



REFLETS

Legal developments of interest to the European Union

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A. Case Law

I. European and International Courts

European Court of Human Rights

*European Convention for the Protection
Rights and Fundamental Freedoms
(ECHR) - Prohibition of torture and of
inhuman or degrading treatment - Right
to freedom and to safety- Right to respect
for private and family life - Right to an
effective remedy - Extraordinary
rendition - State liability for rendition of a
person to the authorities of a non-member
state in spite of a real risk of treatment
contrary to article 3 of the ECHR -
Infringement of articles 3, 5, 8 and 13 of
the ECHR*

In a Grand Chamber decision of 13
December 2012, the European Court of
Human Rights (hereinafter the "ECtHR")
unanimously concluded that there had been
an infringement of article 3 (prohibition of

torture and of inhuman or degrading treatment), of article 5 (right to freedom and to safety), and of article 8 and of article 13 (right to effective remedy) of the ECHR.

The applicant, Mr El-Masri, a German citizen of Lebanese origin, was the victim of “extraordinary rendition”. Having been arrested at the Tabanovce border station between Serbia and the Former Yugoslav Republic of Macedonia, the applicant was secretly detained in a hotel in Skopje, taken to the airport by force and turned over to CIA agents, who took him to a detention centre in Afghanistan. During that whole operation, Mr El-Masri suffered ill-treatment.

It should be emphasised that before the dispute before the ECtHR, the applicant’s situation had already been the subject of several international and national investigations, carried out by the European Parliament, the Parliamentary Assembly of the Council of Europe, the Human Rights Committee, the Inter-American Commission on Human Rights, and the German Bundestag. Since the official version of the facts provided by the Government of the Former Yugoslav Republic of Macedonia differed greatly from that provided by the applicant, and the case concerned secret operations, those investigations were very useful in establishing the facts in the case.

With respect to the prohibition of torture and of inhuman or degrading treatment, the ECtHR found, in the first place, that the summary investigation carried out by the defendant State’s authorities was ineffective, therefore concluding that there had been an infringement of articles 3 and 5 of the ECHR with respect to the *procedural aspect*. In light of the importance of this case to the general public and of the remarks made by intervening third parties, more particularly the ones by the High Commissioner for Human Rights of the United Nations, the ECtHR also addressed the impact of the inadequate nature of the inquiry on the right to truth. With respect to the *material aspect* of article 3 of the ECHR, the treatment inflicted on the applicant during his stay in the Skopje hotel was

characterised as inhuman and degrading treatment, and the treatment suffered at the airport as constituting torture. Moreover the government of the Former Yugoslav Republic of Macedonia is considered responsible for having knowingly subjected Mr El-Masri to a real risk of treatment contrary to article 3 of the ECHR by turning him over to the American authorities, within the framework of an “extraordinary rendition” operation, a notion that entails, de facto, a real risk of torture or of cruel, inhuman or degrading treatment.

With respect to the right to freedom and safety, the ECHR, after having characterised the kidnapping and detention of the applicant as a forced disappearance, noted that the defendant government must be held liable for the infringements of the rights resulting from article 5 of the ECHR for the entire period of the applicant’s imprisonment, including the period of detention in Afghanistan by the CIA.

As to the right to respect for private and family life, the ECtHR considered that the interference in exercise of that right held by the applicant was not provided for by law, therefore taking note of the infringement of article 8 of the ECHR.

Finally, the ECtHR noted an infringement of article 13 of the ECHR, since the applicant did not benefit from any effective remedy.

We should point out that this decision comes after the failure of legal action in the United States filed by the American Civil Liberties Union in the name of the applicant, due to the American government’s call on state secrecy. The decision by the Federal District Court having been upheld by the Court of Appeal of the Fourth Circuit, the Supreme Court refused to grant certiorari (an extraordinary recourse used by a higher court to quash or set aside the decision handed down by a lower court lacking the required jurisdiction for issuing such a decision) in the said case in 2007.

European Court of Human Rights, decision of 13.12.2012, El-Masri vs. the Former Yugoslav

Republic of Macedonia (application No. 39630/09),

www.echr.coe.int/echr

IA/33518-A

(IGLESSA)

European Convention for the Protection Rights and Fundamental Freedoms (ECHR) – Right to an effective remedy – Right to respect for private and family life – Order for removal from Guiana – Non-suspensive effect of remedies – Absence of effective examination of the remedy before implementation of the removal measure – Infringement of article 13 combined with article 8 of the ECHR

In its Grand Chamber decision handed down on 13 December 2012, the European Court of Human Rights (hereinafter the “ECtHR”) made a decision concerning the compatibility with article 13 combined with article 8 of the ECHR of the exceptional treatment provided for effects of remedy against Guiana’s expulsion decisions. The ECtHR unanimously concluded that there had been an infringement of the said articles.

The applicant is a Brazilian citizen who has lived with his family since the age of 7 in Guiana (a French Region and Overseas Department). On 25 January 2007, having been unable to present documents during a road check indicating the authorised nature of his stay, he was the subject of a prefectural expulsion decision and of administrative detention. On the next day, he filed an effect of remedy to the Administrative Court of Cayenne on the grounds of abuse of authority against the removal measure, accompanied by an application in summary proceedings for suspension. Pursuant to the emergency regulations in effect in the French Overseas Territories, appeals to the Administrative Court do not suspend proceedings de jure. Fifty minutes after the filing of the effects of remedy, the applicant was returned to the border of Brazil making his application in summary proceedings for suspension not

applicable because of enforcement of the removal measure. On 18 October 2007, the Administrative Court of Cayenne, considering the appeal on the merits, cancelled the expulsion decision. The applicant, having returned to Guiana sometime later, received a “visitor” residence permit in June 2009. He now holds a renewable residence permit containing the indication “private and family life”.

The applicant alleged in the ECtHR that his removal to Brazil constituted unjustified interference in his right to respect for his private and family life protected by article 8 of the ECHR. Also calling on the right to an effective appeal guaranteed by article 13 thereof, the applicant complained that he had found it impossible to dispute the legality of the removal measure adopted against him, before enforcement thereof.

In its Chamber decision dated 30 June 2011, the ECtHR concluded, by a majority vote, that there had been no infringement of article 13 combined with article 8 of the ECHR, considering, in particular, that the removal in question had not entailed any lasting break of the family relationship, since the applicant had been able to return to Guiana some time after his expulsion and obtain a residence permit. The applicant requested referral of the case to the Grand Chamber.

In its Grand Chamber decision, the ECtHR began by recalling that States are entitled to some a margin of discretion in deciding how to conform to the obligation of existence of effective appeal in national law, in law as well as in practice. It also pointed out that with respect to expulsion of foreigners disputed on the basis of an alleged attack on private and family life, the criterion of effectiveness does not require interested parties to have a right to appeal suspending effects of remedies as of right, contrary to the cases of expulsions disputed on the basis of a risk of inhuman or degrading treatment that is contrary to article 3 of the ECHR or of a risk of interference to life mentioned in article 2 of that Convention.

The ECtHR then considered the effectiveness of the effect of remedy filed by the applicant. According to it, when there is an arguable complaint to the effect that a removal risks attacking a foreigner's right to respect for his private and family life, article 13 combined with article 8 of the ECHR requires that the State provide the person concerned with an effective possibility of disputing the removal decision or the refusal to issue a residence permit and of obtaining a sufficiently detailed examination offering adequate procedural guarantees in connection with the relevant questions by a competent authority offering sufficient guarantees of independence and of impartiality.

The ECtHR continued by finding that, to avoid any risk of an arbitrary decision, effectiveness requires intervention by the judge or by the national authority to be real. The brief nature of the period between the application to the Administrative Court and the removal of the foreign person rules out any possibility for the court to seriously consider the circumstances and the legal arguments for or against the infringement of article 8 of the ECHR, in the event of enforcement of the expulsion decision. According to the ECtHR, the required rapid nature of the appeals cannot go so far as to constitute an unjustified obstacle to their exercise or take precedence over their effectiveness in practice.

Finally, with respect to the petitioner's removal, the ECtHR held that implementation thereof had been extremely rapid, even hasty, and had not enabled him to obtain a sufficiently thorough examination of the legality of the expulsion order before his expulsion. That state of affairs could not be remedied by subsequent issue of a residence permit.

Moreover, the ECtHR rejected the French government's argument to the effect that the geographical location of Guiana and the strong immigration pressure that it experiences would justify the exceptional treatment provided for under legislation as well as its operation.

According to the ECtHR, the a margin of discretion possessed by States as to how to conform to the obligations of article 13 of the ECHR must not preclude the petitioner's ability to call on the minimum procedural guarantees against arbitrary expulsion. It is to the responsibility of the States to organise national approaches to effects of remedy in such a way as to respond to the requirements of that provision.

Consequently, the ECtHR concluded that the absence of effective remedy, while the expulsion of the applicant was in progress, constitutes an infringement of article 13 combined with article 8 of the ECHR, which subsequent issue of a residence permit was not able to remedy.

European Court of Human Rights, Grand Chamber, decision of 13.12.2012. De Souza Ribeiro / France (application No. 22689/07), www.echr.coe.int/echr

IA/33520-A

(CZUBIAN)

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – Freedom of expression – Intellectual property right - Conflict between two fundamental rights – The margin of discretion of States– Non-infringement of article 10 of the ECHR – Dismissal of the application on the grounds of obvious lack of grounds

On 10 January 2013, the European Court of Human Rights (hereinafter the "ECHR") handed down a decision, for the first time, concerning the conflict between, on one hand, freedom of expression and, on the other hand, the intellectual property right. A second decision dated 19 February 2013 confirmed the ECtHR's approach to such a conflict.

In the case of *Ashby Donald e.a. / France*, the applicants, fashion photographers, were sentenced for infringement because they distributed photographs taken during fashion shows on the website of a company dedicated to fashion without authorisation

from the fashion houses concerned. Before the ECtHR, they indicated an infringement of their freedom of expression, protected by article 10 of the ECHR.

After having pointed out that the interference in dispute, namely, sentencing the applicants for infringement, was covered by the Code of Intellectual Property and that it had the legitimate purpose of protection of the copyrights of the fashion houses whose creations were the subject of the photographs in dispute, the ECtHR proceeded to weigh the contending interests against one another.

It held that the distribution of the photographs had a commercial purpose and that the intellectual property right is a fundamental right protected by article 1 of Protocol no. 1. It also emphasised that the national authorities should benefit from a particularly substantial margin of discretion when it is a question of reconciling two fundamental rights.

Consequently, the ECtHR unanimously concluded that there had been no infringement of article 10 of the ECHR.

In the case of *Neij and Sunde Kolmisoppi / Sweden*, known as “Pirate Bay”, the applicants, two of the co-founders of “the Pirate Bay”, one of the largest websites in the world, making it possible to exchange torrent files, were sentenced to a term of imprisonment and also to payment of damages for complicity in infringement of the law concerning copyright. In the ECtHR, they claimed that their freedom of expression had been disregarded.

First of all, the ECtHR recalled that the sharing or facilitating sharing of this kind of files on the Internet, even with respect to data protected by copyright, for lucrative purposes, is covered by the right to receive or transmit information in the meaning of article 10 of the ECHR.

After having noted that the interference in the dispute, namely, the sentencing of the applicants, was covered by the copyright law and that it was for the legitimate

purpose of protecting the rights of others and of preventing criminal offences, the ECtHR weighed the competing interests against one other.

It held that in the presence of two rights protected by the ECHR, the national authorities possessed an ample margin of discretion in this matter. The information in question does not benefit from the same level of protection as expression and political debate, and the obligation to protect copyright, both in light of the relevant law and in light of the ECHR, constituted a valid reason for limiting the applicants’ freedom of expression. Furthermore, they did not take any steps to remove the files in dispute that were protected by copyright from their site, even though they had been urged to do so.

Consequently, the ECtHR concluded that it had to dismiss the application as obviously unfounded.

Beyond the solution finally adopted, it is the identification of a new conflict of rights and the approach of the ECHR that constitute the major contribution to these two cases. The approach adopted brings out the particularly substantial margin of discretion granted to the national authorities. It raises questions in the legal opinion with respect to the scope of the review made by the ECtHR.

European Court of Human Rights, decision dated 10.01.2013, Ashby Donald e.a. / France (application No. 36769/08); decision dated 19.02.2013, Neij and Sunde Kolmisoppi / Sweden (application No. 40397/12),

www.echr.coe.int/echr

IA/33519-A

IA/33521-A

(CZUBIAN) (LTB) (GUSTAAN)

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

In its Grand Chamber decision of 19 February 2013, the ECtHR considered the situation of a couple consisting of women in a stable homosexual relationship, one of

whom wanted to adopt the biological child of the other (co-parental adoption). The adoption was rejected by the Austrian courts, which considered it legally impossible in view of the fact that, under Austrian legislation, the adopting party substitutes the biological parent of the same sex in the parental relationship.

Even though the ECtHR confirmed its precedents in the case of *Gas et Dubois c. France* (decision by the ECtHR of 15 March 2012, application No. 25951/07), holding that in such a case, there is no discrimination in comparison with married couples, it concluded that there had been an infringement of article 14 (prohibition of discrimination) combined with article 8 (right to respect for private and family life) of the ECHR because of the differing treatment experienced by the applicants insofar as one compares their situation with the situation of an unmarried heterosexual couple, one of the members of which wishes to adopt the child of the other.

We should mention the fact that seven judges expressed a partly dissenting joint opinion.

It should be pointed out that this decision by the ECtHR was handed down on the day on which the German Constitutional Court ruled that the law preventing homosexual persons from adopting the children of their partners was unconstitutional (see the German contribution, decision of 19 February 2013 of the Bundesverfassungsgericht, p. 9 of this *Reflets* Bulletin).

European Court of Human Rights, decision dated 19.02.2013, X et alia vs. Austria (application No. 19010/07).

www.echr.coe.int/echr

IA/33517-A

(IGLESSA)

EFTA Court

European Economic Area (EEA) – Directive 94/19/EC relative to the deposit guarantee system – Performance obligation – Emanation of the state – Discrimination

In a widely anticipated decision dated 28 January 2013, the EFTA Court ruled that by not reimbursing the foreign savers of Landsbanki Bank, which went bankrupt in 2008, Iceland did not infringe either directive 94/19 of the European Parliament and of the Council, of 30 May 1994, relative to deposit guarantee systems, or article 4 of the agreement concerning the European Economic Area (hereinafter the “EEA Agreement”).

Icelandic bank Landsbanki opened a branch in the United Kingdom offering online savings accounts under the name Icesave in October 2006. A similar branch was established in the Netherlands in May 2008. Pursuant to directive 94/19, the British and Dutch branches of Landsbanki were made responsible to the Icelandic Investors’ Guarantee Fund (TIF).

On 6 October 2008, online access to the deposits in the British and Dutch branches became impossible. On 7 October, Landsbanki Bank declared bankruptcy. Faced with the collapse of its banking system, Iceland carried out emergency nationalisation of its banks, including Landsbanki. Landsbanki’s Icelandic deposits were transferred to a new bank, the “New Landsbanki”. In parallel, the Netherlands and the United Kingdom decided to reimburse Icesave’s Dutch and British depositors on the basis of their deposit guarantee procedures. The two governments then requested Iceland return them the money paid to the depositors in their countries. However, in two referendums held in March 2010 and April 2011, the people of Iceland rejected the proposal that Iceland repay the 3.9 billion euros paid out to 340,000 British and Dutch savers affected by Icesave’s bankruptcy.

ON 15 December 2011, the EFTA Surveillance Authority filed an appeal for failure to fulfil obligations against Iceland

on the grounds of infringement of its obligation to pay the minimum amount of compensation to Icesave's British and Dutch depositors. The European Commission intervened in support of the Surveillance Authority.

The EFTA Court held that directive 94/19, in its version that was in effect at the time, did not place any performance obligation on the States. According to article 7(6) of the Directive: "Member States shall ensure that the depositor's rights to compensation may be the subject of an action by the depositor against the deposit-guarantee scheme". Consequently, the States had an obligation to implement a deposit guarantee fund guaranteeing repayment of a minimum of 20,000 euros per depositor in the event of the banking establishment's bankruptcy.

However, the Directive did not provide that the obligation to pay depositors had to be applied within the framework of a systemic crisis of the magnitude that occurred in Iceland (point 133 to 135 of the decision). In other words, the Court considered that the directive certainly required the State to implement a guarantee fund, which was done, but not to make sure that it could repay depositors under all circumstances (point 152 of the decision). In addition, the EFTA Court emphasise the fact that there is a difference between the obligations laid down by directive 94/19 and the new directive that replaced it in 2009 (directive 2009/14/EC modifying directive 94/19 relative to the deposit guarantee systems as concerns the level of guarantee and the repayment period), which considerably strengthened the obligations incumbent upon the States. The directive as amended provides that "on 31 December 2010 at the latest, the Member States must ensure that the guarantee of all deposits of one and the same depositor be set at 100,000 EUR in the event of unavailability of the deposits".

The Surveillance Authority also argued that the domestic and foreign depositors found themselves in a comparable situation in light of the guarantee obligations resulting from directive 94/19. Consequently, by not dealing with the domestic depositors and

the depositors of the British and Dutch branches in the same way, Iceland allegedly infringes the principle of non-discrimination between depositors contained in the said directive, as well as article 4 of the EEA agreement, which prohibits any discrimination based on nationality.

Directive 94/19 gives States a maximum period of 21 days for initiating intervention by the guarantee fund when it appears that an establishment can no longer reimburse its savers. However, when Landsbanki Bank went bankrupt and Iceland created a new bank to which it transferred all of the deposits of the Icelandic savers, the Icelandic Financial Supervisory Authority had not yet published the declaration initiating the guarantee fund's intervention. It was not until 27 October 2008, namely 20 days after the bankruptcy, that this intervention was initiated. In the Court's opinion, the directive began to apply as of that date only, and Iceland had to respect equality of treatment among savers (points 205-216 of the decision). Consequently, the transfer of the national deposits to the new bank did not fall within the field of application of the principle of non-discrimination established by directive 94/19.

As to the complaint originating from the infringement of article 4 of the EEA Agreement, the EFTA Court found that the Surveillance Authority did not criticise Iceland for having infringed the principle of non-discrimination in not transferring the totality of the foreign deposits to the New Landsbanki, as it had done for the domestic deposits. Because of this delimitation of the complaint, the Court considered that it had to limit its examination to the issue of whether the Icelandic State had infringed the principle of non-discrimination by not guaranteeing payment of the minimum amount provided for by the directive to the foreign depositors. However, since the Icelandic State is not bound to assume any such guarantee obligation, there was no discrimination (points 218-223).

EFTA Court: EFTA Surveillance Authority / Republic of Iceland E-16/11.

EFTA Court, Judgment of 28.01.13 in case E16/11

www.echr.coe.int/echr

IA/33523-A

(SIMONFL)

II. National Courts

1. Member States

Germany

Combatting international terrorism – Compatibility of the principles of German law relative to the “counter terrorism file” with the German Constitution – Protection of personal data – Field of application of the Charter of Fundamental Rights of the European Union.

By means of a decision handed down on 24 April 2013, the First Chamber of the Bundesverfassungsgericht (Federal Constitutional Court) ruled that the principles of the law relative to the counter terrorism file are compatible with the German Constitution. Insofar as, in detail, the provisions of the law do not comply with the constitutional requirements, those provisions will remain in effect until 2014.

The law in question established a central file for the police authorities and the intelligence services of the Federal State and of the Länder, targeting the combat against international terrorism. That file facilitates and expedites exchanges of information between the police authorities and the intelligence services.

The Bundesverfassungsgericht emphasized, that, in principle, the right to protection of personal data (“Grundrecht auf informationelle Selbstbestimmung”) requires separate treatment of personal information by the police, on one hand, and by the intelligence service on the other (“informationelles Trennungsprinzip”).

According to the Bundesverfassungsgericht, exchange of information is only admissible on an exceptional basis.

Furthermore, the data to be included in the file and the conditions of their use must be determined in a sufficiently clear manner by law and be compatible with the principle of proportionality. In that connection, for its full application after 2014 the law in question requires certain reforms by legislators.

Furthermore, the Bundesverfassungsgericht unanimously held that the case did not give rise to preliminary ruling to the Court of Justice with a view to verifying the scope of protection of the fundamental rights under the charter, and in particular of article 8 of it (protection of personal information) with respect to exchanges of information in connection with a central file.

The Bundesverfassungsgericht holds that, unquestionably according to the principle of acte claire, the law relative to the counter terrorism file and the activities based on that law do not implement Union law in the meaning of article 51, paragraph 1, sentence 1 of the Charter. The law in question is not determined by Union law and pursues national objectives that can only influence the functioning of the situations governed by Union law in an indirect way. Therefore, the fundamental rights of the Charter do not apply in the existing situation.

The decision by the Court of 26 February 2013, Akerberg Fransson (C-617/10), does not make it possible, according to the Bundesverfassungsgericht, to reach any other conclusion. According to the Bundesverfassungsgericht, in the intention to maintain the spirit of cooperation between that jurisdiction and the Court of Justice, the Akerberg Fransson decision must not be construed in a way that obviously entails a need for considering it as an act going beyond the assigned powers (an ultra vires act) or endangering the application of the fundamental rights of the Member States, so that the identity of the national constitutional order is called in question.

The Bundesverfassungsgericht specified that, in particular, one must not deduce, from the Akerberg Fransson decision, that each factual report of national regulation with the abstract field of application of Union law or of the strictly factual impacts on Union law can entail applicability of the Charter. In this context, the Bundesverfassungsgericht recalled that the Court of Justice itself pointed out in the Akerberg Fransson decision (point 19) “that the fundamental rights guaranteed in the Union’s legal order aim to be applied in all situations governed by Union law, but not outside such situations”.

Moreover, it can be seen from the press release published on the occasion of that decision that the First Chamber of the Bundesverfassungsgericht assumes that the Akerberg Fransson decision is based on the specific features of the law relative to turnover taxes, and does not contain any assertion of general scope.

*Bundesverfassungsgericht, decision of 24.04.2013
1BvR 1215/07
www.bundesverfassungsgericht.de*

IA/33265-A

(TLA) (HOEVEME)

Fundamental rights – Principle of equal treatment – Life partnership between persons of the same sex – Child adopted by one of the partners – German legislation not providing for a possibility of the other partner’s adopting the said child – Incompatibility with the German Constitution

ON 19 February 2013, the Bundesverfassungsgericht (Federal Constitutional Court) held that it was unconstitutional for German legislation to prevent persons of the same sex from adopting the child previously adopted by their partner, within the framework of the civil partnership.

The Lebenspartnerschaftsgesetz (law relative to civil partnerships) allows two persons of the same sex to establish a civil partnership. While Article 9, paragraph 7, of that law allows adoption of the partner’s child born outside marriage, the adoption of a child already adopted by the partner is refused for him or her. Such “successive adoption” was, until now, reserved for married couples (heterosexual persons).

The Bundesverfassungsgericht held that this distinction infringes both the fundamental right to equal treatment of the children and of the life partners concerned.

A partner wishing to adopt a child previously adopted by his or her partner is faced with discrimination in comparison with partners able to adopt the partner’s child born outside marriage and the spouses for whom adoption of a child who has already been adopted is possible.

With respect to discrimination against children of civil partners in comparison with the children of married couples, according the Bundesverfassungsgericht, this cannot be justified in particular by the need for protecting the interest of the child. On the contrary, the Bundesverfassungsgericht pointed out that the child’s rights are strengthened with two parents rather than just one.

Moreover, one cannot show that it is harmful for a child to be raised with homosexual parents. In addition, the exclusion of successive adoption would not be liable to avoid such a possible risk, this exclusion not being able to prevent a father from raising his adopted child with his partner of the same sex.

Furthermore, the sole fact that marriage benefits from special constitutional protection in comparison with other forms of cohabitation does not, according to the Bundesverfassungsgericht, justify discriminating against relationships between persons of the same sex who are not married without a sufficiently important reason. However, in the event, no such reason is present.

Therefore, the Bundesverfassungsgericht ruled that article 9, paragraph 7, of the Lebenspartnerschaftsgesetz was unconstitutional, and it ordered legislators to provide, regulations in accordance with the Constitution by June 2014. In the meantime, the provision in question must be applied in the meaning that it allows successive adoption within the framework of a civil partnership.

However, let us point out that the decision only concerns successive adoption and does not authorise persons of the same sex to adopt a child as a couple.

It is appropriate to add that by an order dated 7 May 2013 (2 BvR 909/06 e.a.), the Bundesverfassungsgericht continued to equalise the differences in treatment between marriage and civil partnership, this time in connection with taxation. It held that the limitation to married couples of the right to a joint income tax return, making it possible, in particular, to reduce the tax rate by carrying out equal distribution of income between the two spouses (Ehegattensplitting) constitutes indirect discrimination in accordance with sexual orientation.

See also the brief concerning the decision by the Grand Chamber of the European Court of Human Rights, decision of 19 February 2013, X et alia vs. Austria, p. 6 of this *Reflets* Bulletin.

Bundesverfassungsgericht, decision of 19.02.2013

1BvL 1/11, 1 BvR 3247/09,
www.bundesverfassungsgericht.de

IA/33266-A

(TLA) (HOEVEME)

*** Brief (Germany)**

Applied to in connection with a dispute concerning agreements among German grey cement manufacturers, by means of an order handed down on 26 February 2013, the Bundesgerichtshof (Federal Court of

Justice) upheld their sentencing to severe fines for infringements of the law concerning agreements.

However, it found that there had been an infringement of the principle of reasonable time limit and stated that, as compensation for the excessive duration of the proceedings, 5% of the fines imposed were to be considered as already having been paid.

After the introduction and statements of reasons of the appeals against the decision by the Düsseldorf Court of Appeal on 26 June 2009, the preparation of the joint response by the General Prosecutor's Office of Düsseldorf and the Bundeskartellamt (the Federal Office for recording and auditing cartels) lasted for almost two years, meaning that the dossier was not filed with the General Prosecutor at the Federal Court of Justice until December 2011. The Bundesverfassungsgericht held that the said period for establishment of the response was incompatible with the principle of urgency.

According to the Bundesgerichtshof, since the burden resulting from the excessive duration of the proceedings consisted of setting aside provisions for the penalties ordered, for the companies concerned, the amount of which is determined in particular in accordance with their economic capacity, the Bundesgerichtshof considered it appropriate to grant a deduction expressed as a percentage of the penalties imposed as compensation.

Bundesgerichtshof, decision of 26.02.2013, KRB 20/12,
www.Bundesgerichtshof.de

IA/33267-A

(TLA) (HOEVEME)

Austria

European Union – Monetary union – Measures relative to rescuing the Euro – Austria's participation in the European stability mechanism (ESM) – Infringement

of the Federal Constitution of Austria – Absence

In its decision dated 16 March 2013 (No. SV 2/12-18), the Verfassungsgerichtshof (Constitutional Court) rejected the constitutional complaint filed by the Government of the Land of Carinthia in light of the Treaty instituting the European stability mechanism (hereinafter the “TESM”), signed on 2 February 2012, and the declaration by the representatives of the parties to the TESM dated 27 September 2012. Therefore, the Constitutional Court found that the TESM, holding status as a Federal law in Austria, does not infringe the Austrian Federal Constitution. The TESM was approved by the National Council (Nationalrat – First Chamber of the Federal Parliament) on 4 July 2012 and was published in the Federal Official Journal on 28 September 2012 at the same time as the said declaration of 27 September 2012.

Both Heinz-Christian Strache, President of Austria’s Freedom Party (FPÖ), and the government of the Land of Carinthia, dominated by the said party’s regional organisation at the time, had both filed constitutional complaints against the TESM.

The individual complaint had been rejected as inadmissible by the Constitutional Court. According to its established and very restrictive case law with respect to challenges against rules, regulations and laws by individuals, the Court held that the applicant had not shown that it had been immediately adversely affected with respect to its rights and affected, at present and personally, in a legal position (order dated 25 February 2013, No. G104/12).

However, the Constitutional Court had to rule on the main issue with respect to the complaint filed by the Government of the land of Carinthia, according to articles 140a and 140 of the Federal Constitution. That provision entitles a party to apply to the Constitutional Court with a view to a constitutional check on the Federal Government, in particular, in light of any law of the Länder, and to the Government of

a Land with respect to any Federal law (and also a treaty holding status as Federal law).

The Constitutional Court emphasised that the Federal Government and the National Council decided to join the ESM, accepting contractual and limited obligations, in order to avoid unpredictable economic and social losses. The government maintained that this infringed the constitutional principle of good financial management, i.e., the principles of economy, efficiency and effectiveness, and the principle of sustainable public finance (articles 126b and 13 of the Constitution). The applicant asserted that a political option other than the one chosen would have been more obvious or more correct. However, the Constitutional Court held that the said choice is an issue that relates to policy and it is not incumbent upon the Constitutional Court to Judge it.

Furthermore, the Constitutional Court ruled that the TESM does not lead to an unauthorised transfer of sovereign rights to an international organisation. Article 9, paragraph 2, of the Constitution authorises the transfer of “certain sovereign rights” to another State or to an international organisation, by means of a law or of a treaty approved by the National Council. The Constitutional Court emphasised that the term “certain rights” must not be construed too rigidly. Therefore, it found that the transfer of a multiplicity of powers to the ESM is admissible, from the viewpoint of the content and limited objectives of the ESM.

Finally, the Constitutional Court recalled that Austria is not required to make subsequent payments or unlimited additional payments to the benefit of the ESM, contrary to the opinion of the applicant, which maintained that ESM membership resulted in an additional unlimited financial commitment. According to the Federal Government at the time of conclusion of the treaty, and the National Council, at the time of approval of the said treaty, all of the payment obligations of the Member States are limited pursuant to the

appendix to the TESM, in the event, for Austria, 19.4 billion euros. The Constitutional Court referred to the declaration dated 27 September 2012 made by the representatives of the parties to the TESM, who subsequently confirm the said interpretation following the decision by the German Bundesverfassungsgericht of 12 September 2012 (BVerfG, 2 BvR 1390/12, see *Reflets* No. 3/2012, p. 43).

As the Constitutional Court ruled, the adoption of the said interpretive declaration and its publication in the Federal Official Journal without reconsideration by the Austrian National Council do not constitute an infringement of the Constitution either. The interpretive declaration does not modify the ESM, but simply ensures the said interpretation, which existed before approval of the TESM by the National Council, and which does not have to be approved by the latter.

See Cyprus's contribution relative to a decision by the Supreme Court concerning the ESM, p.14 of this *Reflets* Bulletin. See also, under "Response to the legal opinion", the commentary on the decision by the Court of Justice dated 27 November 2012 (Pringle, C-370/12), in the present *Reflets* Bulletin, p. 54.

Verfassungsgerichtshof, decision of 16.03.2013, No. SV 2/12-18, and order dated 25.02.2013, No. G-104/12, www.vfgh.gv.at

IA/33262-A
IA/33263-A

(WINDIJO)

Belgium

Judicial cooperation in criminal matters – European arrest warrant (EAW) and procedure relative to rendition between Member States– Decision to execute the arrest warrant – Appeal in cassation – Alleged infringement of the fundamental rights enshrined in article 6 TEU – Infringement of the duty to provide a statement of reasons – Dismissal of the appeal

N.J., a person who was the subject of a European arrest warrant issued by Spain, had filed an appeal to the Supreme Court of Appeal against the decision by the Brussels Court of Appeal, Indictment Division, issued on 20 December 2012.

The applicant criticises the Indictment Division for not having carried out the check provided for under article 4, 5°, of the Belgian law concerning the EAW, which states that enforcement of the EAW must be rejected "if there are serious reasons for believing that it will have the effect of attacking the fundamental rights of the person concerned, as enshrined in article 6 TEU". Furthermore, the applicant argued that there was also an infringement of article 16, paragraph 1, of the said law, a provision relative to the duty to provide a statement of reasons for the decision relative to enforcement of the EAW.

In its decision, the Supreme Court of Appeal recalled first of all that "in light of the principle of mutual trust between Member States, refusal of rendition must be justified by detailed elements indicating an obvious danger to the rights of the person and of such a nature as to reverse the presumption of observance of the said rights from which the State of issue benefits". It added that it was not incumbent upon the investigating court to make a complete check on the foreign procedure and on the legitimate nature of the EAW, it only had to verify observance of the provisions of Belgian law relative to the conditions governing enforcement of an EAW.

The Supreme Court of Appeal then considered the arguments submitted by the applicant in support of the infringement of article 4, 5°, of the applicable national rules and regulations.

Following that examination, it concluded that the following did not constitute attacks on fundamental rights justifying a refusal to enforce an EAW: the fact that the Spanish authorities did not hear the person concerned at the time of international letters rogatory or before issue of the EAW; the fact that a previous application for

extradition of the applicant addressed to the Swiss authorities had been cancelled; the fact that the applicant's counsel had been unable, in his absence, to become a party to the dispute for the purpose of representing him in Spain, the Spanish examining magistrate having accepted that possibility when the applicant was brought before him.

Finally, as concerns the obligation to provide a statement of reasons set forth in article 16, paragraph 1, of the Belgian law concerning the EAW, the Supreme Court of Appeal held that the examining court's referral to the procedural documents of the public prosecutor was in accordance with that obligation.

The arguments submitted by the applicant not having been accepted, the Supreme Court of Appeal dismissed the appeal.

*Supreme Court of Appeal, decision of 23.01.2013,
P. 13.0087F
www.cass.be*

IA/33192-A

(FLUMIBA)

*** Brief (Belgium)**

The Supreme Court of Appeal handed down a decision concerning the law of civil liability in connection with a dispute between the European Union and an insurance company.

In this case, an employee of the European Union died following an accident and, pursuant to the statutory provisions governing civil servants, the European Union was required, to pay orphan's pensions to the children or survivor's pensions to the widow or to the previous spouse of the said employee.

Under Belgian law concerning civil liability, the rule, recalled by the Court of Cassation, is that "a public employer that, pursuant to its legal or regulatory obligations, must pay remuneration to its employees without receiving any work services in exchange is entitled to an indemnity on the basis of

article 1382 and 1383 of the Civil Code when it suffers prejudice in this way".

It was on the basis of this well-established case law of the Supreme Court of Appeal that the Union, pursuant to article 85bis, paragraph 4, of the statutory provisions concerning civil servants brought action against the insurer of the third party responsible for the accident with a view to obtaining reimbursement for the amounts of the pension paid, and it had been unsuccessful at first instance.

Called on to rule on the case, the Supreme Court of Appeal held that the payment of the above-mentioned pensions by the Union did not constitute consideration to the work services from which the Union allegedly would have benefited if the accident had not taken place, and therefore did not constitute reparable damage in the meaning of articles 1382 and 1383 of the Belgian Civil Code. Consequently, the Union was not justified in demanding reimbursement for that by means of a direct appeal on the basis of Articles 1382 of the Civil Code and 85bis, paragraph 4, of the statutory provisions concerning civil servants.

*Supreme Court of Appeal, decision of 24.01.2013,
C. 12.0308F,
www.cass.be*

IA/33193-A

(FLUMIBA)

Bulgaria

Social policy – Social Security – Rule (EC) No. 883/2004 – Coordination of the social security systems - Cash benefits – Allocation of a supplement to the old-age pension – National legislation granting this supplement conditional on the requirement of the person benefiting from a pension having been subject to persecution – Infringement of the principle of non-discrimination

In a decision dated 4 December 2012, the Administrativen sad Sofia grad (Administrative Court of the City of Sofia)

made a decision concerning the right to grant a supplement to the old-age pension of a Bulgarian citizen who was persecuted for political reasons and who resides and receives his old-age pension in Germany, as well as in a Member State other than the competent Member State.

Pursuant to article 9, paragraph 1, of the law concerning political and civil rehabilitation of persons subject to persecution, those persons are entitled to benefit from a supplement to their old age pension provided two conditions are met: receiving a pension and being subject to persecution because of their origins, their political opinions or their religious beliefs during the period from 9 September 1944 to 10 November 1989.

In this particular case, the applicant filed an appeal in the Administrative Court of the City of Sofia calling for cancellation of the decision by the director of the Social Security Department of Sofia, relative to the refusal to allocate a supplement to her pension, on the grounds that she did not receive a pension in Bulgaria.

The Court holds that the supposed requirement relative to the persons who have been subject to persecution, called on by the administrative authority, in order to receive their pension in Bulgaria so as to benefit from the said supplement is unfounded. Such a limitation would be contradictory to the Constitution (article 6), to Union law, as well as to article 14 of the ECHR read in combination with article 1 of its Protocol no. 1, insofar as it would infringe the principle of non-discrimination and would disadvantage national citizens who reside and receive a pension in another Member State.

In its statement of reasons, the Court referred to articles 21 and 29 of Rule No. 83/2004 concerning the coordination of the social security systems, and it specified that the supplement to the pension requested by the applicant represents an indemnity for the damages suffered because of the persecution to which she was subjected and does not depend on the period of insurance

completed by the residence in Bulgaria or in another Member State. In that sense, the court also emphasised that an insured person who resides or stays in a Member State other than Bulgaria may benefit from cash benefits due pursuant to Bulgarian legislation applicable by the competent institution of Bulgaria (the Member State responsible for the said services) without noting in which State the said person receives her pension.

The decision dated 4 December 2012 handed down by the Administrative Court of the city of Sofia was the subject of an appeal by the Administrative Authority and was upheld by a decision dated 8 May 2013 by the Varhovnia administrativen sad (the Administrative Supreme Court) ruling on final jurisdiction.

Administrativen sad Sofia grad. Decision dated 04.12.2012, No. 6604, www.admincourts Sofia.bg/Дела/Информациязадела.aspx 1A/32994-A

(NTOD)

Cyprus

International agreements – Agreement on facilitation of financial support between the European Stability Mechanism (ESM) and the Republic of Cyprus – Measures on behalf of reorganisation of the banking system – “Bail-in” by means of a conversion into shares of the unguaranteed bank deposits – Application to set aside – Refusal

On 7 June 2013, the Supreme Court handed down its decision in the Christodoulou e.a. case (consisting of 55 combined cases) against the Central Bank of Cyprus and the Ministry of Finance of Cyprus. In the context of the crisis in Cyprus, the Chamber of Deputies promulgated a series of financial laws within the framework of the effectiveness of the facilitation agreement for financial support between, on one hand, the ESM and, on the other hand, the Republic of Cyprus with the Central Bank of

Cyprus. Those laws include law No. 17(I)/2013 (hereinafter the “law”), which authorises the Central Bank, in consultation with the finance minister, to adopt extensive measures for reorganisation of the banking system. The most drastic measures adopted (with approval of the European Commission and of the Eurogroup) were liquidation of the Cyprus Popular Bank and recapitalisation of the Bank of Cyprus by means of a “Bail-in”, the conversion into shares of part of all of the unguaranteed deposits (up to 60% of the value below 100,000 euros) of the latter bank (hereinafter the “haircut”), which led the applicants in the said 55 cases to dispute the legality of the said measures in the Cyprus Supreme Court. The applicants, depositors in the two banks in question, disputed, on one hand, the legality of the decision made by the central bank to place the Cyprus Popular Bank under consolidation and its partial sale to the Bank of Cyprus, and, on the other hand, the Central Bank’s decision to apply the haircut to the uninsured deposits.

In the first place, with respect to the partial sale of Cyprus Popular Bank to Bank of Cyprus, the Supreme Court found that this was an action under private law, Cyprus Popular Bank acting as seller and the Bank of Cyprus as purchaser, and therefore it did not concern the depositors of Cyprus Popular Bank, who have only a contractual relationship with Cyprus Popular Bank (and hence a creditor-debtor relationship). Thus, the Supreme Court found that the direct interest of the depositors is not directly affected so as to entitle them to file an application for annulment. The Supreme Court also held that if the depositors’ rights are affected by the sale, they do not result from administrative law, but arise only within the framework of a civil action against Cyprus Popular Bank itself.

Moreover, the Supreme Court considered that within the framework of a civil case, the legality of the actions in question taken by the central bank could be checked. However, the Supreme Court pointed out that one must also take into account the principle emphasised in law to the effect that the

creditors of a financial institution undergoing restructuring (like Cyprus Popular Bank) are not in a financial position that is more unfavourable following the implementation of the said measures in comparison with the position in which they would have been if the said institution had been placed under liquidation.

In the second place, with respect to imposing the haircut, the Supreme Court also found that the application of that measure does not modify the situation as concerns the legitimate interests of the depositors and the enforceable nature of the administrative act. The Supreme Court reiterated that the relationship of the Bank of Cyprus depositors with the latter bank is the same as the one of the depositors of Cyprus Popular Bank. Consequently, it was found that a Bank of Cyprus depositor should file a civil action in order to protest against the application of the haircut to his or her deposit. On the other hand, the court perfectly emphasised the hypothesis of the liability (by extension) of the Central Bank (following its decrees) for the damages suffered by the depositors. The Supreme Court’s obiter dictum commentary to the effect that is also possible to find liability (by extension) of the Union Institutions involved by means of the constitutional provisions or of Union Law, is noteworthy. However, as with the first question, the Supreme Court recalled that one must take into consideration the question of whether the creditors of the financial institution in question undergoing restructuring would not be in a more unfavourable financial situation following implementation of the said measures in comparison with the position they would have had if the said institution had been placed under liquidation.

Following this analysis, the Supreme Court, in plenary session, handed down a majority decision pursuant to which the appeals must be rejected as inadmissible. However, two judges in the panel filed dissenting opinions. According to those judges, the measures in question were not governmental but rather administrative acts, which could have been considered by

the Supreme Court on their merits. It is interesting to emphasise that one of the dissenting opinions considered the possibility of a preliminary ruling referred to the Court of Justice concerning the interpretation of the measures in question with regards to the TFEU and the Charter of Fundamental Rights of the European Union.

See the Austrian contribution relative to a decision by the Constitutional Court concerning the ESM, p.11 of this *Reflets* Bulletin. See also, under “Response to the Legal Opinion”, a commentary on the decision by the Court of Justice dated 27 November 2012 (Pringle, C-370/12), in this *Reflets* Bulletin, p. 54.

Supreme Court, second instance, decision dated 07.06.2013, No. 551/2013, Christodoulou et Al. vs. Central Bank of Cyprus et Al.

www.cylaw.org/cgibin/open.pl?file=apofaseis/aad/meros_3/2013/3-201306-551-13_etc_Pliopsifia_Hadjihambis.htm

IA/33512-A

(LOIZOMI)

Spain

European Convention on Extradition – Principle of ne bis in idem – Article 54 of the Convention implementing the Schengen Agreement (CAAS).

In its order dated 14 January 2013, the Criminal Chamber of the Audiencia Nacional rejected a request for extradition handed down by Ukraine in application of the principle ne bis in idem. The extradition application sent by the General Prosecutor’s Office of Ukraine concerned rendition of Ms Naumenko (an Austrian citizen, previously a Ukrainian citizen), who was suspected of having been involved as an intermediary to a murder.

After having verified that the conditions relative to dual criminal liability and

minimum sentencing, inter alia, had been met, the Audiencia considered the issue of the principle of ne bis in idem, prescribed by article 4 of Spanish law 4/985 concerning extradition, and by article 9 of the European Convention on Extradition, applicable in this case.

In light of those provisions, the Audiencia Nacional based its decision to refuse extradition on the fact that Austria, after having refused extradition due to Ms Naumenko’s Austrian nationality, had already made a detailed investigation of the same facts. The closing of the criminal proceedings in Austria, which occurred following a decision by the public prosecutor, was considered a decision for discharge of the accused by the Audiencia Nacional.

More specifically, the Audiencia held that the decision made by the Austrian authorities initiates the effects of article 54 of the CAAS. In light of the case law of the Court of Justice in the Mantello, (decision of 16 November 2010, C-261/09, Rec. P. I-11477), Van Esbroeck, (decision of 9 March 2006, C-436/04, Rec. p. I-2333) and Gozütöck and Brügge cases (decision of 11 February 2003, C-187/01 and -385/01, Rec. p. I-1345). In those cases, the Court of Justice affirmed that the principle ne bis in idem, consecrated in article 54 of the CAAS “also applies to proceedings whereby further proceedings are prohibited (...) by which the prosecutor of the Member State puts an end, to the criminal proceedings filed in that State without intervention by a court”.

In basing itself on that case law, the Audiencia Nacional extended the application of this interpretation of the principle ne bis in idem to a case that concerned a procedure relative to extradition to a non-member state.

Auto, Audiencia Nacional, Sala de lo Penal, Sección Cuarta, order of 14.01.13, extradición no. 25/12,
www.poderjudicial.es/

Approximation of laws – Consumer protection in connection with consumer credit – Directive 93/13/EC – Unfair terms – Jurisdiction of national judges

Numerous cases relative to unfair terms in connection with mortgage loans are now being submitted to the Spanish Courts. In the last few months, the Court was applied to on several occasions for preliminary rulings for it to make a decision concerning the compatibility of the rules and regulations relative to mortgage loans with directive 93/13 concerning unfair terms in contracts entered into with consumers, either because of the impossibility experienced by the competent Judge in connection with mortgage foreclosures to analyse the unfair nature of the contractual provisions, or due to the impossibility experienced by the competent judge in connection with proceedings on the main issue to suspend the current mortgage execution procedures.

In an initial phase, the submissions by Advocate-General Kokott in case C-415/11, Aziz, and then the decision by the Court in this case dated 14 March 2013 caused some legal and judicial upheavals in Spain bringing a conclusion of incompatibility of such national regulation with the said directive.

From the legislative viewpoint, a new law has just been approved: law 1/2013 of 14 May 2013, relative to the measures aimed at strengthening protection of mortgage debtors, restructuring of the debt and the subsidised rent. In the preamble to that law, the decision by the Court of Justice in the Aziz case and the criteria established at the time of those meetings hold a significant place. Among the measures, and with respect to the proceedings relative to mortgage execution in progress at the time it went into effect, the law offers the possibility of filing an “extraordinary protest” because of the existence of unfair terms. That law widens its field of

application to include contracts entered into between parties not classified as consumers, such as professionals and business persons.

The Spanish national courts have been very closely involved in this subject, which has become a substantial social problem in Spain, and also reacted by following the Aziz decision.

The Supreme Court, by means of its decision of 9 May 2013 (STS, 1a, S 9 May. 2013. Rec. 485/2012), has already indicated its position on this point and has established a new legal opinion concerning one of the provisions considered unfair, namely, the “minimum rate clause”. The fact is that the Supreme Court concluded that the clauses in question were improper because of the significant imbalance contrary to good faith because of the absence of sufficient information.

We should emphasise the fact that the Spanish Supreme Court does not consider that the “minimum rate clauses” are, by their very nature, improper or disproportionate, since the determination of the interest rate is part of private initiative, within the limits established by law. Having said that, it holds that the contracts called into question are characterised by a substantial lack of transparency, which gives rise to a certain confusion for consumers preventing them from identifying the said clauses as one of the essential elements of the subject of the contracts and from determining the real breakdown of the risks due to the variability of the applicable interest rates. They lack sufficient information that, clearly and in an understandable way, could enable consumers to determine the cost of their contract in comparison with other kinds of contracts or, also, to find out about certain scenarios relative to the predictable fluctuation of rates. The Supreme Court considers that those essential points of the contracts are presented among an overwhelming amount of data that do not focus the consumer’s attention. The Spanish Supreme Court concluded that this lack of transparency determines the unfair nature of the said terms, but does not give rise to

invalidation of the contracts. Nevertheless, as was emphasised by the Court of Justice in the Banco Español de Crédito case (decision dated 14 June 2012, C- 618/10), the national judge is solely bound, when he notes the nullity of an unfair term, to rule out its application so that it does not produce any restrictive effects with regards to the consumer, but he or she is not authorised to revise the content of the clause.

It is also appropriate to take note of the existence of a pioneering order dated 2 April 2013 handed down by the Court of First Instance of Cordoba, which had jurisdiction to determine the unfair nature of the contractual clauses subject to its review. Pursuant to the decision by the Court of Justice in the Aziz case and contrary to the national regulations, the judge decided to adopt, as a provisional measure, the suspension of the extra-judicial proceedings relative to enforcement in progress so as to guarantee the principle of effectiveness. The clauses in question were the same as the ones targeted by the Aziz case: the late payment interest clause, the clause concerning early payment, and the one concerning unilateral settlement of the unpaid debt.

Nevertheless, several questions remain unanswered. Thus another referral of a preliminary ruling reached the Court concerning the compatibility of making payment in kind, provided for in the national rules and regulations in this matter, in light of directive 93/13.

Tribunal Supremo, Sala Primera, de lo Civil, decision dated 09.05.2013 (Rec. 485/2012,

www.poderjudicial.es

IA/33355-A

(NUNEZMA)

Estonia

Regulation No. 593/2008 concerning the law applicable to contractual obligations – Individual employment contracts – Law

applicable to absence of choice – European Economic Area – Unrestricted provision of services – Worker secondment – Directive 96/71 – Working and employment conditions – Minimum wage rate

The Supreme Court was applied to in connection with whether an employer (hereinafter “the defendant”) had to pay its employees (hereinafter “the applicants”) the unpaid remuneration pursuant to employment contracts entered into during the year 2010 in Estonia, or pursuant to the collective bargaining agreement applicable in Finland.

The applicants declared that they had been seconded to Finland by the defendant, on its behalf and under its direction, as part of their employment contracts. The defendant did not dispute that argument. In 2011, it decided to break the said contracts. The applicants challenged the redundancy decisions in order to obtain salary arrears and a compensatory indemnity.

In that connection the Supreme Court ruled that it was a question of determining the law that was applicable in light of regulation No. 593/2008 (hereinafter the “Rome I regulation”). The Court held that pursuant to article 8, paragraph 2, first sentence, of the Rome I regulation, the said contracts were governed by Finnish law because the applicants had carried out their work, pursuant to the said contracts, in Finland (see in particular the decision by the Court of Justice of 15 March 2011, Heiko Koelzsch, C-29/10, Rec. p. I-1595, point 45). Thus, the defendant was forced to pay the applicants the remuneration provided for under the collective bargaining agreement in effect during the period in dispute.

Moreover, even if the parties could have agreed that the law applicable to the said contracts was Estonian law, it would have been appropriate to apply the provisions aimed at obtaining greater protection for the workers. The Supreme Court pointed out that during the employment relationships, the Republic of Finland had guaranteed minimum salary rates that were

higher than the ones of the Republic of Estonia for the seconded workers.

In that connection the Supreme Court pointed out that the obligation to guarantee minimum salary rates in equivalent manner between seconded workers and the workers of the host country would not give local businesses a competitive advantage. On the other hand, the possibility of paying the seconded workers remuneration at a rate lower than provided for under the said collective bargaining agreement would, rather, give a competitive advantage to the employers seconding their workers to businesses in the host country.

The Supreme Court emphasised that according to established precedents, Union law does not oppose letting a Member State impose, on a company established in another Member State and providing services on its territory, payment to its workers of a minimum remuneration established under the said State's national rules (see the decision of 14 April 2005, Commission/Germany, C-341/02, Rec. p.I-2733, point 24).

Supreme Court, Civil Chamber, decision of 16.01.2013, case No. 3-2-1-179-12 published on the Supreme Court's Internet site, www.rigikohus.ee

IA/33364-A

(TOPKIIJA)

*** Brief (Estonia)**

On 21 November 2012, the Civil Chamber of the Supreme Court handed down a decision in a case concerning application of rule No. 44/2001 concerning jurisdiction of the ordinary courts, recognition and enforcement of the decisions in the civil and commercial matters (hereinafter the "Brussels I Rule").

The dispute on the main issue concerned a situation in which, after having signed a loan contract with an Estonian credit institution, the beneficiary of the loan moved to another Member State in the Union. It was a question of whether, under

those circumstances, the lender could call on the convention assigning jurisdiction contained in the loan contract, according to which the Estonian Courts held jurisdiction for settling the dispute between the parties.

The Supreme Court ruled that the lender could not call on the said convention assigning jurisdiction and that it was appropriate to apply the Brussels I rule to determine jurisdiction, since a cross-border situation was involved.

It added that if the defendant appeared in an Estonian Court without disputing that Court's jurisdiction, that Court had to be regarded as holding jurisdiction and there was therefore no reason not to accept the appeal (see in particular the decision by the Court of Justice dated 20 May 2010, Česká podnikatelská pojišťovna as., Vienna Insurance Group against Michal Bilas, C-111/09, Rec. p. I-4545, points 21 to 24).

The Supreme Court also held that if it appeared that the consumer's place of residence was not in Finland, legal jurisdiction could also result from article 16, paragraph 2, of the Brussels I rule.

Supreme Court, Civil Chamber, 21.11.2012, No. 3-2-1-123-12, www.rigikohus.ee

IA/33365-A

(TOPKIIJA)

France

Social policy - Protection of Employee Health and Safety - Work time adjustment - Directive 2003/88 - Break time - Maximum daily and weekly work duration - Employer's obligations relative to observing break times from work and maximum durations of work-Burden of proof incumbent upon the employer

A few months apart, the Social Division of the Court of Cassation (Supreme Court of Appeal) had the opportunity to make decisions, in two cases, concerning the

interpretation of article L.3171-4 of the Employment Code relative to the distribution of the burden of proof between the employer and the employee concerning working hours carried out.

The Court of Cassation had to consider whether it was the employer or the employee that bore the burden of proof relative to observing break times from work and the maximum work durations required by directive 2003/88, concerning certain aspects of adjustment of work time, and the French Employment Code.

In each case, the employer criticised the decision handed down by the Court of Appeal for having sentenced it to payment of amounts as damages on the ground of non-observance of break time and of the maximum work durations.

By means of two decisions handed down on 17 October 2012 and 20 February 2013, the Court of Cassation ruled that article L.3171-4 of the Employment Code is inapplicable both to proof of observance of the thresholds and limitations provided for under Union law and to proof of observance of the maximum daily and weekly work durations, incumbent upon the employer.

Those two cases are connected with the extension of a new approach initiated on 13 June 2012 by a change to case law of the Social Division of the Court of Cassation with respect to annual paid leave (Cass. Soc. 13 June 2012, No. 11-10.929, commented on in *Reflets* No. 3/2012).

In the said decision, the Court of Cassation had ruled that in light of the purpose assigned to paid annual leave in directive 2003/88, it is the responsibility of the employer to take appropriate steps to ensure that the employees are able to actually exercise their right to leave and, in the event of dispute, to demonstrate that to that effect it took the steps legally incumbent upon it.

Consequently, it is the responsibility of the employer not only to guarantee adherence to the obligations incumbent upon it with respect to breaks, work, and employee

health and safety, but also to show, in the event of dispute, that it complied with the said obligations. For the employer, it is a question of applying the requirements of directive 2003/88 with respect to daily rest (art. 3), breaks from work (art. 4), weekly rest (art. 5), maximum duration of the working week (art. 6), annual paid leave (art. 7), or also duration of night work (art. 8).

Furthermore, the decision made by the Court of Cassation on 20 February 2013 offers some interesting developments with respect to the redress of the prejudice suffered by the employee. As such, returning to the solution indicated by the Court of Justice in the *Dellas* case (decision of 1 December 2005, C- 10/04, Rec. P. I-10253), the Court of Cassation ruled out the possibility of obtaining salary arrears for breaks from work that were not taken that should not have been worked and therefore paid, but it granted damages for the employer's non-adherence of one of its obligations.

This new approach by the Court of Cassation, with respect to the burden of proof, reflects an intention to guarantee effective right for the employee to benefit "from corporate law rules of particular significance", which constitute the requirements laid down in directive 2003/88 necessary in order to guarantee the employee's health and safety.

Court of Cassation, Social Division, decision dated 17.10.2012, No. 10-17.370,
Court of Cassation, Social Division, decision of 20.02.2013, No. 11-28.811,

www.legifrance.gouv.fr

IA/32992-A
IA/32993-A

(CZUBIAN) (DELMANI)

***Border checks, asylum and immigration –
Immigration policy – Status of the citizens
of third party countries who are long-
term residents – EEC-Turkey Association***

Agreement – EC-Algeria Euro-Mediterranean Association Agreement – Right to equal treatment concerning social security, social welfare and social protection – National rules and regulations affecting payment of family allowances to the citizens of third party countries for their dependent children subject to production of documents confirming the legitimate nature of their entry and of the residence of the said children – Infringement

By means of its most solemn formation (called on only three times in 2012), the Court of Cassation was led to consider the compatibility of certain provisions of the French social security system in light of Union law and of International law.

In France, obtaining family allowance for children is subject to two separate allocation procedures depending on the applicant's origin: one system for French nationals and European citizens from a Member State of the Union or of the European Economic Area, and a less favourable system for the citizens of non-member states holding legitimate status on French territory. Thus, article L. 512-2 of the Social Security Code requires only that citizens of non-member states wishing to receive family allowances for their children prove that the child entered national territory in regular manner, for instance, under the heading of family reunification.

By means of decision No. 2005-528 DC of 15 December 2005, the Constitutional Council had found that this requirement was in accordance with the Constitution. The "legislator wished to avoid granting family allowances for children who entered France in disregard of the family reunification rules from depriving those rules of their effectiveness and encourage a foreign citizens to have their children enter the country without verification of their ability to offer them decent living and housing conditions, namely the ones that prevail in France, the host country." However, for the Constitutional Council, by making such a judgement, the legislator did not bring about any obviously unbalanced conciliation

between protection of public order, which is a constitutional objective, and the right to lead a normal family life.

The unconstitutionality of the said provisions having been ruled out, could they pass the test of conforming to a convention, in light of the various international agreements to which France is a party? By means of two decisions, handed down in plenary assembly on 3 June 2011 (appeals no. 09-69.052 and 09-71.352), the Court of Cassation held that the said national provisions conformed both to the European Convention for Protection of Human Rights and Fundamental Freedoms as well as the International Convention on the Rights of Children, since the said provisions had an objective nature that was both proportionate and justified in light of the requirement of verifying the conditions of receiving children on French territory.

There was still the issue of the compatibility of those provisions with Union law. In plenary assembly, the Court of Cassation therefore handed down a decision on these questions on 5 April 2013.

In this particular case, some Turkish and Algerian citizens had pointed to the incompatibility of those provisions with Union law, and more particularly with the association agreements between the Union and certain non-member states: in this case, Turkey and Algeria.

By means of two decisions, the Court of Cassation held that the said provisions were contrary to the association agreements between the Union and Turkey, on one hand, and the Union and Algeria on the other. The Court of Cassation, basing itself on the case law of the Court of Justice, noted that the provisions of the association agreements prohibiting any discrimination based on nationality in connection with the social security systems had a direct effect (decision of 5 April 1995, Krid, C-103/94, Rec. p. I-719; decision of 4 May 1999, Sürüll, C-262/96, Rec. P. I-2685). In that connection, the Court of Cassation held that national law was not able to submit grant of social benefits to such a citizen subject to

additional or stricter conditions in comparison with those applicable to its own citizens, i.e., in this case, by requiring the former to produce additional documents in comparison with the latter.

That decision provided a new example of the number of checks now incumbent upon internal jurisdictions in examination of the law, in light of the instruments available to them, and of the particular place held by Union law in this structure.

We should point out that very recently, a French Court, the Social Security Affairs Court of Bouches-du-Rhône, applied to the Court of Justice with a preliminary matter concerning the compatibility of the same provisions of the Social Security Code in light of the principle of equal treatment contained in article 11 of directive 2003/109 relative to the status of the citizens of third party countries who are long-term residents. (Case C-257/13, Mlalali).

Constitutional Council, decision of 15.12.2005, No. 2005-528 DC,

IA/33196-A

Court of Cassation, Plenary Assembly decision of 03.06.2011, No. 09-69.052,

IA/32995-A

Court of Cassation, Plenary Assembly decision of 03.06.2011, No. 09-71.352,

IA/32996-A

Court of Cassation, Plenary Assembly decision of 05.04.2013, No.119-17.520,
IA/32998-A

Court of Cassation, Plenary Assembly decision of 03.06.201, No. 09-69.520,

IA/32999-A

www.legifrance.gouv.fr

*** Brief (France)**

Applied to in connection with a priority question of constitutionality (QPC), for the first time, the Constitutional Council submitted a preliminary matter to the Court of Justice. The case having given rise to application to the Council concerned a decision ruling on a request for extension of a European arrest warrant. Pursuant to the provisions of the Code of Penal Procedure originating from the framework decision relative to the European arrest warrant and to the procedures for delivery among Member States, the extension decision belongs to the Investigatory Chamber of the jurisdiction concerned and is not subject to appeal. A British citizen, detained in his own country, had nevertheless filed an appeal against the decision authorising an extension of the warrant concerning him (on 21 June last year, he was sentenced by a British Court). That appeal gave rise to the QPC concerning the conformity of the absence of recourse to the Constitution.

The Constitutional Council, having ruled that it lacked jurisdiction for ruling on the compatibility of a provision of French law with Union law, stayed a ruling while submitting the issue for judgement by the Court of Justice. The context of the case justified emergency proceedings, which, on 30 May 2013, gave rise to a decision by the Court of Justice (case C-168/13). That Court held that Union law did not oppose institution of a suspensive effect of remedy. The Constitutional Council handed down its decision concerning the QPC on 14 June 2013, considering that the absence of suspensive effect of remedy against a decision ruling on a request for extension of the European arrest warrant was contrary to the Constitution.

Constitutional Council, decisions of 04.04.2013 and 14.06.2013, QPC No. 2013-314 P, Jérémy F.,
www.legifrance.gouv.fr

QP/07917-A9
QP/07917-P1

(DELMANI)

(ANBD) (DELMANI)

The French national museums and monuments have a system that makes them free of charge to a specific category of visitors. By measures dating from 2009, free access was extended to all visitors between 18 and 25 years of age who legitimately reside on the territory of a Member State in the Union or of a State that is a party to the European Economic Area (EEA). An anti-racism association asked the Council of State to cancel the said measures on the ground that they excluded visitors who could not prove status as a long-term resident or as an authorised resident.

The Council of State initially refused to conclude the existence of a claim by users of the State, the absence of which would adversely affect the right to property, from free access for part of the users on the basis of the European Convention for Protection of Human Rights and Fundamental Freedoms.

In referring to directive 2003/109 relative to the status of citizens of third party countries who are long-term residents and to the Court of Justice cases *Commission/Spain* (decision of 15 March 1994, C-45/93, Rec. p. I-9911) and *Commission / Italy* (decision of 16 January 2003, C-388/01, Rec. p. I-0721), in light of and in the grounds of its decision, the Council of State held that the benefit of free admission, acknowledged for persons intending to reside on the national territory in the long-term, had to be extended, in application of Union law, to Union citizens holding the same right to long-term residence in another Union country or in the EEA. Therefore, the Council of State cancelled an initial series of measures excluding long-term residents in a regular authorised situation from the other states of the Union or of the EEA. A second type of measures, granting free admissions to persons 18 to 25 years of age who are either French citizens or citizens of another Member State in the Union or in the EEA, or are the holders of a long-term visa or of a residence permit in France, and long-term residents in a Member State in the Union or

of the EEA, was maintained because the beneficiaries had been defined on the basis of objective criteria directly related to the subject of the rule that they institute: consequently, the differing treatment resulting from this second type of measures was not obviously disproportionate in light of the intended objective.

Council of State, Legal Proceedings Section, decision of 18.01.2013 No. 328230,

www.legifrance.gouv.fr

IA/33000-A

(ANBD) (DELMANI)

In this case, the applicant in the appeal had seen the Judge at first instance refuse his request for referring a preliminary matter to the Court of Justice. He had immediately filed an appeal against that decision, while the proceedings continued. The Court of Appeal had ruled that the appeal was admissible on the grounds that the request for a stay of ruling submitted with a view to application to the Court of Justice in connection with a preliminary matter is not subject to the rules relative to procedural objections and found that the judge at first instance had settled a substantive issue by rejecting the request for reference of a preliminary matter to another Court. The Court of Appeal had based its decision on combined application of article 267 TFEU and 74 of the Code of Civil Procedure, but had ruled that there was no reason for referring a preliminary matter.

The Court of Cassation found that appeal to be inadmissible on the grounds that the decision by which the Judge on initial jurisdiction had rejected the application for referring a preliminary matter had not settled the merits of the dispute and, since it was a question of a procedural objection, had not ended the proceedings.

Court of Cassation, Social Division, decision of 27.02.2013 No. 11.26-864,

www.legifrance.gouv.fr

IA/32997-A

Greece

European Union – Monetary Union – Government deficits – Measures relative to implementation of the memorandum between Greece and certain Eurozone countries with a view to dealing with an excessive government deficit – Conformity to the Constitution and certain international instruments – Differing case law decisions

The Greek Courts are now providing varied precedents, often contradictory, concerning the issue of compatibility with the Constitution, Union law and other international instruments of the various austerity measures adopted in application of the two Memoranda entered into between Greece, on the one hand, and the European Commission, the European Central Bank and the International Monetary Fund on the other, with a view to restoration of Greek public finance. It is significant to point out that the “protesting” decisions taking note of the incompatibilities with the said texts, and hence of the illegality of such measures, mainly originate from lower courts. On the other hand, the *Symvoulío tis Epikrateias* (Council of State, hereinafter the “SE”), for its part, ratifies the legislators’ and executives’ choices by declaring that the measures disputed by the applicants conform to the laws. Among a collection of decisions, this *Reflète* Bulletin has selected two of them that offer the best reflection of this situation. We are referring, on one hand, to a decision by the SE and, on the other hand, to a decision handed down by the Athens Justice of the Peace.

In the first place, the SE, ruling in plenary assembly on 2 April 2012 by means of its decision 1285/2012, dismissed an application for annulment that had been filed by an association of retired persons and was aimed at the ministerial decision, adopted in application of the above-mentioned two Memoranda, having reduced the level of certain retirement pensions as well as the amount of the “gifts” scheduled

for the Christmas and Easter holidays and of holiday allowances. The applicants’ arguments included the infringement, by the decision under attack, of article 34 of the Charter of Fundamental Rights of the European Union, (hereinafter the “Charter”). In addition to the vague nature of the argument, in order to dismiss it, the SE refers to the case law developed in this connection by the Court of Justice, going back to the *Karlsson* case (decision of 13 April 2000, C-292/97; Rec. p. I-2737) as well as to the cases of *Grant* (decision of 17 February 1996, C-249/96, Rec. p. I-0621) and *Annibaldi* (decision of 18 December 1997, C-309/96, Rec. p. I-7493). It indicates that the Charter produces its effects solely in the event of the powers exercised by the Union, that it cannot have the effect of extending the said powers, and that therefore, it does not apply to the acts of the Member States that are unrelated to Union law, but which, on the contrary, relate solely to their domestic policy.

The decision also takes note of the compatibility of the said measures, on one hand, with the National Constitution and, on the other hand, with a set of international instruments, including in particular the European Convention on Protection of Human Rights and Fundamental Freedoms (hereinafter the “ECHR”).

With respect to the Constitution, the high court considers that the measures in dispute do not infringe article 4 thereof relative to equal treatment before the law. As such, the fact that the said measures target only retired persons younger than 60 years of age does not infringe this principle on the grounds that, on one hand, the age of the interested parties constitutes an objective reference criterion and, on the other hand, that the said criterion is not chosen in an arbitrary way, but, on the contrary, is aimed at protecting older retired persons. Furthermore, the said criterion reflects the process of an increasing retirement age that is aimed at guaranteeing, more generally, the viability of the social security system.

With respect to the compatibility of the measures in dispute with article 22, paragraph 5, of the Constitution, pursuant

to which the State is to ensure the social security of the workers, the SE holds that this is not infringed by the decision under attack either. According to the SE, this provision only guarantees the grant of social cover by the State and the legal entities under public law, but does not constitute an obstacle preventing legislators from modifying the conditions relative to granting the various social benefits.

With respect to the reduction of the Easter and Christmas gifts, the high administrative court holds that this reduction does not constitute a reform measure relative to retirement benefits, but rather a measure of the higher general interest aimed at improving public finance, and, as such, is part of the more general approach consisting of economic policy measures adopted to deal with the crisis.

As concerns compatibility of the measures in dispute with article 1 of the first additional protocol to the ECHR, relative to protection of property, even if the SE agrees that the rights applicable to the social security entities are, certainly, part of the heritage, in the meaning of that provision, it nevertheless points out that, all the same, the latter does not have the objective of guaranteeing a given level of retirement pensions. The same reasoning applies to article 17 of the Constitution, even if it has a different understanding of the notion of property. The upward or downward variation of such pensions is therefore not contrary either to the ECHR or to the Constitution. It is also a question of a measure of the greater general interest taken within the more general framework of the economic policy measures adopted in order to emerge from the crisis. In this connection, the said reduction is characterised as appropriate and proportional for reaching the said objectives.

Against this initial decision, handed down by the country's Supreme Administrative Court, second decision number 599/2012, handed down by the Civil Court of Athens, rules that the reductions of salaries and of certain social allowances decided on within

the framework of the said programme for restoration of public finance are contrary to the Constitution. The Justice of the Peace considers, in particular, that the explanation of the grounds of the law requiring the said reductions is insufficient. If he acknowledges that the public interest may justify such measures, on the other hand the strengthening of business competitively and of foreign investments constitute insufficient grounds for removing autonomy and collective bargaining as well as Union freedom, as enshrined in article 22, paragraph 2 of the Constitution and on which the definition of the salaries and of the allowances in dispute before their reduction was based. Without any particular development, the Civil Court also holds that the measures in dispute infringe, on one hand, article 8 of Convention No. 151 of the International Labour Organisation (ILO) of 7 June 1978 concerning working conditions in the public sector, which required establishment of working conditions by collective bargaining, and article 5 of Convention No. 154 of the ILO of 3 June 1981 concerning promotion of collective negotiations, according to which national measures must be aimed at promoting collective bargaining.

Continuing his reasoning, the Justice of the Peace points out that even if one were to suppose that such measures conform to the Constitution, in particular pursuant to article 106, section 1, paragraph a) thereof, which acknowledges that legislators may limit union autonomy in the public interest, for a limited duration and with due observance of the principle of proportionality, the said conditions relative to limited duration and observance of proportionality are not respected in this case. In that connection, according to the court, on one hand the reductions in dispute are of a permanent nature, moreover without being accompanied by any compensatory measure whatsoever (such as a reduction of prices and of taxes, direct and indirect). On the other hand, the reductions in dispute affect all salaried employees in the same way, independently of the amount of the salaries of the various categories among them. This lack of differentiation,

which would have made it possible to apply staggered reductions, or even proportional reductions to the salaries of the various grades and classes of workers, means that low-income workers are disadvantaged in comparison with workers with high incomes. In the Court's view, this discrimination constitutes an infringement of article 4, section 5, of the Constitution, according to which citizens contribute to public charges in accordance with their abilities. The results of this decision are not yet known.

Symvoulío tis Epikrateias, Plenary Assembly, decision No. 1285/2012, NOMOS database, Eirinodikeio Athinon, decision No. 599/2012, NOMOS database, www.lawdb.intrasoft.com

IA/33522-A
IA/33509-A

(RA) (FERENAL)

*** Brief (Greece)**

On 17 June 2013, the President of the Greek Symvoulío tis Epikrateias (Council of State), ruling in summary proceedings, ordered suspension of the ministerial order that had abolished the public radio and television company, (hereinafter the "ERT"). Just nine lines long, the order limits the stay of execution to only two points of the order: on one hand, to the interruption of broadcasts (television and radio) and of the operation of the ERT websites, which must therefore resume operation, and, on the other hand, to the neutralisation of the broadcasting frequencies, which must also be terminated. The reason provided is to be found in the fact that the closing of the ERT constitutes an obstacle to the contribution of a public operator to information, education and entertainment of the Greek people and of the Greek diaspora as required under article 2, section 1, of law 1730/1987, as modified by Article 19, section 1, of law 1866/1989.

In addition the order requires the Minister of Economics and the Minister to the Prime Minister, holding jurisdiction in this matter, to take all necessary steps to make it possible to continue broadcasts and the

operation of the websites until creation of the new public television entity. The principal appeal will be judged on its merits at the end of September.

President of the Symvoulío tis Epikrateias, ruling in summary proceedings, order dated 17.06.2013, www.ste.gr

IA/33513-A

(RA)

Hungary

Fundamental rights - Right to freedom of expression - European Court of Human Rights (ECHR) application - Constitutional court - Penal Code - Provisions relative to public use of the symbols of totalitarian regimes - Cancellation

The Hungarian Constitutional Court was called on to make a decision concerning the provision of the Hungarian Penal Code relative to the public use of the symbols of totalitarian regimes.

Because of a law adopted 20 years earlier, a person who distributed or wore, in public or at public events, certain symbols of totalitarian regimes was guilty of an offence and was subject to sanctions. The law explicitly established a list of the said symbols, such as the "swastika", the SS badge, and the Arrow Cross of the Hungarian Nazi Party, but also certain symbols connected with Communism (the Hammer and Sickle, and the Red Star).

Certainly, in the past the Constitutional Court had already considered that provision. Nevertheless, following the decision by ECtHR on the Vajani/Hungary case, which also concerned this provision of the Penal Code (ECtHR, 2nd section, 8 July 2008, application No. 33629/06), it seemed necessary to reconsider the provision in dispute.

In the Vajnai / Hungary case, the applicant argued that the fact that he had been sentenced for having worn a Red Star

infringed his right to freedom of expression (article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms).

The ECtHR had considered that the provisions in dispute covered an overly wide field, in light of the various meanings that the Red Star might convey. Moreover the ECtHR had noted that no danger, whether present or potential, could be identified in similar cases. Thus, the sentencing of an individual could not be considered as a response to a vital social need.

The ECtHR had concluded from this that the sanctions imposed for wearing a Red Star in public constituted an infringement of the right to freedom of expression.

The Constitutional Court accepted the reasoning set forth in the decision by the ECtHR. In that connection it held that the provision in question described criminal behaviour patterns in too broad a manner, without making any distinctions. Consequently, less dangerous behaviour could be sanctioned, a fact that caused a disproportionate restriction on the right to freedom of expression.

In examining case law related to that article, the Constitutional Court pointed out that the said case law gave rise to a controversy because of the general formulation of the provision in question, which constituted an attack on the principle of legal security.

In light of the foregoing developments, the Constitutional Court therefore annulled the entire provision in question in the Hungarian legal order as of 30 April 2013.

We should remind you that in the Vajani case (order dated 6 October 2005, C-328/04, Rec. p. I-8577), the Court of Justice ruled that it lacked jurisdiction over the said regulation, which was not included within the framework of Union law.

Constitutional Court, decision of 19.02.2013, number 4/2013, Official Journal (Magyar Közlöny), No. 28/2013, www.kozlonyok.hu/nlonline/MKPDF/hiteles/MK13028.pdf

IA/33363-A

(TANAYZS)

Ireland

*** Brief**

The High Court of Ireland was called on to interpret Irish law in light of Union law in connection with a dispute relative to processing personal information.

The defendant was held liable for having infringed rights guaranteed for the applicant by the data protection acts, 1998 and 2003 (the "DPA"). The Circuit Court ordered payment of damages under section 7 of the DPA. The defendant appealed to the High Court on the basis of an argument to the effect that section 7 did not provide for any automatic right to damages. He maintained that it is necessary to demonstrate prejudice, which the applicant had not done in that particular case.

The DPA transpose directive 95/46 relative to protection of individuals with respect to processing personal information and the free circulation of such information. The High Court pointed out that section 7 of the DPA attempts to transpose the judicial appeals provided for under the said directive. Article 23 of the Directive establishes the principle that Member States must provide that any person having suffered prejudice because of an action incompatible with the national provisions adopted in application of the directive is entitled to obtain compensation for the prejudice suffered. Article 24 of Directive 95/46 provides that the Member States must determine the sanctions to be applied in the event of infringement of the said provisions.

The High Court pointed out that the national laws transposing the directives must be

construed in such a way as to make the said directive operational. However, the requirements of the directive in question do not include any obligation to automatically pay damages for any infringement of the provisions that transpose it. The Member States were entitled to provide for such a right. It seems, however, that the Irish Parliament did not do this. Section 7 refers to liability in tort, which generally requires proof of prejudice.

Therefore, the High Court concluded that the applicant was not entitled to damages in that particular case, and it accepted the appeal.

High Court, Judgment of 14.03.2013, Collins v FBD Insurance plc, (2013) IEHC 137;
www.courts.ie

IA/33418-A

(TCR)

Italy

Assistance granted by the States - Employment aid - Reductions of social security charges for companies signing training and work contracts - Assistance incompatible with the common market - Recovery obligation - Re-establishment of the previous situation - Request by the National Social Security Agency (INPS) for return of the said tax concessions - Time for appealing - Ten-year statute of limitations beginning from the date of the decision by the European Commission or the decision by the Court of Justice.

By means of its decision dated 4 March 2013, the Italian Court of Cassation took a stand on the application by the National Social Security Agency (INPS) to recover the tax concessions that were recognised as due to companies having employed workers by means of training and work contracts.

These contracts benefited from a reduction of social security contributions.

The said tax concessions were considered, by the European Commission, as state aid incompatible with the interior market.

The Republic of Italy attacked the Commission's decision in the Court of Justice, which dismissed the appeal (decision dated 7 March 2002, Italy/Commission, C-310/99, Rec. p. I-2289).

Pursuant to Union case law, the Court of Cassation recalled that the national courts do not hold jurisdiction for ruling on the compatibility of State assistance with the interior market (Court decision dated 18 July 2007, Lucchini, C-119/05, Rec. p. I-6199).

On the other hand, it makes a decision concerning the issue of time limits for appeal applicable to the requests for repayment of the said tax benefits. In that connection the Supreme Court of Appeal first emphasised the fact that the period of five years that is normally applicable to requests for payment of social security benefits, does not apply when it is a question of state aid incompatible with the common market.

It also specified that the State's right or obligation to recover the tax concession must not be confused with the Union's right to act to verify the compatibility of the advantage in question with the interior market. In this latter case, the time limit for appeal is ten years, calculated beginning with the time of allocation of the tax concession. On the other hand, the legal action by the Member State itself to recover the tax concessions is subject, according to the Court of Cassation, to a statute of limitations of ten years beginning either on the date of the decision of the European Commission verifying the infringement of the rules concerning State aid, or on the date of issue of the decision by the Court of Justice that rules on the dispute in this matter.

Court of Cassation, Sez. Lavoro, decision dated 04.03.13, no. 5284,
www.diritto.it/.

Union law – Principles – Right to effective judicial protection – National rules and regulations requiring prior implementation of an extra-judicial conciliation procedure as a condition for admissibility of judicial appeals – Check on constitutionality – Delegation excess

Applied to in connection with several committals for trial, the Italian Constitutional Court made a decision on the sensitive question of the constitutionality of the obligation to initiate attempted mediation prior to the filing of legal proceedings.

Among the various questions submitted to it, the Court granted priority to the ones concerning article 5, section 1, of legislative decree No. 28/2010. According to the said article, “any person intending to file legal action relative to a dispute concerning joint ownership, right in rem, division, succession, family contract, lease, loan for use, lease management, compensation for the prejudice resulting from vehicle or boat traffic, medical liability and libel in the press or any other advertising media, insurance, banking and financial contract, is required, in the first place, to make use of the mediation procedure in the meaning of the present decree or of the conciliation procedure [...]. Effective performance of the mediation procedure is a condition for admissibility of the originating procedure”.

In view of the reference in this act to adherence to the Union’s rules, the Court devoted the first part of its decision to an analysis of the acts of the Union institutions having an effect in this matter.

More particularly, it examined directive 2008/52 concerning certain aspects of mediation in the civil and commercial matters, the resolution of the European Parliament of 25 October 2011 concerning alternative procedures for settling conflicts in connection with civil, commercial and family matters, and that of 13 September 2011 concerning implementation of the directive relative to mediation in the Member States. It also took into account the case law of the Court of Justice in this

matter, particularly the decision handed down in the joint cases *Alassini e.a.* (decision of 18 March 2010, C-317/08 to C-320/08, Rec. p. I-2213).

The Constitutional Court declared that the Union’s acts do not require the Member States to adopt mandatory prior mediation. The Union’s right is limited to settling the procedures by which the proceedings can be structured.

Moreover, according to the Constitutional Court, the same principle inspired the decision by the Court of Justice. Furthermore, the affirmation by the latter, in point 65 of the above-mentioned decision, according to which “the filing of strictly optional extra-judicial settlement proceedings does not constitute an effective means for reaching the said objectives” cannot create a judicial precedent, since it is a question of an *obiter dictum*, because in that particular case, the conciliation procedure concerned specific disputes, namely, disputes between end users and suppliers in connection with electronic communication services.

The Union’s rules and regulations left it the responsibility of the Member States to choose the mediation model to be adopted provided the right to apply to the competent court was ensured.

Having deduced that the national rules and regulations in question were not based on the Union’s acts, the Constitutional Court referred the question to national law. Thus it verified the observance of the principles indicated in the *legge delega*. (*Delegation Law*) by legislative decree No. 28/2010, governing mandatory prior mediation, and it declared the unconstitutionality of article 5 of the said decree to excessive delegation. The fact is that, according to the Court, the *legge delega* did not explicitly provide for mandatory mediation, the obligatory nature of which could no longer be deduced from the law.

We should emphasise the fact that two referrals of a preliminary matter were filed in the Court of Justice on this subject before

the decision by the Italian Constitutional Court in the Galioto (C-464/11, struck off) and Di Donna cases, (decision of 27 June 2013, C- 492/11). However, the declaration of unconstitutionality led the first Referral Court to withdraw its request for a preliminary ruling.

With respect to the second referral of a preliminary ruling, the Court of Justice specified, in the Di Donna decision, that there was no longer any reason for responding to the questions asked on a preliminary basis by the judge applied to insofar as the national legal framework within which the dispute occurred was no longer the one described by the national Jurisdiction in its referral decision (the unconstitutional nature of a national legislative provision having been established, the parties to the dispute are henceforth no longer required to take part in a mediation procedure).

Corte Costituzionale, decision of 06.12.2012, No 272,

www.cortecostituzionale.it

IA/33511-A

(GLA)

business pursuant to national rules and regulations and of Union law.

Furthermore, it asserted that members of a professional order may infringe an understanding limiting their freedom to do business on the basis of the applicable rules of competition, particularly law No. 27 of 2012, containing provisions relative to competition, development of infrastructures and competitiveness. Article 11, paragraph 8, of the said law in fact authorises the opening of pharmacies even outside the mandatory periods established by the competent authorities.

Finally, the Court of Cassation classified contract the agreement entered into among the pharmacists and prohibiting opening outside the established times and days as an atypical agreement, and ruled that such a contract is undeserving of protection because of its anti-competitive nature, in light of national competition law and of Union law.

Civil Court of Cassation, section III, decision dated 08.02.2013, No. 3080

www.dejure.giuffré.it

IA/33524-A

(MSU)(BITTOGI)

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*** Briefs (Italy)**

The Court of Cassation set aside the act concerning a disciplinary sanction adopted by the Pharmacists Association of the Province of Caserta against a pharmacist because of unfair competition adopted by her.

In this particular case, the pharmacist had not adhered to the understanding under which she had agreed on the times and days of opening and closing pharmacies with all of the pharmacists of a city in the province of Caserta.

In its decision, the Supreme Court of Appeal recalled, first of all, that the pharmacist's profession is covered by the concept of

The Council of State, applied to with an appeal for cancellation of a decision made by the administrative Judge of first instance, accepted the applicant's right to compensation for damage suffered because of the infringement of the rules governing government contracts committed by the awarding authority.

On the basis of the case law of the Court of Justice, the Council of State recalls that recognition of the right to obtain damages because of an infringement of the law of government contracts by an awarding authority does not require proof of the wrongful nature of the said infringement. (See the Strabag e.a. (decision of 30 September 2010, C-314/09, Rec. p. I-8769)

and Commission / Portugal cases (decision of 14 October 2004, C- 275/03)). In the decision in question, the High Administrative Court indicates that such a well-established case law applies not only to the procedures relative to entering into contracts subject to Union law, but also to strictly national procedures. Even within the framework of the latter, a party having suffered prejudice because of the infringement of the rules concerning government contracts is not obliged to prove the wrongful nature of the administration's behaviour.

The Judge must consider as established the objective responsibility of the administration when the following conditions are met: the awarding authority has infringed the rules governing government contracts, the applicant has suffered prejudice because of the administration's non-performance of the contract relative to awarding the government contract in question, and there is a causal link between the infringement and the prejudice suffered.

Council of State, Sec. V, decision dated 18.02.2013, No 966
www.dejure.giuffré.it

IA /33525-A

[MSU] [BITTOGI]

Latvia

Judicial cooperation in civil matters - Insolvency proceedings - Rule (EC) No 1346/2000 - International jurisdiction for initiating the insolvency procedure - Action to set aside based on insolvency and aimed at a defendant having its registered office in another Member State - Jurisdiction of the courts of the Member State in which the insolvency proceedings are initiated - Clause assigning jurisdiction agreed in the contract concluded by the parties to the dispute - Absence of impact

In its order dated 19 February 2013, the Court of Cassation, Civil Division (Augstākās

tiesas Senāta Civillietu departaments), made a decision concerning recognition and enforcement of a decision relative to the action filed against a third party by a liquidator appointed in connection with insolvency proceedings, dealing with the right of revocation concluded by the said management agent from the national law applicable to the said proceedings. The case raises a legal problem that is also the subject of several cases pending before the Court of Justice (see, for instance, case C-157/13, Nickel & Goeldner Spedition).

With respect to the issue of recognition, the Court of Cassation, on one hand, considered the effect of a clause assigning jurisdiction agreed in the contract concluded by the parties to the dispute. On the other hand, it responded to the arguments put forth by the applicant party concerning the jurisdiction of the Member State on the territory of which the insolvency proceedings were initiated in connection with actions for revocation based on the insolvency of a business.

The Supreme Court of Cassation emphasised that according to article 16, paragraph 1, of rule no. 1346/2000, relative to insolvency proceedings, any decision relative to insolvency proceedings falling within the field of application of the rule benefits from automatic recognition provided it produces its effects in the state of initiation. Pursuant to article 25 of the said rule, the decisions directly deriving from the insolvency proceedings and which are closely related thereto, even if they are handed down by another jurisdiction, are also recognised without any other formalities. The Court of Cassation applied the case law established by the Court of Justice, particularly in the Seagon case (decision of 12 February 2009, C-339/07, Rec. p. I-767) and in the F-TEX case (decision of 19 April 2012, C-213/10, not yet published in the ECR). The Court of Cassation took over paragraph 21 of the Seagon decision, according to which article 3, paragraph 1, of rule No. 1346/2000 "must be construed to the effect that it also awards international jurisdiction to the Member State on the territory of which the insolvency proceedings were initiated to

hear actions directly deriving from the said proceedings and which are closely associated with them.” The fact that the parties agreed on the Latvian courts for hearing disputes having arisen or to arise on the occasion of a given legal relationship cannot be called on in order to dispute jurisdiction in accordance with the rules applicable to insolvency proceedings.

Consequently, the Supreme Court of Appeal recognised the decision made by the District Court of Tallinn and declared that it was enforceable.

Augstākās tiesas Senāts, order dated 19.02.2013, No. SKC-1194/2013,
www.at.gov.lv

IA /33358-A

[AZN]

*** Brief (Latvia)**

By means of its decision dated 22 March 2013, the Court of Cassation, Administrative Division (Augstākās tiesas Senāta Administratīvo lietu departaments), shed light on the power of the companies register (Uzņēmumu reģistrs) concerning its jurisdiction for checking on the legal status of a foreign legal person. The Court of Cassation approved the business register's decision by which it required that for purposes of a transfer of shares, the request must be accompanied by documents establishing the former owner's legal capacity. No such obligation is binding on the legal persons registered in the Latvian Business Registry.

By means of its decision dated 3 August 2012, the Court of Cassation, in the same case, cancelled the decision handed down by the Administrative Court of Appeal and decided to refer the decision in the case to the latter. The Court of Cassation referred to recommendation no. 33 by Moneyval, the competent entity of the Council of Europe for evaluation of the member countries' systems for prevention of money-laundering. Recommendation no. 33 requires states to have reliable information concerning the owners and the effective

beneficiaries. The Court of Cassation emphasised that the business registry is obliged to verify the legal capacity of a legal person before transfer of its shares is recorded. Concerning a foreign legal person, such a verification is possible only by demanding additional information from the said person.

Those decisions are part of a debate in Latvia involving differing opinions concerning, on one hand, the need for guaranteeing the security of investments and struggling against illegal transfer of shares and, on the other hand, the scope of the check carried out by the business registry. The main question is as to whether the business registry must limit its check to a mere verification of the parties' rights, or if it must carry out a detailed verification of the actual circumstances and the legality of a transfer of shares.

Augstākās tiesas Senāts, decisions of 03.08.2012, No. SKA-672/2012, and of 22.03.13, No. SKA-198/2013,
www.at.gov.lv

IA /33359-B
IA /33359-A

[AZN]

Lithuania

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – Right to run in legislative elections – National constitution providing for a definitive and irreversible prohibition on persons deprived of their mandate following an impeachment procedure for serious infringements of the Constitution – Consequences to be drawn from the decision by the European Court of Human Rights (ECtHR) establishing an infringement of article 3 of Protocol no. 1 – Obligation to modify the Constitution

In its decision dated 5 September 2012, the Constitutional Court ruled on the non-conformity to the Constitution of a provision

of the law concerning legislative elections allowing persons deprived of their mandate in connection with impeachment proceedings, because of serious violations of the Constitution, to be a candidate in parliamentary elections four years after the said resignation.

This provision of law was adopted to conform to the decision made by the Grand Chamber of the ECtHR, which concluded, by a majority, that Lithuania had infringed article 3 of Protocol no. 1 of the ECHR because the previous law concerning parliamentary elections deprived persons having been removed from their functions following an impeachment procedure of any possibility of holding a constitution mandate for which it was necessary to swear an oath pursuant to the Constitution (decision of 6 January 2011, Paksas vs. Lithuania, application No. 34932/04). The ECtHR had considered the said restriction disproportionate.

This case originated in the removal of Mr R. Paksas, now a member of the European Parliament, from his office as President of the Republic in connection with impeachment proceedings because of the serious infringements of the Constitution, as established by the Constitutional Court in 2004 (pursuit of strictly private interests to the detriment of the Nation's interest and of the credibility of the presidential institution). The interested party still wishes to be a candidate in the legislative elections.

In its decision, the Constitutional Court was called on to analyse a problem of national law in the context of the ECHR and of the case law of the ECtHR. In that connection, the Constitutional Court found, for the first time, that article 3 of Protocol no. 1, insofar as it presupposes Lithuania's international commitments to guarantee the right of the said persons to be elected or re-elected to the national Parliament, does not conform to the Constitution.

With respect to the contracting States' commitment to conform to the final decisions made by the ECtHR in dispute to

which they are parties, the Constitution Court noted that States benefit from a margin of discretion as to the choice of means for conforming to the said decisions. However, this judgemental power may be limited by the national Constitution of the Contracting State involved.

In this connection, according to the hierarchy of the sources of Lithuanian law, the ECHR does not prevail over the Constitution. However, like any other ratified international treaty, it has acquired the status of law and should not be applied if it is contrary to the Constitution. Therefore, a final decision by the ECtHR in itself cannot be an argument for reinterpreting or modifying the official constitutional legal opinion, if such a reinterpretation (in the absence of a modification of the text of the Constitution) would lead to modifying the substance of Constitutional regulation, impairing the system of constitutional values, or reducing protection of the primacy of the Constitution on the system of legal acts. Consequently, according to the Constitutional Court, the only possibility of conforming to the said decision by the ECtHR and eliminating the incompatibility between the ECHR and the Constitution would be a modification of the Constitution itself. However, no modification of other laws would suffice in this connection.

Lietuvos, Respublikos, Konstitucinis Teismas, decision dated 05.09.2012, no. 8/2012
www.lrkt.lt

IA /33369-A

[LSA]

Netherlands

Judicial proceedings – Duration of the Proceedings – Reasonable time limit – Suspension of the proceedings in connection with referral of a preliminary matter to another court – Consideration of this suspension period in the calculation of breach of the reasonable time limit.

In a case concerning the issue of whether the Netherlands was authorised to remove the supplement to the disability pension granted, under national legislation, to former Turkish migrant workers after their return to Turkey, the Court of Appeal for Social Security and Civil Service Affairs (hereinafter the “Court of Appeal”) made a decision as to whether the litigation had taken place within a reasonable time limit, with due observance of the right enshrined in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the “ECHR”).

The Court of Appeal found that the proceedings in that particular case had lasted for approximately eight years. Nevertheless, it ruled that the time limit was exceeded by only 6 months, given that the proceedings had been suspended for three and a half years in order to await the response by the Court of Justice to the preliminary questions referred that case. According to the Court of Appeal, the said period of three and a half years should not be taken into account in calculation of the breach of the reasonable time limit.

In referring to the decision by the Court of Justice in the case *Der Grüne Punkt* (decision of 16 July 2009, C-385/07, Rec. p. I-6155), the Court of Appeal held that the applicants are able to file any application for indemnity in the Court of Justice pursuant to articles 268 TFEU and 340, paragraph 2, TFEU. It ruled out the applicants’ arguments to the effect that the said recourse would not be effective pursuant to articles 3 of the ECHR and 47 of the European Union’s Charter of Fundamental Rights.

Furthermore according to the Court of Appeal, it is unable to judge whether the preliminary matter proceedings in the Court of Justice took place within a reasonable time limit, in view of the fact that it does not have any information concerning execution of the proceedings in the Court of Justice. Finally, the Court of Appeal added that at the time it had informed the parties concerned of its intention to submit a

preliminary question to the Court of Justice and that they had not opposed this.

It is interesting to point out that, on 21 May 2013, the Council of State requested in a case pending before it concerning whether the dispute in question had taken place within a reasonable time limit, the opinion of the advocate-general acting before the Council of State (a possibility that has existed since 1 January 2013) as regards the obligation to take account, in calculation of the overrun of the reasonable time limit, of the duration of suspension of the case in connection with a reference of a preliminary matter to the Court of Justice. In a concern for legal uniformity, the courts of final instance wish to take a uniform approach to this matter.

Centrale Raad van Beroep, 14.12.12, Verzoekers/Minister van Veiligheid en Justitie, 11/5544 BESLU e.v., www.rechtspraak.nl, LJN BY6002,

IA /33194-A

[SJN]

Poland

* Brief

The decision dated 4 March 2013 of the Supreme Administrative Court concerns the services offered to an insurance company targeting determination of the causes of damage and establishment of the compensation due from the person responsible.

The Minister of Finance, who was queried by the company concerned before the filing of the appeal, held that the said services did not constitute operations that were exempt on the basis of article 135, paragraph 1,

point a), of directive 2006/112 relative to the common value added tax system, insofar as the said provision exempts only the insurance or reinsurance services, including provision of services relative to the said operations performed by the brokers and the insurance intermediaries and that the company concerned does not constitute an insurance intermediary.

The Supreme Administrative Court, which was called on by the Minister of Finance to judge the appeal against the decision on initial jurisdiction that accepted an appeal filed by the said company against the said opinion, ruled that on the basis of article 43, paragraph 13, of Polish law relative to VAT, the said operations are exempt as an element of an insurance service needed for providing the said insurance service and constitutes, together with the latter, a separate whole.

The same Court emphasised the fact that the notion of insurance service is not defined in directive 2006/112. Moreover, it noted that the said provision of national law does not constitute the transposition of the said directive, since there is no corresponding provision in that directive.

In any event, according to the Supreme Administrative Court, the interpretation obligation in accordance with the directive cannot result in imposing an obligation that is not provided for in a national law, since such a result would be contrary to article 217 of the Constitution, pursuant to which taxes can be levied only by means of a law.

Furthermore, the Supreme Administrative Court held that there is an analogy between the said provision of national law and article 13, par B, point d) of the sixth VAT directive. It referred in this connection to the interpretation of that provision set forth by the Court of Justice in point 45 of the decision of 22 October 2009 (Swiss Re Germany Holding, C-242/08, Rec. p. I-10099), pursuant to which: “to be characterised as exempt operations in the meaning of article 13, B, point d) of the sixth directive, the services supplied must constitute a distinct whole, judged globally,

having the effect of fulfilling the specific and essential functions of a service described in the said provision”.

Naczelny Sąd Administracyjny, decision dated 04.03.2013, O FSKJ 577/12,
www.nsa.gov.pl

IA /33360-A

[BOZEKKA]

United Kingdom

Litigation – Referral of a preliminary ruling – Distribution of powers between the national courts and the Court of Justice of the European Union – Importance of the conclusions of the advocates-general

The Supreme Court decision handed down following a referral of a preliminary ruling to another court (decision dated 7 October 2010, Loyalty Management UK and Baxi Group, C-53/09 and C-55/09, Rec. p. I-9187) concerns the taxation treatment of a customer loyalty programme. Beyond the interest of the facts and of the decision made by the national court, the circumstances surrounding the request for referral for a preliminary ruling for decision by another court and the comments made by the Supreme Court on the distribution of powers between the national courts and the Court of Justice (CJEU) and the special importance attached to the submissions by the advocates-general are of interest for the EU in a more general way.

The Supreme Court clearly recalled that, with respect to article 267 TFEU, the appraisal of the facts and the application of Union law to them falls under the national jurisdiction, referring in that connection to the Atel case (decision dated 2 June 1994, C-30/93, Rec. p. I-2305). The Supreme Court also recalled its obligation to take into account the facts established by the lower courts (data that were not, in this case, transmitted to the CJEU).

As to the criticisms, the Supreme Court criticises the House of Lords for having presented a referral for a preliminary ruling

to the CJEU that was too vague, which did not bring up either the central issues or the essential facts.

In addition, the Supreme Court criticised the decision by the CJEU to combine the case with another one that concerns an utterly different customer loyalty programme, while acknowledging the fact that the CJEU did not have the information needed for identifying the said differences and proceeding in a different way.

Furthermore, the Supreme Court criticised the CJEU for having ruled without having the submissions by an advocate-general, holding that the preliminary matters did not raise any new legal issue, and consequently, by attempting to clarify how the principles established in case law apply to the concrete case.

More particularly, the Supreme Court expressed its regret that an application had been filed for reference of a preliminary question to another court. One of the judges emphasises the fact that the decision by the CJEU lacks the analytical depth generally possessed by decisions relying on submissions by an advocate-general.

It remains true all the same that the two judges in the minority did not agree either with the criticisms aimed at the House of Lords, as the referring court, or with the conclusion to the effect that the decision on a preliminary point had no effect in that particular case. In that connection they referred to the responsibilities conferred on them by the European Communities Act of 1972. However, all of the judges agreed that the absence of submissions by an advocate-general was regrettable.

In any event, a majority of three judges against two of the Supreme Court decided to settle the dispute on the main issue in a way differing from the one recommended by the CJEU, finding that the decision on a preliminary matter had no effect on its decision. However, the Supreme Court still noted a few important aspects of that decision.

Supreme Court, decision of 13.03.2013, Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited), www.supremecourt.gov.uk

IA /33341-A

[VHE]

Police and judicial cooperation in criminal matters – Framework decision 2002 / 584 relative to the European arrest warrant – Enforcement – Jurisdiction of national courts for rejecting a directive or improper warrant – Scope – Limits

On 23 January 2013, the Supreme Court unanimously held that the national courts hold inherent jurisdiction for rejecting a European arrest warrant, on the grounds of abuse of procedure. This is a question of a special power enabling a Judge to check on the facts described in the warrant.

The case concerned a Polish citizen who, after having been sentenced on four occasions in Poland for offences connected with his dishonesty and violence, had fled to the United Kingdom. A European arrest warrant was subsequently issued for him by the Regional Court of Łódź, in Poland. The said citizen had been arrested in the United Kingdom, but his rendition had been suspended since he was the subject of criminal proceedings connected to his stay in that country. During the suspension, the applicant applied to the District Court of Grudziadz in Poland for concurrently serving the sentences imposed on him. That application was accepted, and a cumulative penalty was ordered, the duration of which corresponded to half of the total sentences previously handed down.

Following resumption of the rendition proceedings, the applicant asserted that the arrest warrant did not conform to framework decision 2002/584, insofar as it did not contain any reference to the cumulative sentence, as was allegedly required by article 8, paragraph 1, point f), of the framework decision. That argument

was rejected by a district judge acting as judicial enforcement authority, but the applicant won his case before the High Court. The latter considered that a European arrest warrant must refer to the penalty to which the wanted person is subject and not to the ones combined in the concurrent sentencing. This is necessary so that the judicial enforcement authority can determine the duration of the sentences handed down.

Referred to on appeal, the Supreme Court recalled that framework decision 2002/584 is aimed at implementing a simplified and faster procedure for the rendition of wanted persons. In that connection, the validity of a European arrest warrant depends on the presence of the indications required by the framework decision, and not on the accuracy of the said indications. Consequently, an arrest warrant must be considered as legitimate if, at the time of its issue, it conformed to framework decision 2002/584, and it is therefore impossible for a warrant that has been validly issued to be invalidated by later events.

However, the Supreme Court noted that there are two protective mechanisms aimed at avoiding unjustified renditions. First of all, pursuant to article 15, paragraph 3, of the framework decision, the issuing judicial authority may, at any time, transmit additional useful information to the judicial enforcement authority. Moreover, the national courts are inherently competent to ensure that the proceedings filed in them are not improper. That would be the case, for instance, if a European arrest warrant were issued for unlawful purposes. In that connection, it is permissible for the national judges to check on the reasons for issue of an arrest warrant, in order to determine whether abuse of proceedings are involved.

Nevertheless, the Supreme Court specified that the said verification power can be exercised only in exceptional circumstances. As such, if the factual indications contained in a warrant appear to be inaccurate, the Judge must be convinced beyond a reasonable doubt about what should have appeared therein. Furthermore, the error

committed must have an effect on application of the framework decision.

In this particular case, provided the arrest warrant targeting the applicant was validly issued, the fact that concurrent sentences had been handed down instead of the ones appearing in the warrant did not have the effect of vitiating it, all the more so in that the sentences initially handed down remained valid in Polish law.

Supreme Court, decision of 23.01.2013, Lukasz Zakrewski v The Regional Court in Łódź Poland (2013) 1 WLR 324, www.bailii.org

IA /33411-A

[PE]

*** Briefs (United Kingdom)**

This Supreme Court decision concerns the scope of protection granted to volunteers under the terms of directive 2000/78 laying down a general framework in favour of equal treatment in the field of employment and work.

The applicant worked as a volunteer in a Citizens Advice Bureau (CAB). She claims that after having informed the CAB that she was HIV-positive, it did not allow her to go back to work.

The applicant asserts that the principles laid down in the Marleasing (decision dated 13 November 1990, C-106/89, Rec. p. I-4135) and Mangold cases (decision dated 22 November 2005, C-144/04, Rec. p. I-9981) support her position of being entitled to call on such protection. Consequently, she considered it necessary to obtain referral for a preliminary ruling to another Court. Similarly, two decisions by the High Authority for Combatting Discrimination and for Equality, the competent authority in France, (HALDE) found that the types of protection granted by the framework directive apply to unpaid or volunteer activities.

The Supreme Court held that the applicant, as a volunteer, and not as a paid employee,

did not benefit from the protection against discrimination as guaranteed by directive 2000/78.

The Supreme Court considered that the HALDE's decisions are of no more importance than the remarks made by the equivalent organisation in the United Kingdom, the Equality and Human Rights Commission, which recommended referral for a preliminary ruling to another Court, and took the opinions of both seriously.

However, the Supreme Court subsequently refrained from referral for a preliminary ruling finding that the said decisions did not allow any reasonable doubt concerning its own conclusion to the effect that directive 2000/78 does not apply to volunteer workers.

Supreme Court, decision of 12.12.2012, X v Mid Sussex Citizens Advice Bureau and another (2012) UKSC 59,
www.supremecourt.gov.uk

IA /33432-A

[MSU]

In a decision dated 13 December 2012, the Court of Appeal held that the fact that the European Commission had opened an investigation in connection with competition on the project for acquisition of the Irish Airline Aer Lingus by its Ryanair competitor could not force the United Kingdom's competition authority to end its own investigation concerning Ryanair's purchase of a minority stake in Air Lingus. Even if the principle of fair cooperation enshrined in article 4, paragraph 3, of the treaty on the European Union requires, in particular, that Member States refrain from any steps that could endanger attainment of the Union's objectives, it would not oppose maintenance of the investigation by the national authority, this for three reasons. First of all, the object of the national investigation did not fall under the commission's sole jurisdiction pursuant to article 21 of rule No. 134/2004 concerning

checks on business concentrations. Also, the Commission's decision would be issued before the one made by the national authority. Finally, even if the national authority were to be the first to make its decision, it could use its power, pursuant to national law, to defer application of the measures decided, if any, until publication of the Commission's decision.

Court of Appeal (Civil Division), decision of 13.12.2012, Ryanair Holdings plc v Competition Commission and Aer Lingus Group pls (2012) EXCA Civ 1632,
www.bailii.org

IA /33412-A

[MSU]

In a decision dated 11 April 2011, the High Court enjoined four French companies to provide relevant documents for the civil action filed by the applicant, an English company aimed at obtaining compensation for the prejudice suffered due to an illegal cartel in which the said companies were alleged to have taken part. The appeal was filed following the Commission decision of 24 January 2007 (COMP/F/38.899). According to the French companies, transmission of the documents in question would be impossible, since it would infringe article 1bis of French law No. 68-678 of 26 July 1968, infringement of which would subject the author thereof to criminal sanctions. For the High Court, the essential question is whether there could be a real risk that the defendants would be subject to criminal prosecution for infringement of law No 68-678. On that point, and after having heard the testimony of French legal experts, the English Court concluded that it was a very unlikely scenario. Furthermore, in view of the fact that it was a question of a serious infringement of article 101 TFEU, a key provision of Union law, the High Court considered that it would be hard to imagine that the French authorities would impose criminal sanctions for a communication made under such circumstances, all the more so in that the jurisdiction of the English Court with regards to the French defendants was based on article 6,

paragraph 1, of rule No. 44/2001 concerning jurisdiction of the ordinary courts and recognition and enforcement of decisions in the civil and commercial matters. In that connection the High Court recalled that the Court of Justice had already specified that private damage suits in the field of competition contribute to making article 101 TFEU fully effective. (See the Court decision dated 20 September 2001, Crehan C-453/99, Rec. P. I-6297, points 26-27.)

High Court (Chancery Division), decision dated 11.04.13, National Grid Electricity plc v ABB Ltd and 22 others (2013) EWHC 822(Ch),
www.bailii.org

IA /33419-A

[PE]

Slovakia

Benefits granted by States – Decision by the Commission establishing the incompatibility of aid with the interior market and ordering its refund – Member State’s obligations – Immediate and effective enforcement – Procedural guarantees for the persons concerned

Applied to by a Group of members of parliament, the Ústavný súd (Constitutional Court), ruling in plenary assembly, took a stand in its decision dated 12 December 2012, on the conformity of certain provisions of laws No. 231/1999 Z. z., relative to State aid, and No. 233/1995 Z. z., relative to judicial executors and enforcement measures, to the Constitution, to the European Convention for Protection of Human Rights and Fundamental Freedoms and to the first additional protocol to the said condition. The provisions in dispute were introduced into the above-mentioned laws in 2011 with a view to simplifying and expediting the procedure for recovery of aid considered illegal by the Commission. To that end, the Commission’s decisions taking note of the existence of illegal aid were made directly enforceable with regards to the

beneficiaries of such aid. In case such decisions by the Commission did not specify the amounts to be recovered or did not identify the beneficiaries, a national decision containing such elements was to be adopted by the designated authorities. According to the provisions in dispute, the recourse filed against such a national administrative decision, as well as protests against its enforcement, had no suspensive effect.

The Constitutional Court pointed out that the judgement of the compatibility of State aid with the interior market fell solely under the Commission’s competence. It added that the Commission’s decisions taking note of the existence of illegal aid were mandatory and that the addressee Member States were required to take steps making immediate and effective enforcement of such decisions possible. Under those circumstances, the objective pursued by the provisions in dispute, namely, meeting the obligations originating from Union law, was completely legitimate. Consequently, the objective of the constitutional check was to determine whether the means chosen by legislators complied with the principle of proportionality.

The Constitutional Court pointed out that the direct enforceable nature of the Commission’s decisions concerning state aid did not in itself impair the basic rights and freedoms of the beneficiaries of state aid. It recalled its precedents (decision of 6 April 2011, II.ÚS 501/2010-94, see *Reflets No. 2/2011*, p.29), pursuant to which the Commission’s decisions can be disputed only before the Court of Justice, and that the national courts do not hold jurisdiction for judging their legality or their validity. On the other hand, the national administrative decisions following up on such a decision by the Commission and which specify the amount to be collected or else the identity of the beneficiary of state aid must be subject to an appeal offering protection against possible mistakes made by the national authorities implementing the said Commission decision. In light of the serious nature of the impact of the enforcement on the property of the person concerned,

automatic exclusion of the suspensive effect of the appeal against such a national decision could deprive that person of all useful and effective protection. Similarly, the absence of suspensive effect of the debtor's protest during enforcement with respect to the said national decision would deprive such disputes of any interest.

The purpose of the disputes is to enable debtors to indicate, at the time of enforcement proceedings, circumstances that could put an end to execution. This means that such circumstances represent an important guarantee of the legality of the said procedure. According to the constitutional judge, other less restrictive measures could be contemplated, such as authorisation of an ad hoc suspensive effect.

For these reasons, inter alia, the constitutional judge abrogated certain disputed provisions of the above-mentioned laws. He emphasised that even though it was a question of recovery of illegal state aid, the provisions in question significantly reduced the level of protection of the person concerned in that they could impair the person's property right to a greater extent than necessary.

Ústavný súd *decision of 12.12.2012, No. Pl.ÚS 115/2011-123,*

[www//portal.concourt.sk/pages/viewpage.action?pageId=1277961](http://portal.concourt.sk/pages/viewpage.action?pageId=1277961)

IA /32991-A

[KUSTEDI]

Slovenia

Equal treatment of succession – Unregistered partners of the same sex – Prohibition of discrimination based on sexual orientation – Admissibility

In the decision dated 14 March 2013, the Constitutional Court of Slovenia (Ustavno sodišče Republike Slovenije) ruled that the law on succession (Zakon o dedovanju, Uradni list SRS, No. 15/76, 23/78 and Uradni list RS, No. 67/01), insofar as it did not provide for any legal right of succession as concerns unregistered partners of the same sex, was contrary to the prohibition of discrimination based on sexual orientation

contained in article 14 of the Slovenian Constitution.

To reach that conclusion, the Constitutional Court pointed out, first of all, that the estate law granted the right to legal succession, after the death of one partner, to the other registered partner of the same sex, to civil partners as well as to married couples. Then, comparing the nature of the partners of the same sex who are registered with that of unregistered partners of the same sex, it concluded that the only difference between them was to be found in the fact that the former are registered while the latter are not, as moreover, is the case with marriage and civil partnership. It subsequently considered the situation of the unregistered partners of the same sex and the one of civil partners so as to be able to judge if their situations were comparable as concerns legal succession. Considering that this was the case, the Constitutional Court considered whether the difference of treatment in question could be justified by a legitimate purpose. Since the government did not provide any explanation justifying this difference in treatment, the Constitutional Court concluded that the legislation in dispute was discriminatory.

Ustavno sodišče Republike Slovenije, decision dated 14.03.2013, No. U-I-212/10-15,

[www//odlocitve.us-rs.si/usrs/us-odl.nsf/o/FC62EF78571FE59EC1257B4800408D62](http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/FC62EF78571FE59EC1257B4800408D62)

IA /33368-A

[SAS] (GRGICAN)

Sweden

**** Brief***

In 2011, the Swedish police took action against human trafficking, and in connection with those actions, some sex workers they encountered were removed to their country of origin, particularly Romania. One of the women took the decision to the Justitieombudsman (JO), and attacked the possibility of removal because of the way she supported herself. The JO holds jurisdiction for checking on the legality of

the administration's acts as well as whether such acts are appropriate. The JO does not have jurisdiction to modify or cancel an administrative decision; he may only give his opinion. However, those opinions are very influential in the administration. The JO found that according to article 6 of Directive 2004/38 concerning the right of Union citizens and of members of their families to move and reside freely on the territory of the Member States, a Union citizen is entitled to stay in Sweden for a limited or sometimes unlimited period. According to the exceptions to the right of unrestricted circulation appearing in article 27 of the said directive, Sweden may limit the said liberty for reasons of public order. The JO pointed out that the Court of Justice, in the Jany e.a. case (decision of 20 November 2001, C-268/99, Rec. p. I-8615), ruled that the Netherlands could not limit the right to stay there on the sole grounds that a person supported herself by means of prostitution, given that the Netherlands did not prevent its own citizens from resorting to this means of supporting oneself. Prostitution is not authorised in Sweden, and Swedish legislators declared that the prevention of prostitution is an important matter for society. The JO emphasised that Swedish legislators had chosen not to prohibit sale of sex services, for the sole reason that they did not want to punish sex workers in light of their vulnerable situation. The absence of prosecution of the seller of the said services does not lead to an acceptance by society of that activity. Moreover, the sale of a sex service presupposes that an offence is committed by the persons buying the said service. Since Sweden combats and prohibits prostitution, including when it is carried out by the persons residing there, the JO held that there was no obstacle to removal. This case led to a completely different decision from the one made in a similar case in which the JO criticised the decision to expel Romanian citizens for begging, or unemployment, none of the said activities being prohibited under Swedish law.

JO, Riksdagens ombudsman, decision of 28.06.2011, Dnr 6340-2010,
www.jo.se

[LTB] (GUSTAAN)

2. Third Party Countries

Canada

Canadian constitutional law – Canadian Charter of Rights and Freedoms – Freedom of religion and of expression – Hate publications – Inadmissibility

The decision by the Supreme Court of Canada dated 27 February 2013 in the case of Saskatchewan (Human Rights Commission) against Whatcott (2013 CSC 11) concerned a conflict between the freedom of religion and of expression guaranteed by the Canadian Constitution in paragraph 2b) of the Charter of Rights and Freedoms, on one hand, and the legislative provisions prohibiting promotion of hate or publication of hateful remarks contained in article 14(1) (b) of the Human Rights Code of Saskatchewan, on the other hand.

In the first place, the question arose in that court as to whether this latter provision, pursuant to which one may not publish any representation that “exposes or tends to expose a person or a category of persons to hate, ridicules them, belittles them or otherwise impairs their dignity”, infringes the freedoms of religion and of expression. In this connection, even if the court unanimously held that the said prohibition attacked the constitutional freedoms of religion and of expression, it considered that the said violation was justified by the protection of the vulnerable groups against discrimination.

In second place, the court stated that the prohibitions on hateful language had to be applied with due observance of three principles. First of all, the prohibition had to be applied objectively. Then], the term “hate” had to be construed as covering only the extreme manifestation of the emotion that can be described as “hate” and “defamation”. Finally, the hateful nature had to depend on the effect of the statements in dispute, rather than on the nature of the ideas expressed.

In this connection the Court ruled that the part of article 14 (1) (b) of the said Code that provides that the publication or the exhibition that “exposes or tends to expose (...) to hate (...)” constituted a justified restriction on freedom of religion and of expression, since it had a legitimate purpose, its objective being suppression or elimination of potential causes of discriminatory practices. This restriction was an appropriate means for reaching that goal, since it applied solely to the public sphere.

However, the Court found that the part of article 14 (1) (b) of the code that provides that publication or presentation “exposes or tends to expose a person or a category of persons ridicules them, belittles them or otherwise attacks their dignity” unduly limited the said freedoms, and that it was therefore unjustified.

Finally, there was the question of whether an order handed down by a court prohibiting the distribution of four pamphlets with messages concerning homosexual persons attacked the freedom of religion and of expression of the respondent. In that connection, the court found that the constitutional freedoms had been infringed only with respect to two pamphlets, which were a reprint of a page of advertisements to which some handwritten remarks had been added. The Court considered, with respect to the other two prospectuses called “Let’s keep homosexuality outside Saskatoon’s state schools!” and “sodomites in our state schools”, that they constituted hate address.

Supreme Court of Canada, Saskatchewan (Human Rights Commission) vs. Whatcott (2013 CSC 11), decision of 27.02.2013, www://csc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/fr/item/12876.index.do?r=AAAAAQAMc2Fza2F0Y2hld2FuAAAAAAQ

IA /33367-A

[SAS] (GRGICAN)

United States

US Supreme Court – Private International law – Extra-territorial application of the law on liability in tort concerning foreigners (Aliens Tort Statute) – Inadmissibility

In its decision dated 17 April 2013, *Kiobel et al v Royal Dutch Petroleum Co. et al.*, the US Supreme Court considered whether and under what circumstances article 1350 of the law concerning liability in tort with respect to foreigners (Aliens Tort Statute, 28 U. S. C. §1350, ATS), providing that “[1] the district courts hold jurisdiction in first instance for ruling on any civil action for liability in tort filed by a foreigner that results from infringement of the law of nations or of a treaty”, applies in case such an infringement has occurred on the territory of a sovereign state other than the United States.

The case concerned a group of Nigerian citizens from the Ogoni Region of the Niger Delta who, at the time of filing of the application, resided legally in the United States. The said citizens claimed that the defendants, Royal Dutch Petroleum Company and Shell Transport and Trading Company plc, companies incorporated in the Netherlands and in England, respectively, with an office in New York, at the beginning of the 1990s had encouraged and helped the Nigerian Government to torture, commit crimes against humanity, cause forced exile, destruction of property and other atrocities against the Ogoni people. Those atrocities had been committed as retaliation for the demonstrations organised by the residents of the Ogoni country against the environmental effects of oil exploration in which the defendants were engaged.

The Supreme Court unanimously concluded that the American courts lacked jurisdiction for considering the case. The majority of the justices held that article 1350 of the ATS does not entail any presumption in favour of its extra-territorial application, the said presumption moreover not resulting from the “wording of any other provision of (the

ATS)”. According to that majority, a different conclusion “would imply that the courts of the other States could summon American citizens to account for the presumed offences against the law of nations occurring on the territory of the United States or elsewhere in the world”.

However, a minority of the Supreme Court justices did not agree with that reasoning. That minority considered that pursuant to the principles and practices of international law, the jurisdiction of the American courts could be called on pursuant to the ATS when: “(1) The presumed tortious act took place on American territory, (2) the defendant is an American citizen, or (3) the defendant’s behaviour considerably and unfavourably affects an important American interest”. This latter element is aimed at “avoiding letting the United States become a refuge (in which one does not apply either civil liability or criminal liability) for torturers or for any other common enemy of humanity”. However, the defendants not having been sufficiently present on American territory, their action was not considered as of such a nature as to affect a significant American interest. The mere presence of a company on the national territory is not enough to trigger application of the ATS.

U.S. Supreme Court, Esther Kiobel, individually and on behalf of her late husband, Dr Barinem Kiobel, et al. v. Royal Dutch Petroleum Co. et al., Opinion of the Court of 17.04.2013, 569 U.S., www.supremecourt.gov/opinions/12pdf/10-1491_16gn.pdf

IA /33366-A

[SAS] (GRGICAN)

Constitutional law – Case law developments at federal level – Right to marriage equality – Federal law on the defence of marriage (DOMA) – Unconstitutionality

On 26 June 2013, the US Supreme Court handed down two historic decisions

concerning developments in the right to marriage equality.

In the first place, in a decision of 26 June 2013 in the case of *Hollingsworth v. Perry*, the Supreme Court considered as inadmissible a complaint originating from opponents of marriage between persons of the same sex, aimed at guaranteeing the effects of “Proposition 8”, a law of the state of California, adopted in 2008, modifying the Californian Constitution and defining marriage as the union of a man and of a woman. In ruling that the question of legal status is one of federal law, and is not subject to the jurisdiction of the courts of the federal states, the Supreme Court rejected the applicants’ arguments, considering that they did not hold legal status for filing an appeal against the decision invalidating Proposition 8 handed down by the district Court of California. The *Hollingsworth* decision invalidates “Proposition 8”, thus opening the road to homosexual marriage in the state of California. Since the Supreme Court did not rule on the merits, but only on procedural issues as well as on questions connected with legal status, the decision has no consequences at Federal level. We should point out that on 28 June 2013, the Court of Appeal of the 9th District of California lifted the suspension of carrying out unions between persons of the same sex in California.

In second place, in the case of *United States v Windsor*, the Supreme Court held section 3 of the DOMA to be unconstitutional insofar as it deprives certain citizens of equality, even though they are protected by the Fifth Amendment to the US Constitution. The appeal was filed by a resident of the State of New York, who claimed a federal exemption from the property tax to the benefit of the surviving spouses, after the death of her spouse. Even though the marriage took place in the form a legal ceremony in Canada, section 3 of the DOMA explicitly excludes a partner of the same sex from the notion of surviving spouse, consequently not allowing the applicant to benefit from the exemption. She then paid the tax that was due, and then protested

against the rejection of a tax refund in the District Court. It is interesting to note that the attorney general, pursuant to the White House's policy, refused to defend the constitutionality of the provision in question, which led a group of US Congressmen to make efforts to obtain respect for and to defend the provision. The Supreme Court, noting that the DOMA infringes the rules of due process and the fundamental principles of equality applicable to the Federal Government, opened the way for modification of more than 1000 federal laws and rules so as to no longer discriminate against partners of the same sex. That includes not only fiscal policy issues, involved in the Windsor case, but also immigration policy. However, it is important to point out that the decision has effects on the said federal provisions only in the fourteen states that have already allowed marriage between persons of the same sex. It does not affect the laws of the other federal states, and also does not create any precedent requiring the said federal states to initiate a liberalisation process.

Supreme Court of the United States, Opinion of 26.06.13, Hollingsworth v. Perry, www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf

No. 12-144, Opinion of 26.06.13, United States v. Windsor, No. 12-307, www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf

IA/33514-A
IA/33515-A
[LOIZOMI] [NICOLLO]

Norway

Free provision of services – Secondment of workers carried out within the framework of provision of services – Directive 96/71/EC – Working and employment conditions – Public policy provisions

In a decision dated 5 March 2013, the Supreme Court of Norway upheld the position of the Norwegian government and of the workers' unions in a case concerning application of directive 96/71 to secondment of workers carried out in

connection with provision of services in the shipbuilding sector.

Under Norwegian law, workers in the shipbuilding sector seconded from another State of the European Economic Area (EEA) are guaranteed certain employment conditions by means of a national collective bargaining agreement declared to be of general application. The said terms and conditions include remuneration additional to the minimum hourly wage, additional remuneration per night as well as accommodation and travel expenses.

Applied to in connection with the a preliminary ruling (case E-2/11, STX Norway Offshore AS et al.), the EFTA Court ruled in its decision of 23 January 2012 that only some of the said terms and conditions appeared among the binding rules relative to minimum protection provided for in article 3, section 1, first paragraph, of directive 96/71 on observance of which a host country may make execution of services on its territory by seconded workers conditional. The EFTA Court ruled in particular that the travel and per diem expenses did not appear among those binding rules. Pursuant to article 3, section 10, of directive 96/71, a host country may nevertheless impose such employment conditions on seconded workers insofar as that is required by national public policy. However, this exception must be strictly construed. While referring to the national judge the task of determining whether the mandatory application to seconded workers of travel and of per diem expenses provided for under the collective bargaining agreement was covered by public policy provisions, the EFTA Court had emphasised that the available information did not, a priori, make it possible to reach that conclusion.

In its decision of 5 March 2013 handed down in connection with the same case, the Supreme Court very clearly expresses its disagreement with the EFTA Court. On one hand, it considers that the per diem and travel expenses do indeed constitute remuneration in the meaning of article 3, paragraph 1, of directive 96/71. In addition,

it considers that, in any event, the said terms and conditions are indeed justified by public policy considerations. Thus the Norwegian Supreme Court seems to confer status as a public policy issue on preservation of the Norwegian model of tripartite dialogue between the State, the employers and the workers.

Finally, the Supreme Court expresses its disagreement with the position taken by the EFTA Court according to which, in the absence of harmonisation of the content of working and employment conditions that a host country may impose pursuant to article 3, paragraph 1, of directive 96/71, it is necessary to make sure that the said content does indeed conform to the provisions of the EEA agreement concerning unrestricted circulation of services (point 99 of its decision). In the Supreme Court's opinion, if this additional examination were necessary, "little would be gained by the Directive".

In addition to the issues relative to interpretation of directive 96/71 and to its relationships with primary law, this Supreme Court decision appears to be a reminder of the differences between the authority of the rulings on preliminary questions of the Union's Court of Justice and that of the EFTA Court's advisory opinions. Article 34 of the agreement of the EFTA States relative to instituting a supervisory authority and a court of justice (Accord Surveillance et Cour), which entrusts the EFTA Court with jurisdiction for answering the questions asked by the courts of the States that are party to the EEA agreement but not members of the EU (Norway, Iceland and Liechtenstein) differs, in fact, from article 267 TFEU on two important points. Firstly, the courts of final jurisdiction are not obliged to refer interpreted questions to the EFTA Court. Secondly, responses provided by the EFTA Court are, formally, only opinions that do not bind referring Courts. However, the EFTA Court considers that by virtue, in particular, of the duty for fair cooperation appearing in article 3 of the EEA Agreement, the obligation to refer to it any issue of interpretation and then to respect its opinion (which is characterised as a "judgement") is binding on the national

jurisdictions. The Supreme Court of Norway has maintained for years a different interpretation of article 34 of the Surveillance and Court agreement. However, it had never expressed this disagreement as clearly as it did in its decision of 5 March 2013.

Hoyesterett, decision dated 05.03.2013, STX and others/ the Norwegian state, HR-2013-00496-A,
www.hoyesterett.no

IA/32688-B

[SIMONFL]

Switzerland

* *Briefs*

The Federal Court was applied to in connection with the issue of the constitutionality and conformity to a convention of the reverse discrimination between Swiss citizens and European citizens, with respect to the conditions having to be met for members of their family to be able to benefit from family reunification. Members of families of Union citizens benefit from the same treatment as that applicable within the European Union, as can be seen in particular from the Metock case (decision by the Court of Justice on 28 July 2008, C-127/08, Rec. p. I-6241), whereas the members of the families of Swiss citizens are subject to more restrictive conditions.

In 2010, the Federal Court had ruled that in light of the Swiss Constitution and of article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), no objective grounds clearly appeared of such a nature as to justify the differing treatment. However, it had referred to legislators the task of determining the conditions under which it would be appropriate to modify the law.

In the present decision dated 13 July 2013, the Court pointed out that Swiss legislators considered the question and refused to remove the discrimination, so as to limit the

immigration resulting from family reunification. For the Court, in light of the existing bilateral treaties and of the case law relative thereto, control of the immigration flow can be exercised by taking nationality as a distinguishing criterion. It concluded from this that there are therefore sufficient grounds, non-discriminatory in light of article 14 of the ECHR, justifying different treatment for Swiss citizens in comparison with citizens of the Union when it comes to family reunification. The Swiss Supreme Court pointed out that if legislators are of the opinion that it is necessary to apply a restrictive immigration policy and they lay down limits in that connection in an area in which they have some room for manoeuvre as provided for by Conventional law. (i.e., by treating their own citizens unfavourably), the Federal Court cannot substitute for them.

Federal Court, decision dated 13.07.2012, No. 2C_354/2011,
www.bger.ch/

IA/33269-A

[MEYERRA]

The Cantonal Court of the Canton of Bâle-campagne was applied to on the issue of the legitimate nature of a dismissal ordered after a border worker working in Switzerland but residing in France refused to accept a 6 % salary reduction, which his employer wished to impose on him, as well as on all of its border workers residing in France or in Germany, following the drop of the value of the Euro against the Swiss Franc. The same pay cut had not been demanded by the employer for the employees residing in Switzerland.

The Cantonal Court ruled that the prohibition of discrimination against paid workers who are not citizens of the contracting parties, as resulting from the agreement of 21 June 1999 between the Swiss Confederation and the European Community concerning unrestricted circulation of persons, is binding on private

persons, and that it has a direct horizontal effect.

In this particular case, the Swiss Judge pointed out that the difference in treatment constituted indirect discrimination, which is prohibited by the agreement. In particular, the Cantonal Court rejected the arguments put forth by the employer, which justified the difference in treatment by the fact that, according to it, the employees living in France and in Germany had benefited from the Euro's decline and had seen their standard of living rise, whereas the employees living in Switzerland had to cope with an increased cost of living. The Court noted that the Swiss residents also benefited from the drop in the Euro, particularly by acquiring goods and services from the other side of the border. Moreover, it pointed out that a related increase of the border persons' salaries was not provided for if the Euro's rate were to be reversed, and that the exchange risk has to be borne by the Company, and not by the employees.

Consequently, the Cantonal Court ruled that the employee could, in good faith, refuse the salary reduction offer made to him by the employer, and that termination of the employment contract based on the said refusal by the employee was therefore unfair.

Kantonsgericht Basel-Landschaft, decision dated 17.12.2012, no. 400 12 152,
www.bl.ch/Kantonsgericht
 IA/33268-A
 [MEYERRA]

B. The Practices of International Organisations

World Trade Organisation

WTO - Anti-dumping agreement - Agreement on subsidies and compensatory measures - Compensatory duties and anti-dumping duties targeting what are known as laminated magnetic

steels with oriented particles from the United States

The report by the WTO appeals organ (the Organ) relative to the measures imposing compensatory duties and anti-dumping duties on what are known as laminated magnetic steels with oriented particles (AMGO) from the United States was adopted by the dispute settlement organ on 16 November 2012.

The measures were ordered by the Chinese Ministry of Trade, and the United States protested that the measures were incompatible with China's obligations pursuant to the anti-dumping agreement (the AD Agreement), the agreement on subsidies and compensatory measures (the SMC Agreement) and the GATT of 1994. The handling of the case at the level of the organ emphasised an allegation by China to the effect that the Special Group had made a mistake in interpretation and application of the AD Agreement and the SMC Agreement by finding that China had acted in a way that was incompatible with articles 3.1 and 3.2 of the AD Agreement (determination of the existence of harm with respect to imports that are subject to dumping) and articles 15.1 and 15.2 of the SCM Agreement (determination of the existence of harm as concerns subsidised imports). In addition, China alleged that the special group had made an error in its conclusion pursuant to which it had acted in a way that was incompatible with articles 6.9 and 12.2.2 of the AD Agreement and article 12.8 and 22.5 of the SMC Agreement (as concerns the final disclosure by MOFCOM of the facts underlying its finding of effects on prices and the notice to the public and the explanation of the facts).

In the first place, the organ upheld the special group's conclusion to the effect that the Chinese Ministry's findings concerning the effects on prices (of the imports in question) was incompatible with articles 3.1 and 3.2 of the agreement and articles 15.1 and 15.2 of the SCM Agreement. The appeals organ interpreted the said articles "as requiring the authority responsible for the inquiry to examine the relationship

between the targeted imports and the prices of the similar national products in such a way as to understand whether the volumes and/or the prices of the targeted imports made it possible to explain the occurrence of the noteworthy decline of the domestic prices or of the noteworthy obstacle to domestic price increases". As to the legal criterion set forth in articles 3.2 of the AD Agreement and 15.2 of the SMC Agreement, the appeals organ asserted that the Chinese Ministry's finding concerning the "low prices" (of the imports in question) referred to the existence of an undervaluation of the prices, a fact that the Chinese Ministry manipulated so as to reach the conclusion of the existence of a notable depression of the prices and of a considerable obstacle to price increases.

In second place, the organ reaffirmed the special group's finding to the effect that China infringed the provisions of articles 6.9 and 12.2.2 of the AD Agreement and articles 12.8 and 22.5 of the SMC Agreement, since the Chinese Ministry had not disclosed, either in its preliminary finding or in its final determination, all of the essential facts relative to the low prices (of the imports in question) on which it had relied to obtain a determination of the effects on prices. The organ indicated that the Chinese Ministry was bound to disclose the price comparisons between the imports in question and the national products in order to understand their low prices.

Report by the Appeals Organ, WTO, dated 18.10.2012, Case DS114,
www.wto.org/french/tratop_f/dispu_f/cases_f/ds414_f.htm

[LOIZOMI]

International Labour Organisation

The Laval case dealt with balancing the problem of the right to carry out collective actions against a company having seconded workers in the construction sector in Sweden with the unrestricted provision of services. The Swedish unions had instituted blockades of a Latvian company (Laval un Partneri Ltd.) in order to force it to adhere

to , the pay conditions applicable in the construction sector in that Member State during the time of secondment of the employees to Sweden. In the Laval Case (decision dated 18 December 2007, C-341/05, Rec. p. I-11767), the Court of Justice found, inter alia, that the unions were not entitled to call on the relevant national provisions against the Latvian Company in order to force it to respect the national pay rates, because in Sweden there was no minimum wage law. The Labour Court, Arbetsdomstolen, in turn forced the union organisations involved in the blockades to pay damages to the Latvian companies (then in bankruptcy). Following the Court's decision, the Swedish Parliament made some legislative modifications, called the "Lex Laval", aimed at maintaining the Swedish system, characterised by the social partners' autonomy while making the legislation compatible with Union law. At the end of February 2013, the International Labour Organisation (ILO), whose reports are not binding, criticised the Arbetsdomstolen for the obligation it laid on the union organisations to pay damages even though those organisations had followed Swedish law in effect. The ILO expressed serious concerns about the obligation to pay damages for having instituted a legitimate blockade, and maintained that there had been a serious infringement of the principle of the freedom of association. In addition, the ILO expressed concern about the development of "Lex Laval" in the sense that it believes that the said law goes beyond the need for making Swedish law compatible with Union law. The ILO urged the Swedish government to consider this criticism in connection with the evaluation of the operation of the "Lex Laval" initiated by a committee established for that purpose.

Report by the Experts' Committee for application of conventions and recommendations, ILO, dated 25.02.2013, p. 176,
www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205472.pdf

[LTB/GUSTAAN]

C- National legislation

Cyprus

2013 Legislation passed following the crisis and in connection with enacting 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.

The last few months have brought the implementation of a plethora of new legislative provisions aimed at making effective the agreement relative to facilitating financial support between, on one hand, the ESM and, on the other, the Republic of Cyprus and the Central Bank of Cyprus. The agreement itself went into effect on 30 April 2013 on a mandatory basis due to its ratification by the Republic's Chamber of Deputies by means of law No. 1(III)/2013. The agreement entails application of the memorandum of understanding (memorandum) between the Republic of Cyprus and the European Commission (acting in the name of the ESM), for the purpose of restoring the solidity of Cyprus's banking system, continued consolidation of national fiscal policy and implementation of the structural reforms so as to support the country's competitiveness and lasting and balanced growth. The purpose of this summary is to bring out the most important legislative and political developments, since it is impossible, in summary form, to provide a complete analysis of all of the legislation adopted because of the crisis.

Financial sector

With respect to the financial sector, in light of the serious nature of the economic situation, on 23 March 2013 the Chamber of Deputies adopted a series of laws, including the one on restructuring of financial institutions (law No. 17(I) (2013), authorising the Central Bank, in consultation with the minister of finance, to adopt reorganisation measures on behalf of

survival and re-establishment of the country's financial system. This law has already been called on to carry out the sale of the foreign subsidiaries of the two largest banks (Bank of Cyprus and Cyprus Popular Bank), and in order to make it possible to place the latter bank under liquidation and to provide for absorption of its assets and liabilities by the former. More controversially, the recapitalisation of the Bank of Cyprus was launched by means of a conversion into shares of part of the unguaranteed deposits (up to 60% of the value below 100,000 euros) of the Bank of Cyprus. In addition, law no. 12(I)/2013 concerning the restrictive measures affecting financial exchanges was instituted in order to temporarily limit (but without setting a fixed period) cash withdrawals, electronic payments and transfers abroad for the purpose of guaranteeing the liquidity of the banking sector and preventing "bank panics". The memorandum contemplates the implementation of other measures on behalf of regulation and supervision of the banks until the end of 2014.

Fiscal policy

In order to correct the public administrations' excessive deficit, the Republic of Cyprus, agreed, on one hand, to modify the law relative to the 2013 budget to include some additional stabilisation measures, including an increase of income tax to 30%, of corporation tax to 12.5%, and a levy on bank accounts. In addition, by a modification of law No. 24(I)/1980 concerning the real estate tax (implemented by law No. 33(I)/2013), the tax brackets were increased considerably so as to reach an additional annual turnover of 15 million euros. The Government also agreed to increase the expenses for all public services by 17%. In addition, the Republic of Cyprus agreed to considerably reduce health and education expenses, to restructure the system of housing and retirement allocations, and above all to make an immediate reduction in the remuneration of the public sector's employees and retired persons (which has already been implemented by law No. 31(I)/2013).

Structural reforms

Within the framework of the agreement concluded in the memorandum, the Republic of Cyprus also agreed to make some structural reforms so as to upgrade the effectiveness of public expenditures, particularly in connection with the retirement system and the public health sector. With respect to the latter, an interesting development was launched by law No. 35(I)/2013, which prohibits promotion of health care for persons who have not filed an income declaration with the administration and who are not affiliated with a social security system. That measure will deprive of free care mainly the Turkish Cypriotes residing in the occupied territories (who are not subject to tax in Cyprus), contrary to the Greek Cypriot taxpayers. In addition, the memorandum contemplates a plan for privatisation, planned for 2013, of the government-owned businesses, including the electricity, telecommunications, ports and real property companies. As concerns the reform of the Public Administration, law No. 21(1)/2013 has already been implemented, prohibiting any appointments to a position in the public sector, including a freeze on any current procedures aimed at filling such a position. The government has also agreed to allow an independent outside examination of new reforms, particularly the reorganisation and reduction of the ministries, abolition or merger of the NGO and restructuring of the local administration. In addition, the memorandum provides for a reform of the social security system as of 2014.

Other important provisions

As such, the memorandum provides for a series of reforms of the labour market, of goods and services, including a reform of the salary indexation system, full application of directive 2006/123 relative to services on the interior market, a study aimed at improving and strengthening the competitiveness of the economic model of the tourism sector, improved functioning of the sector of regulated professions, the guarantee of the independence and

improvement of efficient operation of the national competition authority, and, in particular, formulation of a global strategy in reorganising the energy sector so as to exploit the potential natural gas reserves located in the country's maritime territory.

Various legislation connected with the crisis

In a broader context, the government has decided, on its own initiative, to introduce certain additional reforms in order to combat the crisis, particularly creation of a national solidarity fund, to finance and/or strengthen the financial institutions and promote development and social cohesion. Then, the law concerning the investigative commissions has been modified, the President of the Republic has appointed a committee responsible for investigating the reasons for the crisis and identifying the parties responsible for it (at the level of the banking sector as well as at political level) in this connection. Finally, the Council of Ministers has implemented a programme of economic citizenship, by means of naturalisation, for the citizens of other countries who have suffered losses of more than three million euros in connection with their savings in the two banks that failed.

Law No. 1(III)/2013 ratifying the financial support facilitation agreement, between, on one hand, the European Stability Mechanism, and on the other the Republic of Cyprus and the Central Bank of Cyprus. (Official Journal, Appendix 1, Part 3, No. 4173, p. 9).

www.mof.gov.cy/mof/gpo/gpo.nsf/All/947F1F5E9D4FECC2C2257B5D00691918?OpenDocument

[LOIZOMI]

Latvia

Reform of criminal law and of criminal sanctions

On 13 December 2012, after 7 years of preparatory work, a series of laws concerning criminal law, criminal procedure and execution of criminal sanctions was adopted. The said laws, which went into effect on 1 April 2013, represent a complete

reform of criminal law. That reform, on one hand, is aimed at reducing the serious nature of the sanctions, and even at decriminalising certain actions, and on the other hand, it has the goal of revising the penalisation system.

The aspects of the reform connected with Union law deal, in particular, with the transposition of directive 2011/36 concerning prevention of human trafficking and the struggle against that phenomenon, as well as protection of victims and replacing the Council's framework decision 2006/629. This new directive requires, inter alia, that offences connected with human trafficking can give rise to proceedings for a sufficiently long period after the victim has legally become an adult. Consequently, in Latvian law, a statute of limitations of 20 years has been introduced for this type of offence.

Thus, a new offence in the form of a prohibition on illegal aid for obtaining a resident's permit in Latvia, in the Union, in a country of the European Economic Area or else in Switzerland has been introduced by article 285 so as to put an end to civil relationships, particularly marriage and adoption, entered into by fraud.

The ne bis in idem principle, until the time of the present reform, has been included as a principle in penal proceedings. Pursuant to article 1 of the penal law, this principle is now added to the list of the principles of criminal law. The concept of the ne bis in idem principle follows, in substance, article 4 of Protocol 7 of the European Convention for protection of human right and fundamental freedoms.

www.likumi.lv

[AZN]

Czech Republic

Modification of the law concerning protection of competition, enshrining the clemency programme before the National Competition Authority

With the effectiveness as of 1 December 2012, of the modification of law no. 143/2001 concerning protection of competition, the clemency programme installed by the Office for the Protection of Competition (Office) finally received a legal foundation. Introduced by the Office in 2001, the clemency programme relied on a mere communiqué by the Office for more than 10 years. The provisions modifying the said law now lay down the broad outlines of the said programme, including the conditions for clemency, the deadlines, the limits on reduced fines, as well as the question of access to the documents submitted by the clemency applicant. The parties to illicit horizontal understandings may, on the basis of the new provisions, receive total immunity or a reduction of up to as much as 50% of the fines levied by the Office.

The law specifies that applications for clemency and the evidence attached thereto are to be kept outside the file until the time of service on the parties to the illicit understanding of the facts established by the Office and of their legal assessment. However, access to the said documents is limited, even after the notification, insofar as the said documents benefit from a protective regime similar to the one applicable to commercial secrecy. Thus consultation of the said documents by the other parties to the proceedings is still excluded. In addition, the clemency programme also has some repercussion in the field of criminal law, in that it enables the individuals concerned to avoid their criminal liability with respect to the offence of infringement of the rules of competition.

In addition to the clemency procedure, the said modification institutes the compromise procedure that can henceforth be applied in cases of illicit understandings, abuse of a dominant position and unauthorised concentration. At the interested party's request and in exchange for acknowledgement of its unlawful conduct, the Office grants a fine reduction that can range up to 20%, if it considers that the final sanction is sufficient in light of the nature and of the serious nature of the offence.

The Office has recently acquired the power to decide not to take steps against offences that have only weak anti-competitive effects. That will particularly concern the understandings among competitors not holding substantial market shares. Since such understandings are nevertheless still prohibited in the eyes of the law, they may be the object of civil action filed by individuals.

Finally, the modification widens the field of application of the said law, which henceforth applies to public authorities as well. The latter are to be supervised by the Office and their auto-competitive practices can bring a fine.

Zákon č. 360/2012 Sb., kter.m se mění zákon č. 143/2001 Sb., o ochraně hospodářské soutěže a o změně někter.ch zákonů (zákon o ochraně hospodářské soutěže), ve znění pozdějších předpisů, a zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, [www://aplikace.mvcr.cz/sbirka-zakonu/](http://www.aplikace.mvcr.cz/sbirka-zakonu/)

[KUSTEDI]

Romania

Law on the measures for completion of the return process in kind or in the form of an equivalent, of the real properties improperly taken over during the Communist regime in Romania

The ineffective nature of the system for return of real properties improperly taken over during the Communist regime, installed by the old laws, was denounced by the European Court of Human Rights (ECtHR) in numerous decisions, particularly the ones handed down in the cases *Brumărescu / Romania* No. 28342/95, *Străin et al. / Romania* No. 57001/00, *Păduraru /. Romania* No. 63252/10 and *Viașu / Romania* No. 75951/01.

In a leading case of 12 October 2010, *Maria Ataniasu and others vs. Romania*, “in light of the very substantial number of applications aimed at Romania concerning the same kind of contentious proceedings”, the ECtHR decided to defer the examination of all of

the applications resulting from the same point, pending adoption by the Romanian authorities of measures able to provide adequate aid for all persons concerned by the compensation laws for a period of 18 months beginning on 12 January 2011 (the date on which the decision became final).

In that context, the new law applies to all unresolved applications filed within the said period with the competent authorities, to the current matters in the national jurisdictions, as well as to the cases recorded in the ECtHR that are suspended pursuant to the above-mentioned decision. The law enshrines the principle of the return, in kind, of the real properties that were improperly nationalised. When return in kind is no longer possible, compensation by means of a points system will be the only compensatory measure. If the holder has transferred the rights due to it pursuant to the laws concerning return of the properties, the only compensatory measure will be compensation by means of this system.

In article 2, the law sets forth the principles governing the return: the prevalence of return in kind, the principle of equity, the principle of transparency in approving the compensatory measures, and the principle of maintenance of a fair balance between the private interests of the former owners and the general interest of society.

With respect to returns in kind, the applications for return that have not yet been settled, as well as the situations of the agricultural and forest lands will be centralised with a view to establishing a comparative report between requests for return and available lands on 1 March 2014 at the latest. Article 11 requires the administrative authorities to settle all requests for return, to arrange taking possession of, and issue of, ownership deeds by 1 January 2016. In the 30 days following expiration of that period, the interested party may file a complaint in the competent court, and only that decision will be subject to appeal.

In the absence of a return in kind, the interested parties will be entitled to request a grant of points. A national commission for compensation of real properties and a national fund of agricultural lands and other real properties will be established with a view to managing the procedure. By 1 January 2015, the National Commission will have to publish the value of each real property of the National Fund, as resulting from application of the notaries' valuation table applicable on the effective date of the present law. The valuation of the real property will be made by the secretariat of the National Commission and will be expressed in points (1 point being equivalent to a RON). The points established by the compensation decision cannot be made subject to a threshold.

The points granted by the compensation decision may be used by purchase at public auction of real properties of the National Fund beginning on 1 January 2016.

Some measures aimed at maintaining the rapidity of the procedure are also provided for, the law laying down deadlines, disregard of which can entail application of a time limit or of pecuniary sanctions.

Thus, the law is part of the process of compensation for the attacks on property rights caused by the Communist regime in Romania.

Lege nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România. Publicată în Monitorul Oficial nr. 278 din 17.05.13, www.legalis.ro

[CLU]

Sweden

Following infringement proceedings filed against Sweden, initiated by the European Commission in 2007 but not having led to an action for non-performance, Sweden modified the law relative to granting the family name (Namnlag (1982 :670). The proceedings before the Commission

originated in a case involving the national taxation administration (Skatteverket), the administration holding jurisdiction over allocation of names. A couple residing in Sweden had requested registration of the family name of their mutual son in accordance with Spanish tradition, namely, consisting of the parents' two family names. The father was of Swedish nationality, the mother of Spanish nationality, and the son had both nationalities. Since Swedish law treats all persons of Swedish nationality in the same way, the Skatteverket decided to register the family name in accordance with Swedish law, and as such, rejected the parents' application. According to the Commission, on one hand, discrimination occurred against children holding dual nationality due to rejection of the family name chosen in accordance with the tradition of another country, and, on the other hand, an infringement occurred of the right of each Union citizen and of members of his or her family to move freely within the Union. To comply with the conditions laid down by Union law and to remedy the shortcoming alleged by the Commission, particularly under articles 18, 20 and 21 TFEU and directive 2004/38 relative to the right of Union citizens and of the members of their families to circulate and reside freely on the territory of the Member States, Sweden modified the law relative to granting the family name. In the grounds connected with the modification of the law, the Swedish legislators indicated that it is normal to use the same family name independently of the place, and having different names in different countries creates problems for an individual, both from the professional and private life viewpoint. Furthermore, the name appearing in the official documents is used in connection with issuing passports and other identity documents. A difference in this connection can give rise to suspicion of false information provided by the person. The legislators also mention the intention to use the name acquired from another country indicating the person's cultural identity and the characteristics shared with the family residing there. The modifications, which came into effect on 1 March 2012, allow any Union citizen to bear

a name acquired in another Member State of the European Economic Area or Switzerland, if the person who is a citizen of the said state resides there, or has another special link with the said other state at the time of acquisition of the name.

Lag (2012:66) om ändring i namnlagen (1982:670),

www.riksdagen.se

[LTB] [GUSTAAN]

D. Response to the legal opinion

Compatibility of the European Stability Mechanism (ESM) with Union law

Comments on the decision by the Court of Justice dated 27 November 2012 in the Pringle case.

According to Picod, "(a)pplied to in connection with a preliminary matter submitted to another Court originating from the Supreme Court of Ireland on the subject of the stability mechanism instituted by the treaty establishing the European Stability Mechanism (hereinafter the "ESM Treaty"), the Court of Justice handed down a fundamental ruling in plenary assembly in connection with accelerated proceedings completed at the end of a period of less than four months."¹

Certain authors emphasise the political and legal interest arising from the Pringle case:

"Not all cases are equally important; they are not equally interesting intellectually and they are not of equal significance in terms of political relevance. [...] The challenge to the European Stability Mechanism (ESM) ticked all these boxes, especially because its judicial invalidation could well have sent nervous financial markets into a further downward spiral." (Craig²)

Others recall the distribution of jurisdiction between a national judge and a European judge: "this is not the first adoption of a legal position concerning the validity of the ESM process. The fact is that the question of the compatibility of the ESM Treaty with the constitutional law of the Member State had

already been judged, particularly in Germany (BverfG 12 Sept. 2012⁽³⁾ (...)) but this time it is the compatibility with the primary law of the Union itself that was in question." (Simon ⁽⁴⁾)

Is there a requirement for an amendment of the TFEU to establish the ESM?

For certain writers, the economic context in which the Court handed down its decision in the Pringle case is not irrelevant.

"With the fate of the euro area hanging in the balance, (the Court) had to approve the ESM (...). The Court managed to achieve this goal, but only by resorting to the strained reasoning that Member States have always had the ability to provide financial assistance via an instrument such as the ESM and that nothing has changed as a result of the debt crisis. According to this reasoning, the revision of the TFEU, initiated to clear the way for the ESM, is no more than a cosmetic exercise." (Borger ⁽⁵⁾).

According to Thomas, "(...) the Court holds that article 136, paragraph 3, TFEU, added by decision 2011/199, does not fall under monetary policy (point 57) and simply confirms a jurisdiction that already existed pursuant to the Treaties (point 72-73). Consequently, the Court considers that the modification proposed by the Council is utterly superfluous (...). To find that article 48, paragraph 6, TEU has not been infringed, the Court therefore prefers to take note of the legislative powerlessness of the European Council, rather than considering that it acted *ultra vires*, or simply to accept the fact that the said amendment was necessary in order to conclude the ESM Treaty ⁽⁶⁾.

For Weiß and Haberkamm, it is not surprising that the Court held that article 136, paragraph 3, TFEU is of only a declaratory nature, since a different judgement would have implied that the loans granted by the predecessor of the ESM, the European Financial Stabilisation Facility (EFSF), and the aid for Greece were not compatible with Union law. However, they point out that the European Council, unlike the Court of Justice, was of the

opinion that revision of the TFEU was necessary. They also emphasised the fact that the interpretation made by the Court of Justice is, in part, also in opposition to the judgement previously handed down by the Bundesverfassungsgericht (German Federal Constitutional Court). In that context, Weiß and Haberkamm point out that for that Court, article 136, paragraph 3, TFEU is not merely declaratory, but entails a fundamental restructuring of economic and monetary union, by instituting a certain modification of the autonomy of the national budgets. "[D]ie EuGH-Bewertung [...] steht in einem Spannungsverhältnis zur Aussage des BVerfG, wonach Art. 136 III AEUV eine "grundlegende Umgestaltung" der Wirtschafts- und Währungsunion bewirke [...]." ⁽⁷⁾

Callies admits that, for the Bundesverfassungsgericht, unlike the Court of Justice, article 136, paragraph 3, TFEU seems to be of a constitutive nature as a provision departing from article 125, paragraph 1, TFEU. He notes, however, a certain convergence of the conceptions held by the Court of Justice and by the Bundesverfassungsgericht insofar as, according to those two courts, economic and monetary union remains a union of stability, constituting part of the European legal community and, as such, subject to judicial review. "Die Währungsunion bleibt auch nach Auffassung des BVerfG weiterhin als Stabilitätsgemeinschaft ausgestaltet. Nach alledem sind die Perspektiven des EuGH und des BVerfG nicht nur mit Blick auf den neuen Art. 136 III AEUV und den ESM recht nah beieinander." ⁽⁸⁾

Circumventing the mechanisms provided for under the treaties by means of an intergovernmental instrument?

According to Thomas, "(...) the case raises some important legal questions, particularly concerning the 'extra-conjugal' relationships of the Member States and their power to conclude an agreement of this type outside the legal framework of the Union, while relying – at least in part – on its institutions. (...) Could the Council not

contemplate calling on strengthened cooperation pursuant to article 20, paragraph 1, TUE, for instance? Article 352 TFEU (implicit powers) would no doubt also have been able to constitute an appropriate legal basis, (...). (T)he decision by the Court raises a problem, since it is based on a restrictive interpretation of the Union's powers in connection with economic policy, so as to be able to legitimise the agreement concluded by the Member States outside the institutional framework of the Union, but at the risk of encouraging them to continue along the same path in the future. "(9)

On the other hand, Nettesheim is of the opinion that one cannot criticise the Member States for having circumvented the mechanisms provided for under the treaties. "[D]en Mitgliedstaaten [kann] eine "Flucht aus dem EU-Recht" nicht ernsthaft vorgeworfen werden". According to him, it was impossible to create an institution such as the ESM within the framework of the existing treaties. He notes that in the final analysis, the Pringle decision breaks with the neo-federal ideas pursuant to which European integration has already prevented the Member States, in matters relating to the EU, from acting in a pluri-lateral way, without being explicitly legitimised by Union law. On the contrary, according to Nettesheim, the Court of Justice understood that it would be counter-productive to oppose the Member States' commitment to maintenance of integration: Integrationsanhänger nachgerade fahrlässig, sich dem Einsatz der Staaten für den Erhalt der Integration aus institutionellen Eigeninteressen entgegenzustellen."¹⁰

Along the same lines, de Witte and Beukers point out: "The creation of the ESM should [...] not be seen as an "intergovernmental plot" through which the euro area governments sought to escape from the constraints of EU law to exclude any involvement of the Commission and the Parliament. Indeed, they sought to preserve a number of links with the EU legal order through the borrowing of EU institutions."(11)

In this context, it is appropriate to point out that: "[...] when it comes to certain Member States requesting a Union institution [...] to exercise various non-Union functions on their behalf, Pringle offers a clear confirmation of that possibility as a matter of Union law." (Editorial comments, CML Rev.)¹² In that connection, the author refers to point 158 of the Pringle decision, pursuant to which "(...) the Member States, in the fields not covered by the sole jurisdiction of the Union, are entitled to assign, outside the Union framework, missions to the institutions, such as coordination of a collective action undertaken by the Member States or management of financial assistance (...), insofar as such assignments do not distort the powers that the EU and FEU treaties grant to the said institutions".

Interpretation of the no bailout clause

Even if the Court of Justice considers (cf. point 130 of the Pringle decision) that article 125 TFEU, according to which the Union or a Member State is not answerable for the commitments of another Member State and does not accept them, is not aimed at prohibiting the Union and the Member States from granting any type of financial assistance to another Member State. Vogel thinks that the point of departure of the Court's arguments is hardly convincing. According to Vogel, it is rather a question of a strict prohibition. This means, according to him, that article 136, paragraph 3, TFEU must be considered as an exception to the rule of article 125 TFEU. ⁽¹³⁾

Frenz is even of the opinion that the ESM treaty can be compatible with Union law only if the no bailout clause of article 125 TFEU is construed strictly. "Diese hindert indes gerade auch faktische Hilfeleistungen für marode Staatshaushalte, da dadurch ein Anreiz entsteht, Schulden zu machen, anstatt solide zu wirtschaften." ⁽¹⁴⁾

According to Glaser, the Court's position to the effect that "a mechanism such as the ESM and the Member States taking part therein are not answerable for the commitments of a Member State benefiting

from stability support and are also not responsible for them in the meaning of article 125 TFEU (point 146 of the Pringle decision)" "Diese hindert indes gerade auch faktische Hilfeleistungen für marode Staatshaushalte, da dadurch ein Anreiz entsteht, Schulden zu machen, anstatt solide zu wirtschaften." ⁽¹⁴⁾ According to Glaser, for the short term, the ESM aims at indicating to the financial markets that the Member State receiving the financial aid may, in the event of insolvency, count on the assistance of the other ESM members. This mechanism corresponds substantially, still according to Glaser, to a guarantee. The only difference in form would be the absence of a direct relationship between the ESM and the creditors of the Member State concerned. Glaser thinks that if this criterion were sufficient to exclude application of article 125, paragraph 2, TFEU, the structural circumnavigation of this provision would be at risk. ⁽¹⁵⁾ Similarly, Palmsdorfer criticises the Court of Justice because, due to its position, the final purpose of the money made available to the state benefiting from the aid does not seem to have any importance, particularly in that the money indirectly reaches the creditors of the Member State concerned. Only the direct transfer of the financial assistance, i.e., without the intermediary of the addressee state, is prohibited. Palmsdorfer wonders about the economic usefulness of such a distinction. "Nach dieser Lesart ist ein direkter Bailout zwar verboten, ein indirekter Bailout aber erlaubt." ⁽¹⁶⁾

On the other hand, according to Weiß & Haberkamm, in principle, the Pringle decision construes, in a convincing way, the central provisions for saving the euro, particularly article 125 TFEU, and thus lays down some important milestones. According to them, it is justified to distinguish between a grant of a credit line or of a loan, on one hand, and assuming liabilities, on the other. ⁽¹⁷⁾

Conclusion

Picod maintains that "(t)hus the ESM treaty is compatible with all of the rules and principles of European Union law examined

in connection with reference of a preliminary question to another court which appears to have been triggered more for political reasons than in order to settle a real dispute. ⁽¹⁸⁾

De Witte and Beukers conclude that: "All in all, the Court has given, in Pringle, a well-reasoned judgment expressing a good mixture of legal principle and political pragmatism." ⁽¹⁹⁾

In principle, Thomas seems to share this positive judgement: the outcome of this matter must be welcomed without a doubt, in light of its political importance and the risk of again plunging the entire Euro Zone into torment in the event of invalidation by the Court of the ESM treaty. (...). In light of the exceptional context, one cannot criticise the Court's effort to take into account a certain political realism in its approach." ⁽²⁰⁾

Nevertheless, Müller-Graf points out that in light of the debates preceding the Pringle case, the decision by the Court of Justice shows the need for clearly distinguishing between the political objectives and the legal interpretation of the provision of the treaties. "[D]as Urteil [belegt] auch die bekannte Einsicht, dass die beiden Fragen der politischen Richtigkeit und der rechtlichen Zulässigkeit einer Maßnahme strikt zu trennen sind und dass politisches oder konzeptionelles Meinen oder Wünschen nicht die Auslegung vereinbarter Vertragsvorschriften verzerren darf."

According to Müller-Graf, the Pringle decision corresponds, to a great extent, to the legal judgement of the persons, mainly belonging to a minority, who, prior to the Pringle decision, made a literal, teleological and systematic interpretation of the relevant provisions of Union law, without letting themselves be disturbed by global and unclear conceptions of the illegality of budgetary assistance between the Member States. ⁽²¹⁾

Callies concludes that, in the final analysis, the Court of Justice considers that monetary union is an integral part of the European legal community, subject in its entirety to judicial review. ⁽²²⁾ Similarly, Thym is of the

opinion that the Court of Justice will ensure that the agreements under public international law do not impair the primacy of Union law and its proper operation. "Das Fazit muss lauten: "Die supranationale Rechtsgemeinschaft lebt; die Erzählung von der Rechtsdämmerung in der Euro-Krise ist ein Mythos." ⁽²³⁾ On the other hand, Ruffert does not seem to completely share this judgement. He considers that not much remains of the model of a monetary union strictly connected with law: "Vom Modell einer strikt rechtlich gebundenen Währungsunion bleibt dennoch nicht viel übrig." ⁽²⁴⁾

According to Palmsdorfer, following the Pringle decision, article 125, paragraph 1, TFEU is reduced to an empty shell. "Die Bestimmung wurde entkernt, der gravierende Systemwandel weg von der haushaltspolitischen Eigenverantwortung hin zur Solidarität als unionsrechtskonform erachtet." ⁽²⁵⁾

However, according to Ruffert, article 125, paragraph 1, TFEU still prevents the issue of Eurobonds, since they presuppose establishment of a guarantee for the commitments of other Member States. ⁽²⁶⁾

Returning to the broader context in which the Pringle case comes up, Graig notes that: "The legal saving of the ESM will not of course cure the underlying problems with the euro area. That will require longer term measures [...]. There is, however, little doubt that the legal result in Pringle was greeted with quiet relief in the corridors of power in Brussels and elsewhere." ⁽²⁷⁾. Finally for Borger, "[t]he ESM is only an intermediate step. In practice, a shift of focus from financial to political stability may already be observed. However, what is driving this transformation? In *Pringle*, the Court did not have to deal with this question, the importance of which reaches beyond the law.

In her [O]pinion, AG Kokott touches upon the answer: It is, probably, the development of solidarity in the Union." ⁽²⁸⁾

[TLA]

NOTICE

The texts and documents to which the information noted below refers are, in principle, excerpts 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 databases DEC.NAT. and CONVENTIONS. The dossiers relative to the said decision may be consulted in the Research and Documentation Department.

The case law notes incorporated into the heading "Response to the legal opinion" have been strictly elected. An exhaustive statement of the published notes appears in the internal database NOTES.

The publication "Reflets" is available on Curia (<http://curia.europa.eu>) under "Le droit de l'Union en Europe / Jurisprudence nationale et internationale" (Union law in Europe/ national and international case law), as well as on the Intranet of the Research and Documentation Department.

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NOTES

¹ Picod, F., "*Nothing opposes the treaty instituting the European stability mechanism*", La Semaine Juridique - édition générale 2012, n° 50, p. 2260.

² Craig, P., "*Pringle: Legal Reasoning, Text, Purpose and Teleology*", Maastricht Journal of European and Comparative Law 2013, p. 3.

³ See *Reflète* No. 3/2012, p. 43. Let us note that the Bundesverfassungsgericht has so far ruled only on applications in summary proceedings.

⁴ Simon, D., "*European Stability Mechanism (MES)*", Europe 2013 January No. 1, p.17-20.

⁵ Borger, V., "*The ESM and the European Court's predicament in Pringle*", German Law Journal, Vol. 14, No. 01, p. 113, 114.

⁶ Thomas, S., "*Union' Constitutional Law - EMU, 'Pringle' decision*", Revue du droit de l'Union européenne 2013, n° 1, p.198-206.

⁷ Weiß, W., Haberkamm, M., "*Der ESM vor dem EuGH - Widersprüchliche Wertungen in Luxemburg und Karlsruhe?*", Europäische Zeitschrift für Wirtschaftsrecht, EuZW 2013, p. 95, III. 1.

⁸ Calliess, C., "*Der ESM zwischen Luxemburg und Karlsruhe - Die Krise der Währungsunion als Bewährungsprobe der Rechtsgemeinschaft*", Neue Zeitschrift für Verwaltungsrecht, NVwZ 2013, p. 97, 105.

⁹ Thomas, S., cit. supra, note 6.

¹⁰ Nettesheim, M., "*Europarechtskonformität des Europäischen Stabilitätsmechanismus*", Neue Juristische Wochenschrift, NJW 2013, 14.

¹¹ De Witte, B., Beukers, T., "*The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*", Common Market Law Review 50, CML Rev. 2013, p. 805, 848.

¹² Editorial Comments, Common Market Law Review 50, CML Rev. 2013, p. 673, 678.

¹³ Vogel, M., Europäisches Wirtschafts- & Steuerrecht, EWS 2013, p. 45-46.

¹⁴ Frenz, W., "*ESM-Vertrag europarechtskonform!?*", Europäisches Wirtschafts- & Steuerrecht, EWS 2013, p.27-32.

¹⁵ Glaser, A., "*Zur Gültigkeit des Euro-Stabilitätsmechanismus (ESM-Vertrag)*", Deutsches Verwaltungsblatt, DVBl 2013, p.167-169.

¹⁶ Palmsdorfer, R., "*Indirekter Bailout erlaubt, direkter Bailout verboten*", Europarecht, EuR 2013, 215.

¹⁷ Weiß, W., Haberkamm, M., cit. supra, note 7.

¹⁸ Picod, F., "*Nothing opposes the treaty instituting the European stability mechanism*", La Semaine Juridique - édition générale 2012 n° 50, p.2260.

¹⁹ De Witte, B., Beukers, T., cit. supra, note 11.

²⁰ Thomas, S., cit. supra, note 6.

²¹ Müller-Graff, P.-C., "*Das EuGH-Urteil zum Europäischen Stabilitätsmechanismus*", Recht der internationalen Wirtschaft, RIW 2013, p.111-118, (112).

²² Calliess, C., cit. supra, note 8.

²³ Thym, D., "*Anmerkung*", Juristenzeitung, JZ 2013, p.259-264.

²⁴ Ruffert, M., "*Europarecht, Unionsrechtskonformität des Europäischen Stabilitätsmechanismus (ESM)*", Juristische Schulung, JuS 2013, p. 278.

²⁵ Palmsdorfer, Rainer, cit. supra, note 16.

²⁶ Ruffert, M., cit. supra, note 24; cf. also: Ruffert, Matthias, "*Anmerkung*", JuristenZeitung, JZ 5/2013, 257, 259, IV.

²⁷ Craig, P., cit. supra, note 2.

²⁸ Borger, V., cit. supra, note 5.