention of The Hague of 1980 on international kidnapping of children and to the said rule. A single judge concluded that Haroon, without ever having entered the country, habitually resided in the United Kingdom. That judge considers that there is a serious shortcoming in the protection provided by the Convention of The Hague of 1980 since a child like Haroon, who is considered as not habitually residing in the United Kingdom, can legally be the subject of travel or of a non-return.

According to the response of the High Court concerning the relevance of its extraordinary jurisdiction, a request for a decision on a preliminary matter cannot be excluded;

Supreme Court, decision dated 09.09.2013; in the matter of A (Children) (AP) [2013] UKSC 60, www.supremecourt.gov.uk

IA/33703-A

(VHE)

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

In a decision dated 25 October 2012, the Court of Appeal held that depriving British citizens not resident in the United Kingdom for more than fifteen years of the right to vote conformed to Union law. The applicant was last registered in the voting register in 1992 and has carried out economic activity in Spain since 1995. His request to sign up for the 2010 parliamentary elections was rejected on the grounds of his absence from the national territory, in accordance with national legislation governing voting rights. He asserted that the 15-year rule constituted an attack on the rights of free movement and residence, as provided for in articles 21, 45 and 49 TFEU. This argument was rejected by the High Court, which considered the effect of the said rule as too indirect and uncertain to impair the said rights. Applied to on appeal, the Court of Appeal pointed out that even if establishment of the conditions for being eligible for voting rights is the responsibility of the Member States, legislators must nevertheless take into account the impact that the said conditions may have on the exercise of rights guaranteed by the Union's treaties. In this particular case, the Court of Appeal ruled that the 15-year rule provided for under national legislation did not have the effect of limiting the free movement of British citizens, since the applicant had not provided evidence bearing witness to the harmful effect of the rule in practice on exercise by British citizens of their right to free movement. Even if one were to suppose that there would be a limitation to free movement, the English court considered that justified, in light of its legitimate objective to test the strength of the links between the United Kingdom and its expatriates. Based on the principle of acte claire, it was decided not to refer a preliminary ruling to the Court of Justice. On 11 March 2013, the applicant's request for authorisation to appeal to the Supreme Court was rejected.

Court of Appeal (Civil Division), decision dated 25.10.2012, R (on the application of

James Alistair Preston) / Wandsworth Borough Council (2013) 2 WLR 733,
www.bailii.org

IA/33420-A

(PE)

By means of a decision dated 7 March 2013, the Court of Appeal rejected the appeal filed by two asylum seekers aimed at establishing the State's liability for not having transposed into national law, before the set deadline, directive 2009/3/EC concerning minimum standards for receiving asylum seekers in the Member States. The applicants had submitted two asylum applications. Not having received any response from the national authorities to the second request, they applied for a work permit on the basis of article 11 of directive 2003/9/EC. That application was rejected by the Home Secretary on the grounds that, pursuant to the rules transposing the directive into national law, the said article 11 applied only to the first application for asylum. The Supreme Court ruled in 2010 that that interpretation was erroneous. Based on the case law of the Court of Justice with respect to state liability, the applicants requested compensation for the prejudice suffered because of the minister's decision. Rejecting the appeal, the Court of Appeal held that the minister's misinterpretation did not constitute a sufficiently established infringement of Union law, since it was a question of a misunderstanding that was neither cynical nor flagrant. As in the Cooper case (decision by the Court of Appeal dated 12 May 2010, Cooper / Attorney General, see Reflets No. 3/2012, pp. 21-2), the national court took into account the history of the directive and of the adoption of the transposition measures, as well as the history of the dispute having given rise to the Supreme Court's decision in 2010, in order to conclude that the solution offered by that court was not previously obvious.

See also the Austrian contribution relative to asylum and state liability, pp. 17-18 of this Reflets bulletin.

Court of Appeal (Civil Division), decision dated 07.03.2013, R (on the application of Negassi and Lutalo) / Secretary of State for the Home Department (2013) 2 CMLR 45,
www.bailii.org

IA/33421-A

(PE)

The Supreme Court reconsidered its decision of 13 March 2013, announced in the latest issue of Reflets. In holding that a decision on an application for a finding on a preliminary ruling by the Court of Justice (decision dated 7 October 2010, Loyalty Management UK and Baxi Group, C-53/09 and C-5509, Rec. p. 19187) had had no effect on that initial decision, the Supreme Court settled the dispute on the main issue in a way opposite to the one advocated by the Court of Justice. However, one judge expressed his disagreement.

On appeal, the applicant claimed that Union law obliges the national courts to file a new application for a decision on a preliminary ruling in case an initial decision handed down by the Court on a preliminary ruling proved to be incomplete or unsatisfactory.

The Supreme Court held that it had not questioned the decision by the Court as concerns Union law, but on the other hand it acknowledged the binding nature of that decision. The decision by the Supreme Court dated 13 March 2013 confirmed that court's previous decision, specifying that the latter was based on a more detailed examination of the facts in the case than the one initiated by the Court. In acknowledging that a new request for a decision on a preliminary ruling could be required if the national court adopts a different opinion with respect to the facts in the case, the Supreme Court holds that no such request is necessary in this case. Moreover, and taking into account the fact that the Court considered that the case did not raise any new legal issue (see the absence of submissions by an advocate general), the Supreme Court considers that there was no question of Union law making it necessary to query the Court of Justice.

Supreme Court, decision of 20.06.2013, Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited) (No. 2) (2013) UKSC 42,
www.supremecourt.gov.uk

IA/33701-A

(VHE)

Slovakia

Competition – Dominant position – Abuse – New improper behaviour – Absence of effect – Simultaneous application of Union law and of national competition law – Admissibility

In its decision of 23 May 2013, the Najvšší súd (Supreme Court) concluded that article 102 TFEU was applicable, as well as the corresponding provision of law No. 136/2001 Z.z. relative to protection of competition in a situation in which the anti-competitive behaviour is not based on any of the practices described in the said provisions but constitutes, all the same, an abuse of a dominant position. In particular, the Najvšší súd, ruling on appeal, objected to the reasoning of the judge in the first instance, according to whom, in application of the principle nulla poena sine lege, behaviour that is not concretely defined by law or by the decision-making practices of the competition authority cannot constitute an infringement of the rules of competition.

The dispute arose between a supplier of services relative to collecting and recycling packing waste, which also held an exclusive license from a trademark, and the competition authority (hereinafter the "authority"). The latter had held that by making use of the trademark conditional on payment of fees by the sub-licensees, this even for packaging on which the trademark had not been placed, while use of the trademark by its customers was free, the supplier misused its dominant position on the relevant market originating from its exclusive right. Because such behaviour did not correspond to any of the practices described by the law or in article 102 TFEU, the authority based its decision on the general prohibition of abuses of a dominant position. However, the judge in first instance set aside that decision, holding that, on one hand, application of the said articles in such a case infringed the principle of legality, and moreover, Union law and national law could not be applied simultaneously by the authority. We should point out that the European Commission intervened in the case as amicus curiae and asserted that simultaneous application of the Union law of competition and of national law was permissible. It added that companies are not entitled to call on unpredictability of offences at the time of application of articles 101 and 102 TFEU.

The Najvšší súd recalled the objective nature of the concept of improper exploitation, as defined by the Court of Justice. It pointed out in this connection that it was impossible to provide, in law, for all practices that might constitute an abuse of a dominant position. Thus when improper behaviour does not correspond to any of the practices mentioned by the law for indicative purposes, the authority, to guarantee the effectiveness of the protection of competition, must base its decision on the general ban on abuses. Otherwise it would be impossible to sanction a business for practices that are new, but improper.

In addition, the Najvšší súd pointed out that the State's obligation to protect competition was also provided for in the Slovak Constitution. Since national law and Union law overlap in this matter, national law must be construed with an eye on guaranteeing the legal security and the uniform application of European competition law. In this particular case, the Najvšší súd pointed out that the authority had provided a sufficient legal demonstration of the infringement of the above-mentioned law as well as of article 102 TFEU. The supplier, as an experienced entrepreneur, had been able to anticipate and should have anticipated that its behaviour, in light of the decision-making practice of the European Commission and of the case law of the Court of Justice, constituted an abuse of a dominant position on the relevant market.

Najvšší súd, decision dated 23.05.2013, 8Szhpu/1/2012;
www.supcourt.gov.sk/rozhodnutia

IA/33604_A

((MRAZILU) (KUSTEDI)

- ***Brief (Slovakia)***

In its decision of 3 May 2013, the Najvšší súd (Supreme Court) construed the national provisions relative to detention of citizens of non-member countries in light of the international conventions and of directive 2008/115/EC relative to the common standards and procedures applicable in the Member States to the return of citizens of non-

member countries in irregular status. The question before the Najvšší súd, applied to on appeal by a citizen of a non-member state, was whether that person's illegal entry into Slovak territory with the intention of requesting asylum justified, in itself, that person's subsequent detention for the purpose of return to the partner country on the basis of a re-admission agreement between the European Community and the East European countries.

After having recalled the case law of the European Court of Human Rights (ECtHR), relative to article 5, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as concerns the right to freedom and to safety, the Najvšší súd offered its interpretation of national law from the viewpoint of directive 2008/115/EC. It pointed out in that connection that the Member States could detain a citizen of a non-member state who was the subject of return proceedings only in order to prepare for his or her return. Furthermore, in accordance with article 15, paragraph 4, of the said directive, when it appears that there are no longer any reasonable prospects for return, detention is no longer justified and the foreigner concerned must be freed immediately.

Consequently, the Najvšší súd ruled that in the event that it was obvious, at the time the administrative authority decided on detention, that it would be unlikely, since the foreigner concerned had declared his or her intention of requesting asylum, to meet the purpose of the detention, namely, returning the foreigner concerned to the State from which he or she arrived directly, because of current asylum proceedings, detention could no longer be considered as conforming to Slovakia's constitutional order, to its international commitments relative to protection of human rights, or to the provisions of directive 2008/115/EC. It is incumbent upon the administrative authority to consider not only the legality of the entrance and stay of the foreigner concerned on Slovak territory, but also to consider possible obstacles to enforcement of a return, particularly if such obstacles are brought to its attention before it decides on detention.

Najvšší súd Slovenskej republiky, decision dated 03.05.2013, 1Sza/5/2013,

www.supcourt.gov.sk/data/files/720_stanovisk a_rozhodnutia 7 2013.pdf

IA/33605-A

(KUSTEDI)

Slovenia

Visa, asylum, immigration – Rule (EC) No. 343/2003 (Dublin II rule) – Sovereignty clause – Directive 2003/9/EC – Asylum applicants – Material conditions relative to reception – Scope – Pocket money – Inclusion – Directive 2005/85/EC – National concept of a safe non-member country -
Incorrect transposition of the said directive into national law – Direct effect

In a decision dated 20 February 2013, the Administrative Court of Slovenia (Upravno sodišče Republike Slovenije) took a stand on the evidence required for application of the "sovereignty clause" appearing in article 3, paragraph 2, of rule (EC) No. 343/2003, establishing the criteria and the mechanisms for determination of the Member State responsible for considering an asylum application filed in one of the Member States by a citizen of a non-member country.

In that connection, the Administrative Court specifies, basing itself on the joined cases N.S. e.a. (decision of 21 December 2011, C-411/10 and C-493/10, not yet published in the ECR), that the presumption of adequate protection of the fundamental rights by the Member States appearing in the said article can be reversed. Consequently, it considers that the second Member State examining an application for asylum must judge the evidence showing that the applicant could be subjected to a serious infringement of his fundamental rights if he were to be returned to the first Member State in which he also filed an asylum application.

In the same matter, in a decision dated 17 January 2013, the Administrative Court had an opportunity to make a decision on the scope of a Member State's obligation to provide access for an asylum applicant to the "material conditions relative to reception" appearing in article 13, paragraph 1, of directive 2003/9/EC, relative to minimum standards for receiving asylum seekers in the Member States. . Even though the said directive does not provide any details concerning the field of application of the said concept, the Administrative Court recalls,

like the decision by the Court of Justice handed down in the Cimade case (decision of 27 September 2011, C-179/11, point 39, not yet published in the ECR), that the said concept includes housing, food and clothing as well as a daily allowance. Consequently, the Administrative Court considers that the Member States' obligation to provide asylum seekers with pocket money also falls within the field of application of he said concept. It adds that such an interpretation is justified by the length of the proceedings during which the applicants for asylum are present on the territory of the Member State concerned. Moreover, the Administrative Court emphasizes that the said obligation also results from article 1 of the Charter of Fundamental Rights, which specifies that the Member States must respect and protect human dignity.

Finally, in a decision dated 9 January 2013, the Administrative Court clarified some points relative to the national concept of safe non-member country appearing in article 61 of the Slovenian law on international protection. This concept corresponds to the one contained in article 27, paragraph 2, point a) of directive 2005/85/EC relative to minimum standards governing the procedure for granting and withdrawing refugee status in the Member States. It implies that it is incumbent upon each Member State to establish, by means of a governmental act, the list of safe non-member countries.

The Administrative Court specifies in that connection that because of an improper transposition of article 27, paragraph 2, point a) of directive 2005/85/EC into Slovenian law by article 61 of the law concerning international protection, the grounds for its decision are based directly on the said provision of the directive. It stresses the fact that the law on international protection provides in article 61, on one hand, that the application of the concept of safe non-member country is optional, and on the other hand that for that provision to be applicable, the applicant needs only to have made a stay in the said country. On the other hand, the said provision of directive 2005/85/EC presupposes the existence of a link between the applicant and the safe non-member country concerned as well as mandatory application of this concept in proceedings relating to applicants for asylum.

Upravno sodišče Republike Slovenije, decision dated 20.02.2013, Sodba I U 283/2013-5; decision dated 17.01.2013; Sodba I U 1921/2012-15 and decision of 09.01.2013, Sodba I U 1/2013-5,

www.sodisce.si/znanje/sodna_praksa/upravno sodisce_rs/

IA/33372-A
IA/33373-A
IA/33374-A

(SAS)

**** Brief (Slovenia)***

In a case concerning determination of the competent court in a dispute involving two commercial companies, one with its registered office on Slovenian territory and the other on Italian territory, the Koper Court of Appeal (Višje sodišče v Kopru); Commercial Disputes Chamber, construed article 5, paragraph 1, of rule (EC) No. 44/2001 concerning judicial jurisdiction and recognition and enforcement of decisions in the civil and commercial matters.

That text provides that a person resident on the territory of a Member State may be sued in another Member State in connection with contractual matters in the court of the place at which the obligation constituting the basis for the application has been or must be executed. With respect to services rendered, the place of execution of the obligation constituting the basis for the application is the place in the Member State where, pursuant to the "contract", the services have been or should have been provided.

Even though the services rendered, namely supplying electronic parts for the production of chips by the defendant party, were not supplied "pursuant to a contract", the Court of Appeal holds that that they are closely connected with the contract that the companies in question concluded, insofar as they were supplied for purposes of subsequent conclusion of the said contract.

Consequently, in light of the fact that the said services were provided on Slovenian territory, the Court of Appeal considers that the Slovenian courts hold jurisdiction for settling the dispute in question.

Višje sodišče v Kopru, order dated 24.01.2013, Sklep Cpg 277/2012,
www.sodnapraksa.si

IA/33375-A

(SAS)

2. Non-member countries

United States

Legal protection of biotechnological inventions – Isolation of human genes and artificial creation of their synthesis – Patentability – Exclusion of human genes from patentability – Acceptance of the patentability of the synthesis of the said genes

In its decision of 13 June 2013, Association for Molecular Pathology et. Al v. Myriad Genetics, inc. e.a., the US Supreme Court considered whether human genes, as segments of deoxyribonucleic acid (DNA) and their artificially created synthesis – complementary DNA – could be patentable pursuant to article 101 of the Patent Act, 35 U.C.S. §101 – which provides that whoever invents or discovers a composition of useful and new matter (…) or any new and useful improvement thereof may obtain a patent (…)". That article has been interpreted by the Supreme Court in that it contains an implicit exception in accordance with which "the laws of Nature, natural phenomena and abstract ideas are not patentable."

In this case, the applicants, a group of medical patients, lobbies and university researchers, had filed an appeal aimed at nullification of a certain number of patents filed by the defendant, Myriad Genetics, on two human genes, BRCA1 and BRCA2, which are important in diagnosis and treatment of breast and ovarian cancer. If the patents were recognized as valid, they would give the defendant the exclusive right to isolate the said genes of an individual and to artificially create their DNAc.

The Supreme Court unanimously held that a segment of DNA of natural origin is a product of Nature and is not patentable because it is isolated from the surrounding genetic material. Since the defendant did not create or modify the genetic structure of the DNA, the Supreme Court considered that the discovery of the location of the BRCA1 and BRCA2 genes did not, in itself, make the BRCA genes such as to be considered as "a composition of useful and new matter" and is therefore not an inventive act. The Supreme Court also ruled unanimously that DNAc is not a product of Nature and can be patented, unless it contains segments of a natural origin. In that situation, a short strand of DNAc can be distinguished from natural DNA.

Finally, the Supreme Court considered it important to state that the case did not concern claims to the innovative method of handling genes while looking for the BRCA1 and BRCA2 genes or the patentability of the scientific alteration of the genetic code of the DNA.

We should point out that the Court of Justice expressed its view on the issue of legal protection of biotechnological inventions in the Brüstle case (decision dated 18 October 2011, C-34/10, Rec. p.I-9821).

US Supreme Court, Association for Molecular Pathology et al v. Myriad Genetics, Inc., et al., Opinion of the Court of 13.06.2013, 569 U.S.,
www.supremecourt.gov/

IA/33801-A

(GRGICAN)

**** Brief (United States)***

In its decision of 25 June 2013, the US Supreme Court ruled on the constitutionality of two articles of the Voting Rights Act (42 U.S.C. §§ 19731973bb-1, hereinafter the "VRA", which provides for different treatment of the federal States in regulating voting procedures.

The VRA was promulgated in 1965 to struggle against race discrimination rooted in voting. Article 2 of the VRA, which prohibits any "practice or procedure" that "results in a reduction or a denial of the right of any citizen . . . to vote because of race or color" and which applies to the entire nation, was not in question in the present case.

Article 5 of the VRA requires the federal States to obtain authorisation from the federal government (the preliminary check requirement) before promulgating a voting

law. Article 4 of the VRA applied this requirement only to the "covered jurisdictions". Article 4 (b) of the VRA supplied the coverage formula to the effect that the "covered jurisdictions" are the federal States or political subdivisions that, in the past, have instituted requirements such as tests or practices giving rise to registration and low voter turnout (less than 50%) in the 1960s and the beginning of the 1970s. The preliminary check obligation and the coverage formula initially expired after five years, but the law was extended on several occasions. In 2006, it was extended for another 25 years, but the coverage formula was not modified.

Without expressing themselves on article 5 of the VRA, the majority of the Supreme Court justices held that article 4, section b) of the VRA is unconstitutional. Saying that voting discrimination still exists, the justices found that the coverage formula is based on old 10-year census data and abandoned test practices and discriminatory provisions. In view of the fact that voter registration numbers and voting participation in the territories covered had increased spectacularly in the past 40 years, the majority of the Supreme Court held that article 4, section b) of the VRA infringed the basic principles of sovereign equality among the States, federalism reserving, for the federal States, the power of regulating elections pursuant to the 10th amendment. For those reasons, the minority concurrent opinion stated that article 5 of the VRA was also unconstitutional.

Emphasizing that Congress may choose any "appropriate" and "fully suitable" means for achieving a legitimate constitutional purpose, the dissenting court minority made articles 4, section b), and 5 of the VRA subject to the test of proportionality. Attributing the decline of the number of cases of discrimination connected with voting in the jurisdictions concerned to promulgation of the VRA, and finding therein the proof of the existence of a second generation of obstacles to minorities' voting rights, the dissident minority stated that the VRA had proven its effectiveness and that the formula relative to coverage and the requirement for an advance check continue to meet the present needs. Consequently, that minority considered that those two articles are constitutional.

U.S. Supreme Court, Shelby County, Alabama / Holder, Attorney General et al., Opinion of the Court of 25.06.2013, 570 U.S.,
www.supremecourt.gov/,

IA/33802-A

(GRGICAN)

Switzerland

Competition – Right to effective judicial protection – Judicial review of the decisions made by the national authority in connection with competition – Review of full jurisdiction, both in fact and in law – Infringement – Absence

By means of a decision of 29 June 2012, the Swiss Federal Court took a stand, for the first time, on the application of article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with respect to the sanction decisions made by the Swiss national competition authority, the Competition Commission (Comco).

The Federal Court first highlighted that in light of the criteria developed by the European Court of Human Rights (ECtHR), the sanctions provided for by law with respect to cartels are of a criminal or quasi-criminal nature and that proceedings in the ComCo do not meet the conditions laid down in article 6, paragraph 1, of the ECHR. Consequently, the Federal Court considered the issue of whether the judicial review of the sanction decisions made by the ComCo by the Federal Administrative Court (TAF) does indeed constitute a review by an authority empowered to make any order required for justice in the case in accordance with the requirements laid down by the ECtHR in its decision in A. Menarini Diagnostics / Italy of 27 September 2011 (see Reflets No. 2/2011, p. 49).

In that connection, basing itself on the Sigma Radio Television ltd. / Cyprus decision of 21 July 2011, the Federal Court pointed out that even if the jurisdiction reviewing decisions adopted by the national competition authority has an obligation to make a review with the power of making any order required for justice in the case, in fact as well as in law, in order to comply with the ECtHR requirements, the

latter court does not rule out the possibility that the review may be more limited in the fields involving expert opinions, provided certain criteria are met. Thus the judge's review must be evaluated in accordance with the issue involved (in particular, if it requires special expertise), in light of the way in which the procedural guarantees have been safeguarded within the framework of development of the decision under attack, and finally in light of the object of the dispute, while comparing the admissible arguments put forth with the ones actually considered by the judge. So one cannot exclude, in any absolute manner, the possibility that the TAF will rely on the technical findings of the ComCo, provided the review actually made by the judge complies with the criteria laid down by the ECtHR in the Sigma Radio Television case, and, in particular, makes a point-by-point examination of the claims and arguments put forth by the applicant.

Consequently, the intensity of the review required by the Swiss Federal Court seems to endow the competition authority with a certain amount of judgmental power in the economic domain, reflecting the constraints inherent to the concrete conditions governing the judge's intervention in areas requiring specialised technical expertise.

Beyond that decision, it is interesting to point out that on 22 February 2012, the Swiss government had proposed a thorough reform of the institutional organisation of the authorities in the field of competition. In the present model, the decisions under competition law are made by an independent commission, the ComCo, which has its own secretariat and consists of university law or economics professors, as well as of representatives of economic associations and of the consumer organisations; The review of its decisions is assigned to the TAF, with appeals possible to the Federal Court. The reform would consist of implementing an independent competition authority carrying out the investigations and submitting its proposals to an independent court of first instance, which would rule and decide on the possible sanction. That new competition court would be an integral part of the TAF. The Government's proposal is still under discussion in the Swiss Parliament.

Federal Court, decision dated 29.06.2012, Publigroupe, 2C_484/2010, ATF 139 I 72, *www.bger.ch/*

IA/33543-A

[MEYERRA]

B. Practice of International organisations

World Trade Organisation

WTO – GATT – Agreement on measures concerning investments and connected with trade – Agreement on subsidies and compensatory measures – Measures relative to the programme of guaranteed repurchase rates in the sector of renewable energy production

At its meeting held on 24 May 2013, the Dispute Settlement Organ adopted two reports by the Appeals Organ (hereinafter the "Organ") concerning certain measures adopted in the sector of production of renewable energy by the Government of the Canadian Province of Ontario. The measures in question guaranteed the repurchase price of the electricity produced from certain renewable energy sources provided the production equipment respects minimum levels of national content. Those guaranteed repurchase measures were supposed to increase the supply of electricity produced from renewable energy sources.

The European Union and Japan, respectively, filed complaints against those measures, alleging that they were incompatible with the General Agreement on Tariffs and Trade of 1994 (GATT), the agreement on Trade-Related Investment Measures (connected with trade) (TRIM Agreement) and the agreement on Subsidies and Countervailing Measures (concerning subsidies and compensatory measures) (SCM Agreement). More specifically, the complainants alleged that the measures in question are investment measures, connected with trade and incompatible with article 2.1 of the TRIM Agreement. Moreover, the complainants asserted that the measures entailed less favourable treatment for the imported products than the treatment provided for similar products originating in Ontario, in infringement of article III:4 of the GATT Finally, the complainants alleged that

Canada grants subsidies prohibited under articles 3.1 b) and 3.2 of the SCM Agreement.

First of all, the question arose as to whether the measures mentioned in article 2.2 and in paragraph 1 a) of the list of examples of the TRIM agreement could benefit from the exception to the obligation of granting national treatment under article III:8 of the GATT. That exception applies to the measures governing certain acquisitions by the governmental organs "for the needs of the authorities and not to be resold in trade". According to the special group, the measures in question were incompatible with article 2:1 of the TRIM Agreement and with article III:4 of the GATT, but benefited from the exception. On appeal, the European Union asserted that the measures mentioned in article 2:2 and in section 1a) of the list of examples of the TRIM agreement cannot benefit from the exception. Noting that the provisions of the TRIM Agreement are not supposed to limit the rights resulting from the GATT, the organ confirmed that the measures targeted in article 2:2 and in section 1 a) of the list of examples of the MIC Agreement could benefit from the exception provided for in article III:8 of the GATT.

Supplementing the legal analysis under article III-8 of the GATT, the Organ confirmed that the measures in question were not covered by the exception. According to the Special Group, there is a close relationship between the electricity bought by the authorities and the production equipment targeted by the measures in question. However, the Special Group found that the purchases made by the Ontario authorities "for resale in trade" did not come under article III:8 a). Called on to interpret article III-8 a) of the GATT for the first time, the Organ provided a global interpretation of the article. The Organ then pointed out that the electricity acquired by the Authorities did not compete with the production equipment that was the object of the regulations. Canada did not dispute, on appeal, the finding by the Special Group, according to which the measures are incompatible with article 2:1 of the TRIM Agreement and article III:4 of the GATT. Consequently, the Organ maintained the conclusion to the effect that the measures are incompatible with the aid provisions.

Secondly, with respect to the allegations in connection with the SCM agreement, the Organ upheld the characterisation of the disputed measures as "purchases of goods" by the authorities in light of article 1.1 a) a) iii) of the SCM Agreement. On appeal, Japan proposed some alternative characterisations in light of article 1.1 a), or, on a subsidiary basis, some cumulative qualifications. Recalling the report adopted in the case DS316, the Organ held that a transaction can fall into several categories of financial contributions. However, the Organ ruled that Japan had not established, in this particular case, that the composite transaction has additional characteristics justifying a characterisation other than as "purchases of goods".

As to whether the measures in dispute granted an advantage in the meaning of article 1.1 b) of the SCM Agreement, the Organ set aside the conclusion by the Special Group to the effect that the complainants had not established the existence of an advantage. According to the Special Group's report, the relevant market for purposes of analysis of the existence of an advantage was the single market for electricity coming from all sources of energy. The Organ criticised that definition, which takes account only of the substitutability in demand and ignores substitutability in connection with supply. Both the appropriate market and the appropriate reference point should have been determined in light of the definition provided by the authorities of Ontario of diversified energy supply According to the Special Group's report, the competitive wholesale market for electricity would not be an appropriate point of reference, since intervention by the authorities was required to reach certain objectives of general policy. Noting that a constant and reliable electricity market would not exist without the authorities' intervention, the Organ held that one must not exclude the idea of treating the prices resulting from the authorities' intervention as market prices. Finally, the Organ concluded that it could not determine whether the measures in dispute granted an advantage, because the evidence was insufficient. Consequently, the Organ acknowledged its inability to reach a conclusion as to whether the measures in dispute are subsidies prohibited under articles 3.1 b) and 3.2 of the SCM Agreement.

Reports by the WTO Appeals Organ, adopted on

24.05.2013, cases DS412 and DS426, www.wto.org/

[LOIZOMI]

United Nations Organisation

Treaty concerning the arms trade – Regulation of international trade in conventional weapons – Transfer and exportation bans – Supervisory obligations at national level

On 2 April 2013, the General Assembly of the United Nations Organisation (UNO) adopted a treaty concerning the arms trade. Article 1 states that the object of the treaty is to improve the regulation of international trade in conventional weapons with a view to preventing and eliminating illicit trade in conventional weapons, as well as their divergence. The material field of application of the treaty is defined in article 2, which describes 8 types of conventional weapon. According to article 5, paragraph 3, of the treaty, no national definition will refer to descriptions of a more limited scope than the ones used by the UNO. In addition, the fields of application of articles 6 and 7 of the treaty extends to munitions, parts and components pursuant to articles 3 and 4 of the treaty.

The treaty prohibits the participating states from transferring conventional weapons when certain risks are present, and it laid obligations on them relative to supervision, communication and preservation of data relative to transfers of conventional weapons coming under their jurisdiction. To be more precise, article 6 of the treaty prohibits the contracting parties from transferring conventional weapons in infringement of the arms embargos, in infringement of their international obligations relative to the illicit arms trade, or if they are aware of the fact that the said weapons could be used to commit war crimes. In addition, article 7 requires the contracting parties that export convention weapons to assess the risks to which their exports might give rise: committing serious infringements of humanitarian international law; serious infringements of human rights; acts of terrorism; infractions committed by organised transnational crime; serious acts of violence based on sex or against women and children. If there is a dominant risk that one of the negative consequences listed in the treaty may come about, the party state may not authorise exportation.

The party States are required, pursuant to article 5 of the treaty, to designate a national authority empowered to establish, update and communicate a national control list to the Secretariat. In addition, article 12 provides for the preservation of the data relative to exports and to weapons routed over the territory of the party state, in the form of a national register. Finally, articles 9 and 10 require the party states to take the steps required to regulate transit or transhipment, as well as brokerage, when coming under their jurisdiction, while article 11 requires the party States to take steps to prevent their diversion.

Treaty on the arms trade adopted by resolution 67/234B dated 02.04.2013, www://treaties.un.org/

[TCR] [MADDEMA]

C- National legislation

Belgium

Law creating a Family and Youth Court

The law of 3 July 2013 creating a family and Youth Court was adopted after several years of debate, both in civil society and in parliament. This represents a fundamental reform of the way of dealing with family disputes *sensu lato,* which will have some important repercussions for citizens facing family difficulties and for practitioners' daily life.

As of the time at which the law becomes effective, scheduled for 1 September 2014, all disputes of the family type – divorce, descent, accommodation, alimony, estate settlement – will be grouped for hearing before one and the same judge, whereas at present they are scattered among four different courts (judge of the peace, Civil Chamber of the Court of First Instance, Youth Court and presiding judge of the Court of First instance).

All this will be characterised not only by a centralised jurisdiction, but also by a single magistrate, on the basis of the principle "one

family – one dossier – one judge", which will offer the said judge better knowledge of the specific nature of a family conflict. As a single jurisdiction, he will also apply similar procedural rules, whereas at present some elementary rights such as hearing the child, are granted automatically or are merely optional, depending on the jurisdiction in which the proceedings take place.

The new law institutes, by means of a chamber of amicable settlements, alternative procedures for settling family conflicts.

www.moniteur.be,
www.justice-en-ligne.be

[NICOLLO]

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Royal decree relative to procedures for protection of competition

The law of 3 April 2013 relative to protection of competition not only transferred the Belgian Competition Authority from status as an administrative jurisdiction to status as an autonomous department, endowed with legal personality, but in addition, by providing for its representation before the Brussels Court of Appeal in connection with proceedings involving the legality of its decisions (article IV.20 paragraph 1,4°), it also took account of the decision by the Court of Justice relative to participation by national competition authorities in legal proceedings aimed at their decisions in an Appeals Court (decision of 7 December 2010, Vebic, C-439-08, Rec. p. I-12471).

In addition, the procedural rules were amended so as to facilitate the handling of dossiers. In that connection, a royal decree of 30 August 2013 relative to proceedings concerning protection of competition provides some details concerning the investigatory procedure in connection with auditing as well as concerning the decision-making procedure before the Competition College, and it contains requirement that are common to all of the proceedings. In the first place, with respect to the investigatory procedure, the decree lays down the rules applicable to appearance (article 3) and sets forth some specific procedural provisions for restrictive practices (articles 2 to 5), compromise settlements (articles 10 and 11) and concentrations (articles 12 and 13). In second place, with respect to proceedings before the Competition College, the decree states the rules applicable to remarks (article 14), to interventions (articles 15 and 22), to appearances (articles 3 and 21) and to hearings (articles 19 and 21). Finally, for each of the procedures, the decree lays down the rules relative to calculation of the time limits (articles 27 and 28) and the ones concerning the transmission of documents by the competition authority (article 29).

Royal decree of 30.08.2013 relative to proceedings in connection with protection of competition, M.B., dated 06.09.2013,

[NICOLLO] (WAGNELO)

Bulgaria

Modification of the rules of the Bulgarian Code of Penal Procedure aimed at establishing recourse by the accused for the purpose of expediting criminal proceedings characterised by their excessive duration

The law of 13 August 2013, modifying and supplementing the Code of Penal Procedure (hereinafter "CPP"), creates a new chapter instituting a new procedure aimed mainly at enabling an accused party to force the authorities responsible for investigation and prosecution to take steps, under the judge's supervision, with a view to expediting criminal proceedings that have experienced delay for various reasons.

Introductory remarks

This legislative modification originates, in the first place, from article 6 paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), entitling any person to have his or her case heard fairly and within a reasonable period, and secondly, from the national measures adopted following enforcement of the decisions handed down by the European Court of Human Rights (ECtHR) handed down in the cases Dimitrov and Hamanov / Bulgaria (decision of 10 May 2011, applications numbers 48059/06 and 2708/09) and Ganche / Bulgaria (decision dated 12 April 2007, application No. 57855/00), according to which

Bulgaria must institute one or several types of recourse to counter the excessive duration of criminal proceedings.

We should point out that following the Dimitrov and Hamanov / Bulgaria cases, Bulgaria introduced, in the law concerning judicial power, recourse aimed at expediting proceedings and making compensation possible for the damage caused by the excessive duration of such proceedings. However, the Bulgarian Authorities felt that the said application for compensation did not provide the guarantees needed for defence of the accused and for consideration of his case within a reasonable period and without delay. The preference for an appeal for acceleration rather than a mere application for compensation was also expressed by the ECtHR in its Ganchev /Bulgaria decision.

In its grounds relative to establishment of the said application for acceleration by new chapter 26 of the CPP, the Bulgarian legislators emphasise that such recourse is unquestionably advantageous in comparison with one aimed solely at compensation, since it also avoids any need for establishing successive infringements by the same proceedings, and is not limited to acting solely a posteriori, as would be the case with an application for compensation.

Proceedings at the accused's request

Pursuant to the said chapter, the accused may apply to the Court of First Instance holding jurisdiction for ruling on the case for a quick decision concerning the legality of his or her detention, provided, beginning with the date on which he or she is charged, a period of two years, in the event of a serious offence, or of one year for the other offences has elapsed (article 368 of the CPC).

Article 369 of the CPC provides that the Court ruling is made by a single judge and the Court is to make its decision on the accused's request within a period of seven days at most. When the judge finds that the required mandatory deadlines have passed, he refers the case to the prosecutor, who may close out the matter within a period of two months, either by referring it to the Court for an indictment or by concluding an agreement with the parties with a view to settling the case. If the prosecutor does not meet his obligations by respecting the two-month period or if the settlement agreement is not approved by the Court, the latter puts an end to the proceedings. That decision is not subject to appeal.

Law modifying and supplementing the Code of Penal Procedure, published in the Darzhaven vestnik (the Bulgarian Official Journal) No. 71 dated 13.08.2013,
www://pravo0.ciela.net/Document.aspx?id=2135512224&category=normi&lang=bg-BG

[NTOD]

Cyprus

Economic legislation passed following the crisis and in connection with the coming into force of the agreement on facilitation of financial support between, on one hand, the European Stability Mechanism (ESM) and, on the other hand, the Republic of Cyprus and the Central Bank of Cyprus

In order to guarantee payment of the next tranche of financial aid by the International lenders, the Parliament of Cyprus adopted a new series of laws concerning the memorandum of understanding 'hereinafter the "memorandum") between the Republic of Cyprus and the European Commission (acting in the name of the ESM), aimed at restoration of the solidity of the banking system of Cyprus, continuation of the consolidation of national fiscal policy and implementation of the structural reforms in order to support the country's competitiveness and lasting and balanced growth.

The purpose of the first series of laws is to provide continuous support for the banking sector. First of all, Parliament adopted a law establishing a compensation system for the provident fund and the pension deposits of Laiki Bank, the bank in bankruptcy, which represents a necessary measure with a view to re-establishment of Cypriot consumers' trust in the banking system. Secondly, Parliament will base itself on a previously adopted law relative to the restructuring of financial institutions (law No. 17(I)/2013) in order to adopt some new measures concerning the restructuring of the banking sector, including a law transferring responsibility for supervision of the cooperative banks to the Central Bank of

Cyprus. The latter law gave rise to a certain amount of resistance by the parliamentary opposition and the public. Furthermore, Parliament adopted a law for recapitalisation of Helinik Bank, by means of automatic conversion of the convertible bonds into shares.

The second series of laws concerns a commitment made by the Republic of Cyprus to improve the financial system in terms of transparency and good governance. An important legislative modification was made concerning the law of Cyprus relative to trusts and the law regulating companies providing administrative services (trustees). The new legislative provision provides for a register of the trusts established in Cyprus and required retroactive registration of trusts and of the names of all administrators. Furthermore, the law concerning prevention of and the prevention of activities constituting money laundering was modified for the purpose of strengthening the measures for preventing money laundering, including measures on behalf of more effective supervision and a more concrete responsibility of the financial sector for reporting questionable activities.

The new measures were welcomed with satisfaction at the last meeting of the Eurogroup on Brussels. The financial aid tranche has already been delivered.

Laws Nos. 102(1)/2013 to 108(I)/2013 as concerns the banking sector, Laws Nos. 98(I)/2013 and 109(I)/2013 with respect to legislation concerning trusts, and law No. 101(I)/2013 as regards money laundering (Official Journal, appendix I, part 1, No. 4404, p. 731 to 953),

www.mof.gov.cy/mof/gpo/gpo.nsf/All/FD00C6F28EEC9CE1C2257BE1003BF7F7?OpenDocument

[LOIZOMI]

Spain

Law relative to support for entrepreneurs and their internationalisation

Law No. 14/2013, concerning support for entrepreneurs and for their internationalisation, was adopted for the purpose of encouraging entrepreneurial initiatives, and in a concern for proposing economic recovery. The law contains, in the first place, some measures for orienting the education system in the spirit of enterprise, measures for administrative simplification, and measures for facilitating access to government contracts. Certain new features were also introduced with respect to commercial law, such as the limited company of successive formation (making it possible to create companies without any requirement for a minimum capital), or the entrepreneur with limited liability system aimed at preventing the entrepreneur from settling or her his debts on his usual residence. Moreover, the law also modifies legislation on bankruptcy and the rules relative to contributions of independent workers, and it introduced certain fiscal measures relative to income tax, company tax and value added tax. With respect to the latter tax, the law benefits from the exception provided for in directive 2006/112/EC relative to the common system of value added tax, in accordance with which the Member States may provide that taxes become payable for certain operations for certain types of taxpayers at the time of collection of the amount.

As concerns internationalisation, the law provides for certain specific measures relative, inter alia, to access to international financing. Significantly, the law constitutes a modification of the rules concerning entry into and stays in Spain for citizens of non-member countries, in particular, investors, highly qualified workers and persons temporarily transferred by their company. The law specifies that the residence permits issued will be treated in accordance with directive 2011/98/EC, establishing a single application procedure with a view to issue of a single permit authorising the citizens of non-member countries to reside and to work on the territory of a Member State and establishing a common base of rights for the workers from non-member countries who legally reside in a Member State.

Law No. 14/2013, dated 27.09.2013, relative to support for entrepreneurs and for their internationalisation (Official Journal 233, dated 28 .09.2013, Section I, p. 78787), www.boe.es/boe/dias/2013/09/28/pdfs/BOE-A-2013-10074.pdf

[IGLESSA]

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Royal decree laying down the criteria and the procedure for establishing liability in the event of a failure to conform to Union law

Organic law 2/2012 of 27 April 2012 relative to budgetary stability and financial viability provides, for the first time in the Spanish legal order, a general system for division of responsibilities among the public administrations in the face of disregard of the obligations resulting from Union law and for which the state alone is responsible vis-à-vis the European Union. Royal decree 515/2013 of 5 July 2013, in accordance with the said law, approves the procedure for implementing this division as well as the criteria for determination of such responsibility. In this connection and to date, no general procedure has existed, except for certain references in sectorial rules in areas, such as the funds (structural and cohesion) from the European Union, the commitments offered in connection with budgetary stability, and the services provided on the interior market.

Article 8 and the second additional provision of the Spanish law, mentioned above, provide that the public administrations that, in performance of their functions, have disregarded the obligations resulting from Union law, thus giving rise to a sanction on the Kingdom of Spain imposed by the European institutions, are found to be liable insofar as such disregard is attributable to them. The Council of Ministers will be empowered to establish the said responsibility, within a period of 6 months, as well as for establishing either payment of a fine, or compensation, or a debt withholding from the amount due from the State to the Administration or to the entity responsible for any concept, budgetary or otherwise. This liability is applicable to all administrations, organs and public entities whose disregard of Union law has entailed, for Spain, payment of a fine, a financial correction, a reduction of the amount transferred or of the funds coming from the European Union budget that Spain is entitled to claim. The State's action to pass along such types of liability is subject to a four-year statute of limitations beginning with the time at which the State has paid the fine imposed on it.

Real Decreto 515/2013, de 05.07.13, por el que se regulan los criterios y el procedimiento para determinar y repercutir las responsabilidades por incumplimiento del Derecho de la Unión Europea; BOE-A-2013-7385, No. 161, dated 06.07.2013,
www.boe.es

[NUNEZMA]

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Law setting forth the rules governing certain taxes in the field of administration of justice and of the National Institute of Toxicology and Forensic Medicine

Law 10/2012 of 20 November 2012, relative to certain taxes in the field of administration of justice, established a new tax for access to justice, in the civil order, administrative and social continuous proceedings, in effect since December 2012. Since its approval, the said law has given rise to considerable legal discussion about its compatibility with the Spanish constitution and concerning observance of certain fundamental rights, since payment of the said tax is established as a condition for exercise of effective judicial guardianship recognised in article 24 of the Spanish Constitution. The preamble to the law states that the right to effective judicial protection must not be confused with the right to legal aid, and that citizens resorting to the Courts must contribute to part of the costs that the said public service implies so as to rationalise the exercise of judicial power and to financially support the judicial system, in particular, the legal aid service. The law justifies the levying of such taxes on the basis of decision 20/2012 made by the Constitutional Court dated 16 February 2012, which upheld the constitutionality of the tax for access to justice established by law 53/2002 of 30 December 2002 in the Civil Order, for legal persons acting for profit, subject to company tax, and with a high annual billing, plus having to contribute to the financing of the public costs resulting from exercise of judicial power that targets the defence of their rights and their legitimate interest.

The coming into force of law 10/2012 as well as its subsequent modification by Royal Legislative Decree No. 3/2013 also gave rise to doubts for the national courts as to their application. Those doubts even entailed, in the case of the Supreme Court, adoption of an

agreement, as a plenary panel, aimed at non-application of taxes on access to justice to certain communities: employees, social security beneficiaries, civil servants and statutory staff, as well as labour unions in the filing of certain types of recourse in the social order.

The debate is not limited to the social order alone. Thus the Audiencia Nacional recently submitted the question of unconstitutionality to the Constitutional Court in connection with the administrative contentious proceedings order, since the said law may affect citizens' access to the public service of justice, which could become an "unnecessary and unjustified obstacle" to obtaining the guarantee relative to the right to effective judicial protection.

Ley 10/2012, de 20.11.12, por la que se regulan determinadas tasas en el ámbito de la Administración de Justicia y del Instituto Nacional de Toxicología y Ciencias Forenses; BOE-a-2012-14301, nº 280, de 21.11.12, www.boe.es

[NUNEZMA]

Ireland

Transposition of directive 2011/36/EC

The Criminal Law (Human Trafficking) (Amendment) Act, 2013 was adopted in order to transpose directive 2011/36/EU concerning prevention of human trafficking and the struggle against that phenomenon, as well as protection of victims and replacing framework decision 2002/629/JAI of the Council. The said law, contrary to the one that already existed in Ireland, includes, in the concept of human trafficking, traffic in human beings for purposes of forced begging or exploitation for criminal activities. The Criminal Law (Human Trafficking) Act, 2008, had already criminalised human trafficking for the sex industry, for purposes of exploitation of labour, or organ removals.

Furthermore, the new law provides that the fact that a violation is committed by a civil servant in exercise of his functions is considered an aggravating circumstance in determination of the sanction. Finally in order to transpose the provisions of directive 2011/36/EU relative to reducing secondary victimisation, the said law provides for video recording of the depositions made by minors who are victims of or witnesses to human trafficking. Previously, that possibility was reserved for minor victims younger than 14 years of age.

Criminal Law (Human Trafficking) (Amendment) Act, 2013, www.oireachtas.ie

[TCR] [MADDEMA]

Italy

Adoption by the Italian government of legislative decrees providing improvements in connection with citizenship and immigration

The first one, in chronological order, namely decree law No. 69/2013 concerning "urgent provisions for relaunching the economy", provides for some simplifications in connection with the procedure for acquiring Italian citizenship. In the meaning of article 33 of the said decree, non-performance of the administrative obligations by the parents or the administrative authorities is not applicable to a foreigner born in Italy and having resided there until he comes of age, for acquisition of citizenship. For purpose of demonstrating that he had resided uninterruptedly in Italy, he may provide either official documents or any other document (invoices, etc.). Finally, the said provision lays down an obligation incumbent upon the competent authorities to inform the interested party of his right to be able to acquire Italian nationality.

Legislative decree No. 93/2013 concerning the provisions for preventing and controlling gender-based violence provides, in article 4, for taking into account the status of citizens of non-member countries whose stay in the country is irregular and who are the victims of domestic violence, but do not report the violence they suffer to the authorities because of the risk of expulsion. Thus the said article added a provision to the legislative decree concerning immigration (No. 286/1998) providing a possibility for obtaining a residence permit for a victim of domestic violence. In particular, it is necessary, with a view to issuing a residence permit, that situations involving violence or abuse vis-à-vis

a foreigner as well as a real danger to that person's integrity exist. The said provision supplies a definition of domestic violence, excluding cases in which it occurs in connection with cohabitation for employment reasons. Withdrawal of the permit because of behaviour incompatible with the purpose of the permit and the extension of the said protective measures to include citizens of Member States of the European Union and members of their families are also covered in the said provision.

Finally, following the shipwreck of immigrants off the island of Lampeduza, the Italian Government adopted legislative decree No. 120/2013 laying down some urgent provisions in connection with immigration. To deal with the exceptional influx of asylum seekers on Italian territory, a fund was established and other funds that already existed have seen their budgets increase. Moreover, on the same occasion, the Council of Ministers approved a legislative decree approach (relative to transposition of directive 2011/51/EU modifying directive 2003/109/EC so as to extend its field of application to include beneficiaries of international protection) pursuing the objective of promoting the integration of holders of international protection.

Decreto legge n. 69, dated 21.06.13, convertito in legge n. 98, du 09.08.13, decreto legge n. 93, du 14.08.13, convertito in legge n. 119, du 15.10.13, e decreto legge n° 120, du 15.10.13,
www.gazzettaufficiale.it

[GLA]

Sweden

Fundamental rights – Modifications of Swedish law – Sex changes – Withdrawal of the sterilisation obligation – Right of self-determination – outdated legislation – transsexuals

According to the Swedish law relative to determination of sex in certain situations (lag: 1972:119 om faställande av), it is possible, under certain conditions, to carry out a surgical operation to change the sex of a person. One of those conditions, before the latest modification of the law, was biological sterilisation.

Following a case in the Administrative Court of Appeal of Stockholm, (Kammarrätten I Stockholm), in which the judges held that the said condition did not conform to the European Convention for Safeguarding of Human Rights and of Fundamental Freedoms, the Government designated a committee of inquiry to analyse whether Swedish law was outdated. The committee felt that the sterilisation obligation is contrary to human dignity and to the right of self-determination, and that it constitutes out-dated legislation. The Swedish legislators note in the legislative bill (Regeringens propostition 2012/13:107 Upphävande av kravetpåsterilisering förändrad könstillhörighet) that the tendency in the Council of Europe and the United Nations is to develop individual rights, independently of the individual's sexual orientation, and they consider that one of the essential aspects of those rights is the right of each person not be forced to undergo sterilisation. Moreover, the legislators felt that depriving a person of the possibility of having a child represents serious interference having important consequences, and that the said obligation is disproportionate in comparison with the reasons for maintaining it among the objectives pursued. Prior to the said legislative bill, the Swedish legislators had already emphasised their desire to be in the vanguard with respect to the rights of transsexuals.

The modification of the law relative to biological sterilisation went into effect on 1 July 2013. This modification of the law follows another one, which went into effect on 1 January 2013, doing away with the conditions relative to possession of Swedish nationality and that of not being married to be able to undergo a sex change.

Lag (2013:405) om ändring i lagen (1972:119) om fasställande av könstillhörighet i vissa fall,
www.riksdagen.se

[LTB] [GUSTAAN]

D. Response to the Legal Opinion

Application of the Charter of Fundamental Rights to the Member States – Comments on the decision of 26 February 2013 in case C-617/10 Åkerberg Fransson

The first edition of Response to the Legal Opinion in 2013 concerned application of the European Union's Charter of Fundamental Rights to the member states, and consequently, on the analysis by the legal opinion of article 51, paragraph 1 (see *Reflets No. 1/2013)*. This last issue of the year considers the reaction of legal opinion to the decision by the Grand Chamber in the Åkerberg Fransson case, concentrating on the interpretation of the expression "when (the Member States) implement Union law" which, in accordance with article 51 paragraph 1 of the Charter, delimits the field of application of the Charter vis-à-vis the Member States.

The legal opinion is unanimous when it comes to the importance of the Court's decision. For Hancox, "Åkerberg Fransson marks a turning point in our understanding of the scope of the EU Charter of Fundamental Rights [1] according to Kronenberger, even if the decision provides some interesting elements as concerns the interpretation of the principle ne bis in idem, "(the) essential contribution […], which will no doubt be the object of ample doctrinal commentary, is to be found […] in the interpretation of the expression "implementation of Union law" making it possible to identify the situations covered by the field of application of the Charter".[2] In adopting a conception of the field of application of the charter going beyond the strict framework of mere implementation of Union law, the Court's decision is characterised as bold.[3].

Interpretation of article 51, paragraph 1 of the Charter – Continuity or break

The legal opinion having hesitated, before the Åkerberg Fransson case, among three possible readings of article 51, paragraph 1, of the Charter (see Reflets No. 1/2013*)*, and the Court's decision having clarified which of the three reasons must be considered as correct, the numerous doctrinal comments anticipated by Kronenberger quickly appeared.

For part of the Doctrine, "the Åkerberg Fransson decision provides a necessary and opportune clarification with respect to the applicability of the fundamental rights set forth in the charter by adopting a broad interpretation of the expression "*implementation of Union law*" in the meaning of article 51, paragraph 1, of the Charter, an expression that is treated as equivalent to the "*field of application*" of the said right. [4] In rejecting a regressive interpretation of this last provision of the Charter, the Court "also rejects the possibility that Member States might act within the scope of application of EU law but with no duty to respect the Charter. A strict interpretation of Article 51(1) would have confirmed the existence of areas in which EU law would be applicable, but not the Charter." [5] For the authors who see, in this decision and in the use by the Court of the explanations developed with a view to guiding interpretation of the Charter, a confirmation of its existing case law in the field of fundamental rights, the Court's decision represents continuity instead of a break. It is a question of continuity that, for certain people, is indispensable: "The decision (Åkerberg Fransson) thus appears first of all to be an act of unification of the system of fundamental rights in the legal order of the European Union. The approach is certainly salutary, since one does not bear to think about the complexities that would be faced if it was necessary to reason concerning the applicability of rights in accordance with their source (general principles of law or charter). [6] To Fontanelli, it is remarkable, but not surprising, "that the ECJ took the equivalence between the scope of application of the Charter and of general principles for granted, *pace* the theories which believed that the choice of the word 'implementation' reflected a deliberate curtailment of the acquits on fundamental

[1] HANCOX, E. 'The meaning of "implementing" EU law under Article 51(1) of the Charter *Åkerberg Fransson"*, Common Market Law Review 2013, No. 50 p. 1411.

[2] KRONENBERG, V., "When "implementation" is equivalent to "field of application", the Court specifies the situations covered by the European Union's Charter of Fundamental rights in the context of application of the *ne bis in idem*", Revue des affaires européennes 2013, No. 1 p.147-159.

[3] PICOD, F., "The Charter must be respected as soon as a national rule or regulation falls within the field of application of Union law, La Semaine Juridique - édition générale 2013 nº 11, p. 312.

[4] See for instance, KRONENBERG, cit. supra, note 2, p.159

[5] SARMIENTO, D., "Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", Common Market Law Review 2013, no. 50, p.1278. See also, along those lines, IGLESIAS SANCHEZ, S., "La confirmación del ámbito de aplicación de la carta y su interrelación con el estándar de protección", Revista de Derecho Comunitario Europeo 2013, no. 46, undergoing publication, p.10.

[6] AKANDIJI-KOMBÉ, J. F. "'Åkerberg Fransson' decision": judicial application of the European Charter of fundamental rights", Journal de droit européen 2013, No. 199, p. 185. See also Kronenberger, cit. supra, note 2, p.150-151 and Hancox, cit. supra, note 1, p.1412.

rights, and should be interpreted restrictively[7]. We should point out that this analysis of the Court's decision, anchored in a perspective of continuity and consistency with its prior case law, it not unanimously accepted. For other authors, the Court decided, in the Åkerber Fransson decision, to restrictively interpret the limits laid down in article 51, paragraph 1, of the Charter8 Lavranos asserts, for instance, that the innovative aspect of this decision is not to be found in the fact that the Charter allows the Court to harmonise the level of protection of fundamental rights in a member states, even in light of existing constitutional and legal practices:

"[…] what is new is that the safety valves in the form of Articles 51 and 53 of the Charter, which Member States had deliberately inserted into the Charter in order to limit the usurping and centrifugal forces of the ECJ, have been effectively switched off by the ECJ."9 Thym writes along the same lines: "[d]amit sind alle Versuche hinfällig, die Anwendung der EU-Grundrechte im Rahmen der Grundfreiheiten oder bei nationalen Gestaltungsspielräumen zurückzudrängen".[10]

Consequently, for this part of the legal opinion, the *broad* interpretation recommended by the Court of article 51, paragraph 1, of the Charter, within the specific framework of the Åkerberg Fransson decision and the Union rules and regulations relative to VAT, which are examined there, imply a *restrictive interpretation* of certain general provisions conceived by the Member States as limits: "If one tried to derive from each of these provisions, including Articles 2 and 250 (1) of the Directive, the ECJ's ideal-type of the concept of implementation in the sense of the Article 51(1) of the Charter, it should be concluded that for every EU norm there is an area of state competences that are touched upon by the operation and effect of that norm, and all national measures falling within that area equally 'implement EU law' for the purpose of Article 51(1) of the Charter. This assumption would turn Article 51 of the Charter, a clause that expressly defines itself as a safeguard against competence-creep, into a sort of 'implicit powers' portal".[11] The same author points out that " [e]ven if the *Fransson* judgment confirmed that the Charter applies only to measures falling within the scope of EU law, as per the *ERT*, *Wachauf* and *Annibaldi* precedents, there are commentators who read this decision as an instance of competence-creep that the ECJ validated through an expansive use of Article 51(1) of the Charter".[12] Fontanelli concludes by pointing out that: "the German Constitutional court reacted vehemently to *Fransson* and revived the dormant war with the ECJ that had recently broken out after *Mangold* and had led to qualified truces of the *Lissabon-Urteil* and *Honeywell* decisions."[13] Other authors point out that the interpretation of article 51, paragraph 1, of the Charter provided by the Court departs from the wording of that provision and from the preparatory work: "Der EuGH legt entgegen Wortlaut und Entstehungsgeschichte Art. 51 GRCh weit aus, indem er sich offenbar mehr an der Überschrift 'Anwendung' und nicht an der konkret auf die Mitgliedstaaten bezogenen Einschränkung 'ausschließlich bei der Durchführung des Rechts der Union' orientiert". Consequently, the solution adopted by the Court produced some critical reactions, certain ones among them concerning the supposed widening of the field of application of the Charter: "[l]as críticas motivadas por la potencial vis expansiva de las consideraciones de esta Sentencia en relación con el ámbito de aplicación de la Carta siguen las líneas ya clásicas en esta materia, habiendo inspirado denominaciones tales como 'Mangold 2.0' o incluso 'bolso de Mary Poppins'" [14]

However, Skouris points out, referring to the Åkerberg Fransson decision and to the orders

[7] FONTANELLI, F. "Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog", European Constitutional Law Review No. 2013, N)9, p323

[8] VECCHIO, F., "I casi Melloni e Åkerberg : il sistema multilivello di protezione dei diritti fondamentali", Quaderni costituzionali 2013, nº 33, p. 454. "Ciò che merita di essere segnalato in questa sede è l'interpretazione restrittiva con cui l'istituzione giudiziaria europea sceglie di circoscrivere i limiti previsti dall'art. 51 della Carta".

[9] LAVRANOS, N., "The ECJ's Judgments in Melloni and Åkerberg Fransson: a difficult *ménage à trois*", European Law Reporter 2013, No. 3, p. 139, also quoting another decision by the Grand Chamber dated 26 February 2013, Melloni, C-399/11, not yet published in the ECR.

[10] THYM, D. "Die Reichweite der EU-Grundrechte-Charta - Zu viel Grundrechtsschutz?", Neue Zeitschrift für Verwalttungsrecht 2013; No. 14, p. 890

[11] FONTANELLI, cit. supra, note 7, p. 326,

[12] Ibid

[13] Ibid. p. 327

[14] IGLESIAS SÁNCHEZ, cit. supra, note 5, quoting LETTERON, R. "The Charter of fundamental rights, Union law, and the Mary Poppins bag", http://libertescheries.blogspot.com, 2013 and RATHKE, H., "Mangold Reloaded? Anmerkungen zu EuGH, Rs. C-617/10 - Åkerberg Fransson"http://www.juwiss.de/mangold-reloaded/.

and decisions relative to article 51, paragraph 1, of the Charter, which preceded it, that "the Court shows (…) that it takes very seriously the limits laid down repeatedly by the primary law in order to respect the sharing of the powers provided for under the treaty".[15]. In that connection, he recalls that "the Court expressed, in several recent decisions, its intention of rejecting the requests for a decision on a preliminary matter when the dispute handing before the national judge was unconnected with Union Law." [16] Similarly, according to Kronenberger, if the Court, certainly, opted for a broad acceptance of the expression implementation of Union law appearing in article 51, paragraph 1, of the Charter, "one already found a few first fruits in its recent case law". [17] A "restrictive" interpretation of article 51, paragraph 1 of the Charter could have ended up weakening the level of protection of the rights, in infringement of article 53 of that Charter". [18]

Clearness or confusion in the terminology used by the Court

The terminology used by the Court in the Åkerberg Fransson decision is being examined with a magnifying glass. For Iglesias Sanchez, the clarity with which the Court established its decision implies that a restrictive interpretation of article 51, paragraph 1 of the Charter, based on a literal interpretation of the wording of that provision, should be definitively ruled out. [19] Simon points out that "the Court opts, within the framework of the recurrent controversy concerning the Member States' duty to respect the fundamental rights imposed by Union law, for the jurisprudential expression "field of application of Union law", in preference to the Charter expression, namely 'implementation of Union law'". [20]For Hancox as well, the Court has demonstrated its desire "to move beyond the language of "implementing" in [Article 51, paragraph 1, of the Charter], looking beyond this to the description of scope in the Explanations and in the pre-Charter case law". However, she points out that the Court "introduces different terminology, for example, when a situation is 'governed' by EU law, or where EU law is 'applicable'".[21] Certain authors consider that this varied terminology used by the Court in interpreting article 51, paragraph 1, of the Charter could give rise to confusion, or could even give the Member States a way of escaping application of the Charter to themselves: "The ECJ made a generous use of words like 'designed' and 'intended' to describe the link between the application of national measures and the implementation of EU obligations. This inadvertent contradiction is unfortunate because it sends a mixed signal on a matter that was waiting for a clear solution; it is particularly lamentable because it paves the way for a strategic slicing of the judgment. It is now relatively easy for national authorities to put the emphasis on these words that evoke a precise intention of the domestic legislator, with a view to escaping EU obligations. Arguably, this is what the German Constitutional court has already done to claim immunity from the Charter for the Anti-terror Database Law ".[22]

Establishment of a principle and its application in practice

The reasoning in the Åkerberg Fransson decision takes place in two stages: "the first one being devoted to determining the principles of interpretation of the concept of implementation, the second to application of those principles to that particular case. In connection with the principles, the Court is going to gradually treat the implementation of Union law as 'situations governed by' that law, since it linked it to the cases in which national regulation falls within (its) field of application (…) Thus there cannot be any kinds of cases subject to Union law without the said fundamental rights applying. The applicability in Union law implies the applicability of the

[15] SKOURIS, V., "Recent developments relative to protection of the fundamental rights in the European Union: the Melloni and Åkerberg (***) Fransson decisions", Il diritto dell'Unione Europea 2013, nº 2, pp. 234-235.
[16] Ibid., p. 233-234.
[17] KRONENBERG, cit. supra, note 2, p.148,
[18] See, for instance, KRONENBERG, cit. supra, note 2, p.151.
[19] IGLESIAS SÁNCHEZ, cit. supra, note 5, p. 7 "Su claridad, énfasis y rotundidad, (…) ha de llevar a descartar definitivamente una interpretación restrictiva fundada en el tenor literal del artículo 51. "Voir également ANKERSMITH, L. "Casting the net of fundamental rights protection: C-617/10 Åkerberg Franssonv", European law blog, http://europeanlawblog.eu/?p=1594. "The Court squarely equated" implementation with scope of application.
[20] SIMON, D., "*Ne bis in idem*. The Court validates, on certain conditions, the option for cumulating the fiscal and penal sanctions after a thorough examination of the requirements resulting from the European Convention of Human Rights and the Charter of Fundamental Rights", Europe 2013 April nº 4, p.14-16.
[21] HANCOX, cit. supra, note 1, p.1419
[22] FONTANELLI, cit. supra, note 7, p. 326

fundamental rights guaranteed by the Charter. [23] However, even if the Doctrine is unanimous with respect to characterisation of the Åkerberg Fransson decision as a leading case, some of those persons do not underestimate the difficulties at the time of application of the principle announced therein: "(it is a question of) a conception that is both broad and is governed by the concept of implementation, with respect to which one may think that it will raise certain questions in its application". [24] According to Fontanelli: "The group of norms instantiated to display this link is uneven and patched. Taken separately, some of these EU norms fail to come across as the result of national implementation in the sense of Article 51(1) of the Charter, and their inclusion could only stand scrutiny if declassified to the function of padding material."[25]

Consequently, certain authors concentrate on the issue of how the decision should be interpreted and applied in practice, outside the specific context of the Fransson case, the field of VAT and the principle of *ne bis in idem*: "First and foremost, [the decision] reiterates the ECJ's firm commitment to upholding the rule of law of which fundamental rights are always part and parcel. In that case, the ECJ made clear that "[t]he applicability of [EU] entails [the] applicability of the fundamental rights guaranteed by the Charter". Metaphorically speaking, this means that the Charter is the "shadow" of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter. Second, in order to determine whether a national measure falls within the scope of EU law, one must determine whether, by adopting such a national measure, a Member State is fulfilling an obligation imposed by that law. (…) In order for a national measure to fall within the scope of EU law, it suffices to determine the existence of such an obligation. Conversely, the application of the Charter is not conditioned upon finding that the EU legislator has specifically determined the ways in which Member States are to carry out such an obligation. Third, in determining the existence or absence of such an obligation, one must look at both primary and secondary EU law, including the principles of effectiveness ("effet utile") and loyal cooperation. Fourth and last, from the fact that all national measures which fall within the scope of EU law must comply with the Charter, it does not follow that the latter rules out the application of national standards of fundamental rights protection (…)".[26] Similarly, "it is not the *intention* of the State, but the *function* of the State act regarding the implementation of EU law which matters. The ECJ thus relies on the effect and not the cause of Member State action, a criterion that is perfectly coherent with the need effectively to guarantee Charter rights. Otherwise, the protection of those rights would be avoided by a simple statement of the concerned Member State denying that its original purpose was to implement EU law. This means that all cases concerning the Charter will need as an essential precondition to its application the existence of a substantive rule of EU law, what Ladenburger has defined as '*a concrete norm of EU law applied*'.[27] Nevertheless, differences of opinion are not lacking: "when it comes to interpreting Article 51(1) of the Charter it is still unclear whether only measures *designed* to implement EU law must conform to the Charter or, instead, it applies also to measures that *happen* to share the objectives of EU law".[28]

Even if Åkerberg Fransson confirms that the field of application of the Charter corresponds to that of Union law, it remains difficult, for the legal opinion, to identify the limits of that law and consequently, the limits on the field of application of the Charter: "though the Court of Justice in Fransson and Melloni decided that in these cases the yardstick should be the Charter, and not national fundamental rights, it is far from settled yet that fundamental rights protection via the Charter by now has become the general rule, and protection on the basis of other sources the exception. For instance, although the Court clarified in Fransson that the scope of application of the Charter is identical to the scope of application of EU law, the outer limits of the latter remain shrouded

[23] ABENHAÏM, M. «The case law of the Court of Justice and of the Courts of the European Union. Chronicle of decisions. "Åkerberg Fransson" decision, Revue du droit de l'Union européenne 2013, n°1, p. 177

[24] AUBERT, M., BROUSSY, E. and CASSAGABÈRE, H., "Chronicle of EUCJ case law. Charter of fundamental rights – Field of application", Legal News: administrative law, 2013, No. 20, p. 1154.

[25] FONTANELLI, cit. supra, note 7, p. 325

[26] LENAERTS, K. "The EU Charter of Fundamental Rights: scope of application and methods of interpretation", From Rome to Lisbon: mixtures in honour of Paolo Mengozzi, 2013, p.117.

[27] SARMIENTO, cit. supra, note 5, 1279-1280

[28] FONTANELLI, cit. supra, note 7, p. 333

in mist."[29] According to Lavranos, the expansive nature of the Court's interpretation in the Åkerberg Fransson decision is to be found precisely in this latter finding: "Since Union law continues to expand in ever new areas of law, it is practically always possible to construe a "connection" between a national law measure and Union law."[30]

Åkerberg Fransson, Melloni the Charter and the National Constitutional Courts

Several commentaries consider the Åkerberg Fransson decision not in an isolated way, but rather in combination with the decision handed down on the same day in the Melloni[31] case. It has been indicated that the "Åkerberg Fransson and Melloni cases have set the basic rules for a new framework of fundamental rights in Europe"[32]. For the authors who see, in the first decision an expansive interpretation of article 51, paragraph 1, of the Charter, the combination with the Melloni decision winds up with an even more problematic conclusion: "le due pronunce sono accomunate da una manifesta (e con ogni probabilità foriera di nuove tensioni giurisprudenziali) volontà di alterare la natura sussidiaria della Carta dei diritti fondamentali e di interpretare la stessa come un documento che preclude gli spazi per l'applicazione degli standard di tutela delle costituzioni nazionali.[33]" In light of the fact that "[t]he role of the Charter as a paramount reference of EU law grants new interpretative powers to the Court of Justice […] in an area much cherished by national constitutional courts", [34] Fontanelli considers that the combined effect of those two decisions "is perceived to further the inexorable marginalization of constitutional tribunals in an area where they have long lost the home-field advantage: the review of domestic norms for human rights' compliance. National constitutions are sidelined when EU law applies even remotely or when national measures *happen* to fall within its scope"[35]

For these reasons, the legal opinion calls on the Court to take into consideration the role of the constitutional courts in protection of fundamental rights: "[t]he ECJ, in developing the multi-level system of the protection of human rights in the EU, is asked to leave enough leeway for the national constitutional courts to breathe". [36] More particularly, Reestman and Besselink assert that "[t]he national constitutional courts' authority and legitimacy is to a considerable extent built on the fundamental rights protection they offer. Dislocating fundamental rights protection from the national arena may undermine and erode the functioning of these courts in the national constitutional spheres and therefore affect the national trias politica. This is all the more because it is ordinary courts that refer questions to the ECJ, which in turn determines the applicable fundamental rights standard, and finally it is ordinary courts". [37] The consequence of the Åkerberg Fransson and Melloni decision could be, for part of the legal opinion, a scenario opened to competition. Between the levels of national protection and of the Union : "(…) The Court acknowledges the possibility of a competing application of the Charter and of the national instruments for protection of fundamental rights and explains the method for settlement of the conflicts that such competition could create ". [38]
In Thym's opinion "[Der EuGh verweist] auf eine Doppelgeltung der nationalen Grundrechte unter Vorbehalt des Anwendungsvorrangs. Speziell bei Regelungen, die nur am Rande von Unionsrecht determiniert werden, garantiert diese Lösung nationalen Gerichten dauerhaft einen eigenen Gestaltungsspielraum. Schon aus Kapazitätsgründen ist der EuGH nicht in der Lage, ein Mikromanagement des Grundrechtsschutzes in Randbereichen des Europarechts zu betreiben. Doppelgeltung ist keine Leerformel, sondern
Gibt Freiraum zur nationalen gestaltung" [39]

The Charter as the first or only point of reference

The doctrinal commentaries on the Court's

[29] REESTMAN, J. H. et BESSELINK, L. F.M. (editorial), "After Åkerberg Fransson and Melloni", European Constitutional Law Review, 2013, Vol. 9, p. 171.
[30] LAVRANOS, cit. supra, note 9, p. 139
[31] Decision of 26 February 2013, Melloni, C-399/11, not yet published in the ECR.
[32] SARMIENTO, cit. supra, note 5, p. 1269
[33] VECCHIO, cit. supra, note 8, p. 456
[34] SARMIENTO, cit. supra, note 5, p. 1268
[35] FONTANELLI, cit. supra, note 7, p. 332.
[36] EDITORIAL, "Ultra vires - has the Bundesverfassungsgericht shown its teeth?", Common Market Law Review 2013, nº 4, p.929.
[37] REESTMAN and BESSELINK, cit. supra, note 29, p. 171.
[38] RITLENG, D., "Concerning the articulation of the systems of protection of the' fundamental rights in the Union: the lessons of the Åkerberg Fransson and Melloni decisions", Quarterly review of European law 2013, No. 2, p. 267-292
[39] THYM, cit. supra, note 10, p. 892

decision in the Åkerberg Fransson case have also highlighted the strengthening of the autonomous nature of the Charter: "[el Tribunal] resuelve el asunto tomando como único punto de referencia la Carta. Ello ha de ser considerado una afirmación de la autonomía de la Carta, y una confirmación de su papel primario como punto de referencia". [40] For certain writers, this autonomy is indicated in particular by the absence of references to the European Convention of Human Rights: "[i]t seems as if the ECJ is signalling with its extensive interpretation of the scope of the Charter that the role and importance of the ECHR will progressively reduce over time - at least as far as the EU Member States are concerned. In short, it is pretty certain that *the ménage à trois* between the Charter, Union law and the ECHR will remain difficult".[41] "Consequently, exit any reference to the case law of the ECtHR. Characteristic of the Court's new approach since the Lisbon treaty went into effect, this kind of pruning bears witness here to a 'partially autonomous' interpretation of the fundamental rights guaranteed by the Charter ". [42] Along the same lines, Aubert considers that the Åkerberg Fransson case therefore reaffirms the autonomy, relative certainly and "controlled of the national systems with respect to the Charter enshrined in the Melloni decision, but also enshrines that of the Charter with respect to the (ECHR): the first one applies 'as construed by the Court' and not solely in light of the case law of the (ECtHR)". [43] We should emphasise the fact that the central role of the Charter was already obvious in light of the Court's previous decisions:" (The) lesson of the Schecke Decision (joined cases C-92/09 and C-93/09) lies in the redefinition of the frame of reference in order to guarantee protection of the fundamental rights. As was anticipated, with the effectiveness of the Lisbon Treaty, it is no longer the international instruments, with the (ECHR) in first place, or the national constitutional traditions that guarantee, as a priority, the fundamental rights, but it is indeed the Charter of Fundamental rights with the help of its detailed rules. Primacy among the sources of fundamental rights is henceforth to be assigned to the Charter, whereas the (ECRH) is now quoted only in second place, and often for the purpose of confirming the result that the Charter had already reached".[44]. Under those circumstances, Weiler raises the questions framed in a situation in which the Union is not yet part of the ECHR system: " "[s]hould a Member State court accept an interpretation of the ECHR by the ECJ, which in its view would bring its jurisdiction into infringement of an international obligation of the highest order, a risk which the ECJ does not have?

(…) Does its legal duty to the European Union legal order trump its legal duty under international law to the [ECHR] system?"45

[SLE] [IGLESSA]

[40] IGLESIAS SÁNCHEZ, cit. supra, note 5.
[41] LAVRANOS, cit. supra, note 9, p. 139
[42] ABENHAÏM, cit. supra, note 23, p.181.
[43] AUBERT et al., cit. supra, note 24
[44] SKOURIS, cit. supra, note 15, p. 236
[45] WEILER, J. H. H. (editorial), "Human Rights: Member State, EU and ECHR Levels of Protection; P.S. Catalonia; Why Does it Take So Long for my Article to Be Published?; In this Issue", European Journal

NOTICE

The texts and documents to which the information noted below refers are, in principle, extracts from publications available in the Court's library.

The references appearing under the case law decisions (IA/…, QP/…, etc.) refer to the dossier numbers in the internal bases DEC.NAT. and CONVENTIONS. The dossiers relative to the said decision may be consulted in the Research and Documentation Department.

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The following administrators collaborated on this issue:

Réa Apostolidis [RA], Bernd Bertelmann [BBER], Katarzyna Bozekowska-Zawisza [BOZEKKA], Antoine Briand [ANBD], Maria Helena Cardoso Ferreira [MHC], Tess May Crean [TCR], Anna Czubinski [CZUBIAN], Nicolas Delmas [DELMANI], Patrick Embley [PE], Andrea Grgić [GRCICAN], Victoria Hanley-Emilsson [HANLEVI], Anna Melanie Hövelborn Bellido [HOEVEME],Sara Iglesias Sánchez [IGLESSA], Sally Janssen [SJN], Diana Kušteková [KUSTEDI], Giovanna Lanni [GLA], Michael George Loizou [LOIZOMI], Julia Magaz Urquidi [MAGAZJU], Raphaël Meyer [MEYERRA], Loris Nicoletti [NICOLLO], Garyfalia Nikolakaki [GANI], María Pilar Núñez Ruiz [NUNEZMA], Siofra O'Leary [SLE], Veera Pedersen [PEDERVE], Cristina Maria Prunaru [CLU], Saša Sever [SAS], Maria Grazia Surace [MSU], Zsófia Tanay [TANAYZS], Lina Tapper Brandberg [LTB], Jaanika Topkin [TOPKIJA], Nadezhda Todorova [NTOD], Johannes Windisch [WINDIJO].

As well as: Suzanne Frodl [FRODLSU], Marianne Madden [MADDEMA] Lukas Mrazik [MRAZILU], Ana Rita Ramirez Campino [RAMIRAN], Loïc Wagner [WAGNELO].

Coordinators: Síofra O'Leary [SLE], Loris Nicoletti [NICOLLO] _