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# *R E F L E T S*

## *Brief information on legal developments of Community interest*

**Contents**



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# A. Case law

## I. European and international courts

### European Court of Human Rights

***European Convention on Human Rights - Protection of the property rights - Annulment of certificates of inheritance on the basis of the heirs' nationality - Application of the principle of reciprocity in the context of the European Convention on Human Rights - Breach of Article 1 of the 1st Protocol of the Convention***

In a series of judgments in cases between Greek nationals and the Turkish state, the European Court of Human Rights (hereafter referred to as "the ECHR") unanimously ruled that Turkey had breached Article 1 of the 1st Protocol of the European Convention on Human Rights, which protects property rights. The most recent judgment was pronounced on 23 February 2010, while the other two dated from 29 September 2009 and 27 March 2007. In two of the cases, namely the Ağnidis and Fokas cases, both the bequeathers and the heirs were Greek nationals.

In the Apostolidi case, the heirs were Greek nationals and the bequeathers were one Greek national and one Turkish national of Greek origin. The three cases relate to the Turkish courts' annulment of the appellants' certificates of inheritance for the bequeathers' immovable property and the subsequent transfer of this immovable property to the Turkish Treasury. In the Ağnidis case, the Turkish authorities originally took action against the deceased bequeather, until cassation put an end to the action and a new action was launched against his rightful heirs, who appealed to the ECHR. In two of the aforementioned cases, the heirs' certificates of inheritance were annulled despite the fact that they had already paid the relevant inheritance tax (the Ağnidis and Fokas cases). In the Fokas case, the bequeather was deprived of her property while staying in a psychiatric hospital.

The legal basis for these actions is the condition of reciprocity required, at the time of the events, by Turkish legislation or the Turkish authorities (Fokas case) for foreign nationals, particularly Greeks, to be able to inherit immovable property. In the case in point, the Turkish authorities held that this restriction and its application to the appellants was justified by the fact that Greek legislation requires non-EU nationals to have prior permission from the authorities to acquire immovable property across an area representing 55% of Greek territory, and that this measure and its application prevent Turkish nationals from acquiring immovable property in Greece.

The ECHR did not subscribe to this argument. In the Apostolidi and Fokas cases, it began by recognising that the appellants had property, while in the Ağnidis case, it established that annulling the certificate of inheritance that had served as a basis for the inclusion of the disputed property in the land register infringed on the right of the parties concerned to have their property respected.

The ECHR went on to examine the issue from the viewpoint of the principle of legality (the Ağnidis and Apostolidi cases). It pointed out that in this respect, the existence of a legal basis was not, in itself, enough to satisfy this principle. Rather, compliance with the principle of legality entails having sufficiently accessible, detailed and foreseeable internal legal provisions. As for the principle of reciprocity, the ECHR observed that unlike traditional international treaties, the Convention transcends the framework of mere reciprocity between State parties and creates objective requirements with a collective guarantee that go beyond bilateral synallagmatic commitments. The ECHR held that in concluding the Convention, the State parties wished not to confer mutual rights and obligations on each other conducive to the pursuit of their respective national interests, but to "create community-based public policy for the free democracies of Europe in order to protect their shared heritage of political traditions, ideals, freedom and the rule of law". For this reason, the ECHR believed that it was not a question of determining whether Turkish legislation was compatible with the Convention or not, but of determining whether the effects of the principle of reciprocity on the appellants breached the Convention.

In this respect, the ECHR observed that the known restrictions in Greek law on acquisition of immovable property by non-Greeks, particularly Turks, did not apply to acquisition of property by inheritance but to transactions between living people. It also noted that the documentation provided by the Turkish authorities showed that Turkish nationals had acquired property in Greece by inheritance on numerous occasions. In the Ağnidis case, the ECHR also observed that the disputed condition of reciprocity had been overturned in Turkey since the events that had led to the disputes. Given these conditions, the ECHR found that applying Article 35 of the Turkish Land Registry Law to the appellants was not sufficiently foreseeable, and so concluded that the Turkish authorities' interference was not compatible with the principle of legality and therefore contravened Article 1 of the 1st Protocol of the Convention.

In the Fokas case, the ECHR stated that the inheritance certificate had been annulled by virtue of a legislative text that had been abolished and was therefore not applicable at the time of the events. Based on this fact, the ECHR ruled that the Turkish authorities' interference was not compatible with the principle of loyalty and contravened Article 1 of the 1st Protocol.

*European Court of Human Rights, judgments of 23 February 2010, Ağnidis v. Turkey (appeal no 21668/02), 29 September 2009*

*(Fokas v. Turkey) and 27 March 2007 (Apostolidi and others v. Turkey)* www.echr.coe.int/

IA/32246-A
IA/32245-A
IA/32244-A

[RA] [GANI]

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***European Convention on Human Rights - Protection of property rights - Annulment of a title deed for an immovable property belonging to the Greek Orthodox Ecumenical Patriarchate - Registration of the immovable property in the name of a foundation managed by Turkish government authorities - Deprivation of the property with no appropriate compensation - Breach of Article 1 of the 1st Protocol***

In its ruling on the appeal of the Greek Orthodox Ecumenical Patriarchate (Fener Rum Patrikliği) against Turkey, the ECHR found that the annulment of the appellant's title deed to a property by Turkish courts and the registration of this property in the name of a foundation currently managed by the Turkish authorities was a violation of Article 1 of the 1st Protocol, which covers the protection of property and respect for the property of all natural and legal persons.

The appellant, who is the head of the Orthodox Church in Istanbul, became the owner of a plot of land on the island of Büyükada (Istanbul) by virtue of a sale contract concluded in June 1902. The sale was officially approved at the time by a firman (deed of foundation) of the Sultan and inclusion in the imperial register. At the time of purchase, a main building with five floors and an annexe with two floors were already on the land. In 1903, use of the property was granted to an Orthodox minority foundation, the Büyükada Greek Boys' Orphanage Foundation (hereafter referred to as "the Orphanage Foundation"), so it could carry out charitable activities there. Following the change in Turkey's political system in 1923, the legal personality of the Orphanage Foundation was officially recognised in 1935 by the entry into force of Turkish law no. 2762 on foundations. The property and its ownership were listed in the new regime's land register as the appellant had had it included in 1929.

In 1997, the Directorate-General for Foundations (a Turkish public body that reports directly to the Prime Minister) issued an order closing down the Orphanage Foundation and took over its management on the grounds that the Orphanage Foundation no longer did charitable works, which was a requirement under Turkish law. The Directorate-General then went to court to request the annulment of the title deed to the property, which was transferred to the Orphanage Foundation, a foundation run by Istanbul's Orthodox minority. This request was granted. The ruling by which Adalar Regional Court annulled the title deed and transferred it to the Orphanage Foundation was subsequently confirmed by the Turkish Court of Cassation. The Ecumenical Patriarchate then brought the matter before the ECHR.

In the judgment in question, the ECHR began by reiterating the autonomy of the concept of "property" in Article 1 of the 1st Protocol of the Convention and stressing that it was independent of any descriptions contained in national law. The ECHR noted that transfer of the building to an orphanage foundation did not cancel out the appellant's property rights, nor did it negate the fact that the building had been paid for with the appellant's own funds and that the respondent government had not produced any documents confirming the transfer of the disputed property. The ECHR also pointed out that the decision of Regional Court that annulled the title deed referred to the appellant as "the owner", stated that the only thing the appellant had done wrong was to fail to perform preservation work on the building and highlighted that the public authorities had never contested the appellant's ownership of the property, nor had the Orphanage Foundation ever demanded a title deed to the property. On this basis, the ECHR concluded that the annulment of the appellant's title deed constituted interference with the appellant's right to respect of property and, as such, contravened Article 1 of the 1st Protocol of the Convention.

Without ruling out the fact that the disputed annulment could have been performed for reasons that were in the public interest, the ECHR nevertheless concluded that any measure interfering with the right to respect of property had to strike the right balance between acting in the general interests of the community and protecting the fundamental rights of the individual. However, it stressed that in the case

in point, the appellant had been deprived of the property without being given any compensation at all, so much so that being deprived of the property constituted an extraordinarily excessive violation in light of Article 1 of the 1st Protocol of the Convention. The ECHR held that the need for proportionality dictated that the owner should be fairly compensated for the loss of the property, no matter how the owner acquired it. In this case, the ECHR found that there was no sign of the balance mentioned above and that the appellant had had to bear an "excessive and individual burden". However, confirmation that Article 1 of the 1st Protocol of the Convention had been breached was still not enough to settle the dispute completely. The ECHR invited the parties to submit proposals for the "just satisfaction" to which the appellant is entitled under Article 41 of the Convention. This may take the form of restitution of the property or payment of compensation.

*European Court of Human Rights, judgment of 8 July 2008, Fener Rum Patrikliği (Ecumenical Patriarchate) v. Turkey (appeal no. 14340/05), www.echr.coe.int/echr*

IA/32243-A

[RA] [GANI]

## EFTA Court

***European Economic Area - Freedom of establishment - Restrictions - National legislation requiring all members of the management boards and executive management of banks established in the State and all lawyers, patent lawyers, auditors and trustees working in the State to be, by reason of their residence, in a position to fulfil their tasks - Inadmissibility - Justification - No justification***

The EFTA Court was asked to declare inconsistent with Articles 28 and 31 of the EFTA Agreement the Liechtenstein national regulation requiring all members of the executive board and executive management of banks established in the State and all lawyers, patent lawyers, auditors and trustees to be, by reason of their residence, in a position to fulfil their tasks actually and unobjectionably. The EFTA Court ruled that:

"(…) by requiring the members of the management board and of the executive management of banks established in Liechtenstein to be, by reason of their residence, in a position to actually and unobjectionably perform their functions and duties, the Principality of Liechtenstein has failed to fulfil its obligations under Article 31 of the EEA Agreement".

In this respect, it found that:

"(…) it is not a precondition for establishment within the meaning of Article 31 EEA that self-employed persons have their residence in a place wherefrom they are able to fulfil their tasks actually, unobjectionably or on a regular basis. Establishment means that a person pursues a professional activity on a stable and continuous basis (…). Furthermore, it is not a precondition for establishment that business activities are carried out in accordance with relevant rules of professional conduct.

(…) the residence requirements (…) entail indirect discrimination. It cannot be decisive in this respect that there may be more nationals of other EEA States than Liechtenstein nationals who fulfil the residence requirements. The residence requirements are still intrinsically liable to operate to a particular disadvantage for non-Liechtenstein nationals and for banks having or wishing to place non-Liechtenstein nationals in their management." (points 28-29)

"The residence requirements (…) also restrict the right of establishment for banks from other EEA States wishing to establish themselves in Liechtenstein. The requirements mean that the banks cannot freely choose members of the board and the executive management.

It is furthermore clear (…) that the residence requirements for members of the management board and the executive management of banks also restrict the right of free movement of EEA nationals wishing to take up such positions (…)." (points 32-33)

"(…) the objectives (…), such as ensuring the functioning and good reputation of the financial market, are deemed by the Court to constitute legitimate public interest objectives, which, in principle, are capable of justifying restrictive measures such as residence requirements.

In particular, ensuring that individuals engaged in certain professions and positions hold the necessary professional qualifications and live up to the requisite ethical standards is a legitimate objective. The same goes for the endeavour to ensure that the management of banks is able to react quickly in a crisis, and

more generally, that it effectively directs the business (…).” (points 36-37).

“(…) [However] the likelihood of living up to the requisite ethical standards is unrelated to residence in a particular area. Thus, a residence requirement does not constitute a suitable means to ensure ethical standards. Furthermore, (…) requirements relating directly to professional experience and training would be more appropriate, and certainly less of a restriction on the freedom of establishment, as a means of ensuring that those concerned hold the necessary professional qualifications.

(…) the requirements do not ensure that even one member of the management will always be able to reach the bank’s place of business at short notice. Thus, the requirements are unsuited to ensure that banks are able to react quickly to a crisis by having qualified and authorised persons present at short notice. It would be more appropriate, and certainly less of a restriction on free movement, for instance, to require the banks to demonstrate in a credible and verifiable manner that, in the case of a crisis, they have the capacity to muster key personnel at the bank’s place of business within a justifiable period of time.

Finally (…) it is disproportionate to restrict free movement, through the imposition of residence requirements, simply because managers may find it more difficult to fulfil their obligation to effectively direct the business of the bank when residing at a distance. Indeed, irrespective of the personal inconvenience of spending more time travelling or more time away from their own place of residence, it would appear quite possible for the individuals concerned to overcome such difficulties (…).” (points 40-42)

For the reasons outlined above, the EFTA Court also concluded that:

“(…) by requiring lawyers, patent lawyers, auditors and trustees to be, by reason of their residence, in a position to fulfil their tasks actually and on a regular basis, the Principality of Liechtenstein has failed to fulfil its obligations under Article 31 of the EEA Agreement”.

*EFTA Court, judgment of 6 January 2010, E-1/09, EFTA Surveillance Authority v. The Principality of Liechtenstein,*
*www.eftacourt.int*

IA/31692-A

[LSA]

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***European Economic Area - Free movement of persons - Freedom of establishment - Freedom to provide services - Insurance mediation - Directive 2002/92/EC of the European Parliament and of the Council- Concept of a “durable medium” - Criteria for assessment***

The EFTA Court was asked to rule on a question about the interpretation of Article 2(12) of Directive 2002/92/EC of the European Parliament and of the Council on insurance mediation (hereafter referred to as “the Directive”), in relation to the criteria which have to be fulfilled for an Internet site to constitute a “durable medium” under the said Article. With regard to the first criterion, the EFTA Court ruled that:

“In order for an Internet site to qualify as a ‘durable medium’ within the meaning of Article 2(12) of Directive (…), it must enable the customer to store the information listed in Article 12 of the Directive”.

It observed, in this respect, that:

“The issue whether information published on a website freely accessible to the general public may qualify as information "personally addressed" to that customer, is linked to the obligation, also included under Article 12(1) of the Directive, to "provide the customer with" the information required. In relation to the present Directive, the notion of "information addressed personally" to the customer in Article 2(12) refers, in effect, to the information which must be provided to a customer under Article 12”. (point 37)

Then, with regard to the second criterion, the EFTA Court noted that:

“In order to qualify as a ‘durable medium’, an Internet site must enable the customer to store the information required under Article 12 of the Directive in a way which makes it accessible for a period of time adequate to the purposes of the information, that is, for as long as it is relevant for the customer in order to protect his interests

stemming from his relations with the insurance intermediary. This may cover the time during which contractual negotiations were conducted, even if not resulting in the conclusion of an insurance contract, the period during which an insurance contract is in force and, to the extent necessary, the period after such a contract has lapsed".

In this respect, it found that:

"(…) The length of this period will depend upon the content of the information, the contractual relationship and the circumstances of the case (…)". (point 44)

With regard to the third criterion, the EFTA Court ruled that:

"In order to qualify as a 'durable medium', an Internet site must allow for the unchanged reproduction of the information stored, that is, the information must be stored in a way that makes it impossible for the insurance intermediary to change it unilaterally".

In this respect, it observed that:

"(…) An ordinary website serves as a dynamic electronic host or portal for the provision of information which, generally, may freely be changed by the website proprietor. (…) [A] website which exhibits these characteristics, including freedom for the proprietor to change the content, does not meet the requirements laid down in the first subparagraph of Article 2(12) of the Directive with respect to guaranteeing unchanged reproduction. Therefore, it cannot be regarded as durable medium within the meaning of that Article". (point 63)

"The (…) sophisticated website [those that act as a portal for the provision of information on another instrument which can qualify as a durable medium] in essence allows the user to access information, for example in the form of an e-mail with an attachment, which he can copy and store on his own computer. For this method to constitute the communication to the customer of information on a durable medium, as required under Article 13(1)(a) of the Directive, the website must contain features which will lead the customer almost certainly to either secure the information on paper or to store it on another durable medium.

The second type of sophisticated website [those that may actually constitute durable media themselves] contains a secure storage area for individual users which is accessed by a user code and password. Provided that this method of storing information excludes any possibility of the insurance intermediary changing the information, this kind of storage can be compared to the user's own hard drive. The only difference is that the customer can access the information remotely via the Internet. The Court finds that this type of sophisticated website fulfils the requirement of guaranteeing unchanged reproduction necessary to qualify as a durable medium within the meaning of Article 2(12) of the Directive.

It cannot be ruled out that other technological solutions may similarly enable a website to comply with requirements laid down in Article 2(12) of the Directive, including the condition of securing unchanged reproduction of information. This is an assessment which must be made based on the characteristics of the technology in question. It is not for the Court (…) to specify which particular technological solutions may be acceptable in that regard (…)." (points 65-67)

With regard to the fourth criterion, the EFTA Court ruled that:

"In order for an Internet site to qualify as a 'durable medium', it is irrelevant whether the customer has expressly consented to the provision of information through the Internet".

*EFTA Court, judgment of 27 January 2010, E-4/09, EFTA Inconsult Anstalt v. the Financial Market Authority (Finanzmarktaufsicht), www.eftacourt.int*

IA/31693-A

[LSA]

## II. National courts

### 1. Member States

### Germany

***Retention of data generated or processed in connection with publicly accessible electronic communications services - National provisions transposing Directive 2006/24/EC of the European Parliament and of the Council - Power of the national court to***

***examine these provisions from the point of view of fundamental rights - Violation of secrecy of telecommunications - Requirements set by the principle of proportionality which must be respected by any new rules***

The Bundesverfassungsgericht ruled that certain provisions of the telecommunications law and the Code of Criminal Procedure, that is, those provisions that transpose Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with publicly accessible telecommunications services, were not consistent with the Basic Law and were therefore null and void.

Nonetheless, the Bundesverfassungsgericht stressed that retaining data for up to six months with no apparent reason was not unconstitutional as such. Rather, it is the actual form that this data retention takes in German law that infringes on the fundamental right to secrecy of telecommunications, which is enshrined in Article 10 of the Basic Law.

Since the provisions in question transposed Directive 2006/24/EC of the European Parliament and of the Council, the first matter for resolution was whether the Bundesverfassungsgericht has the power to check their constitutionality in view of the Solange II case law (order of 22 October 1986, 2 BvR 197/83, according to which it would no longer check the compatibility of European legislation with German fundamental rights "as long as" the protection of fundamental rights offered by European law is, on the whole, equivalent to that offered by the German Basic Law.

With regard to this issue, the Bundesverfassungsgericht decided that it did not have to refer preliminary questions to the European Court of Justice for it to rule on the validity of the directive. The Bundesverfassungsgericht held that the directive's validity would not affect the decision in the case in point, particularly given the room for manoeuvre provided by the directive. It emphasised that national fundamental rights apply to the extent that provisions for transposition do not contain the same binding requirements as a directive, but result from the legislative bodies of the Member States using their own discretion.

As regards the actual examination of the provisions on data retention, the Bundesverfassungsgericht gave a very detailed outline of the requirements that must be met for the new provisions to be compatible with the Basic Law. Since secrecy of telecommunications would be severely restricted if data were stored for six months, the new provisions must include mechanisms to ensure that they abide by the principle of proportionality. The Bundesverfassungsgericht held that if creating personality profiles of electronic communications users were to be allowed, preventive legislative measures would have to be established to ensure that data retention remains the exception rather than the rule. For there to be a suitable level of transparency, German lawmakers will have to ensure that telecommunications data is used openly and honestly in criminal proceedings, and that use of such data is only secret under exceptional circumstances. The main reason for this requirement is to dispel "the feeling of an omnipresent threat" (*"Gefühl der diffusen Bedrohlichkeit"*) experienced by citizens when data are retained. Moreover, effective punishments must be applied for violations of the secrecy of telecommunications.

The Bundesverfassungsgericht raised three points in particular. First, it stressed that when it comes to the security of stored data, the law cannot merely refer to general standards. Instead, it must insist upon compliance with a binding, high-quality standard.

Second, with regard to use of data for criminal proceedings, the Bundesverfassungsgericht found that national law should only allow access to telecommunications data on a case-by-case basis and where serious crime is involved, such as where there is a real threat to a person's physical integrity or freedom. Furthermore, the decision ordering the use or transfer of such data may only be issued by a court.

Third, with regard to indirect use of data, the Bundesverfassungsgericht held that the authorities' right to obtain information from service providers so that they can identify the users of certain IP addresses must not be extended to use for prosecution for offences.

*Bundesverfassungsgericht, judgment of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, www.bundesverfassungsgericht.de*

IA/ 31025-C

[AGT] [BBER]

**Belgium**

***Social security for migrant workers - Health insurance - Work done in another Member State - Article 22 of Council Regulation (EEC) no. 1408/71 - Scope of application - Freedom to provide services - Restrictions - National legislation on the reimbursement of medical expenses incurred in another Member State - Prior authorisation required from the social security body in the State of affiliation - Inadmissibility***

In a judgment pronounced on 8 December 2009, the Arbeidshof Antwerpen (Antwerp Labour Court) examined Belgian legislation on social security for migrant workers in light of the case law of the European Court of Justice, and more specifically, the Decker and Kohll judgments (judgments of 28 April 1998, Decker, C-120/95, Rec. p. I-1831 and Kohll, C-158/96, Rec. p. I-1931).

The dispute concerned a French patient who was resident in Belgium but had gone to France for medical treatment by the successor of the doctor who had always treated her, despite not having been given prior authorisation for the treatment by her health insurance fund. Under Article 294(1)(2) of the Royal Decree of 3 July 1996, authorisation for treatment is required for medical costs to be reimbursed. When the patient returned to Belgium, her subsequent application for reimbursement was rejected and she brought an action before the Arbeidshof Antwerpen, which ruled in her favour. The patient's health insurance fund then lodged an appeal against the judgment.

The Arbeidshof began its judgment by going over the legal framework for the reimbursement of medical treatments received abroad and explained that pursuant to Article 22 of Council Regulation (EEC) no. 1408/71, the costs of medical treatment obtained abroad are only reimbursed if the patient's health insurance fund has given prior authorisation. If a patient has authorisation, costs are reimbursed according to the legislation of the Member State where medical care was received.

The Arbeidshof then explained that the ECJ had created a second procedure for the reimbursement of costs related to medical treatment abroad with its judgments in the Decker and Kohll cases, handed down on 28 April 1998. This second procedure runs in parallel to the procedure outlined in Council Regulation (EEC) no. 1408/71 and allows patients to receive treatment in another Member State and have their costs reimbursed without prior authorisation. In such cases, costs are reimbursed according to the legislation of the Member State in which the patient's health insurance fund is based. Nevertheless, implementation of this second procedure must comply with the provisions of Community law, and more specifically with the principles of free movement of goods and freedom to provide services.

Applying these principles to the case in point, the Arbeidshof found that the patient had based her action on the Decker and Kohll judgments, thus ruling out the application of Article 22 of Council Regulation (EEC) no. 1408/71 and making it necessary to check the conformity of Article 294(1)(2) of the Royal Decree of 3 July 1996 with Community law. The court therefore began by checking the applicability of Article 294, seeing whether "[the patient in question's] return to health [required] hospital care, the best conditions for which [were] present abroad". The court concluded that this was indeed the case, given that a patient's need for medical treatment in another Member State should be assessed based not only on the patient's medical history (referring to the ECJ's judgment of 12 July 2001 in the Smits and Peerbooms cases, C-157/99, Rec. p. I-5773) or the degree of pain or nature of the patient's disability (referring to the ECJ's judgment of 13 May 2003 in the Müller-Fauré and Van Riet cases, C-385/99, Rec. p. I-4509), but also on the relationship of trust between the patient and a specific doctor, which was a factor in the case in point. The Arbeidshof found that requirements such as prior authorisation for treatment, which is needed for reimbursement of medical costs under Article 294, constituted

an unjustifiable violation of the principles of free movement of goods and freedom to provide services. For this reason, the fact that the patient did not have prior authorisation for treatment from her health insurance fund did not mean that the health insurance fund would not be obliged to reimburse the medical costs the patient incurred in France in line with the applicable Belgian standards.

*Arbeidshof Antwerpen, 8 December 2009, AR 2080348, www.juridat.be*

IA/32528-A

[CHEE]

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***Freedom to provide services - Postal services in the European Union - Directive 97/67/EC of the European Parliament and of the Council, as amended by Directives 2002/39/EC and 2008/6/EC of the European Parliament and of the Council - Non-cumulative definition of postal services - Admissibility - Conditions governing the provision of non-reserved services - Introduction of general authorisations - Admissibility - Universal service - Determining which services can be defined as universal services - Burden of proof***

In a judgment pronounced on 3 December 2009, the Cour d'Appel de Bruxelles (Brussels Court of Appeal) had to rule on the interpretation of the directive on the internal market for postal services (Directive 97/67/EC of the European Parliament and of the Council, as amended by Directives 2002/39/EC and 2008/6/EC of the European Parliament and of the Council).

The dispute was between United Parcel Service Belgium NV (UPS) and the Belgian Institute for Post and Telecommunications (IBPT/BIPT). IBPT/BIPT had formally notified UPS to submit a request for authorisation of its activities or to at least send it a declaration concerning its activities by registered letter. Both measures would cost UPS money. UPS refused to accede to IBPT/BIPT's request and gave the Cour d'Appel three arguments supporting its position, all of which were linked to the admissibility of the relevant Belgian provisions.

UPS's first argument was that the Belgian definition of postal services was not consistent with Directive 97/67/EC of the European Parliament and of the Council (as amended by Directives 2002/39/EC and 2008/6/EC of the European Parliament and of the Council) since unlike Article 2(1) of the Directive, it connected the different elements of postal services with the word "or" and not the word "and", giving it a non-cumulative character that went beyond the Directive's scope of application. However, the Cour d'Appel found that the directive did not in any way imply that the different elements making up postal services were cumulative (as claimed by UPS) and therefore decided that the word "and" should be interpreted according to its usual meaning, that is, as an ordinary conjunction without cumulative meaning. It thus dismissed UPS's first argument and found that there would be no point in referring a preliminary question on the matter to the ECJ.

The Cour d'Appel did not uphold UPS's second argument either, finding that Belgium's lawmakers were entitled to require operators offering non-universal, non-reserved services to make a declaration to IBPT/BIPT. In fact, the court held that Article 9(1) of Directive 97/67/EC of the European Parliament and of the Council allowed Member States to introduce general authorisations for these services, to the extent necessary for guaranteeing compliance with essential requirements. Although Belgium's lawmakers have not yet outlined the exact content of these essential requirements, making it seem pointless to oblige service providers to make declarations with a view to checking compliance, the Cour d'Appel ruled that such declarations could already prove necessary to the extent that they enable IBPT/BIPT to improve its knowledge of the market and the operators present on it. For this reason, the Cour d'Appel decided that the declaration required by Belgian law was perfectly admissible and found that there would be no point in referring a preliminary question on the matter to the ECJ.

UPS's third argument concerned the question as to whether some services provided by UPS should be categorised as universal services, for which authorisation must be obtained, or express services. When reviewing this question, the Cour d'Appel began by explaining – making reference to the ECJ's judgment of 11 March 2004 (Asempre, C-204/02, Rec. p. I-4261) – that the margin of discretion accorded

to the Member States for defining the scope of universal services (due to the lack of harmonisation in this respect) could not justify the existence of an assumption that all postal services should be considered universal services unless the operator can prove otherwise. The court held that it was in fact up to postal services operators to examine their services and decide whether they were universal services (and as such, in need of authorisation) or not. Should IBPT/BIPT disagree with the operators' choice, it must then prove that this choice was wrong. Given that IBPT/BIPT did not manage to prove that the disputed services were universal services in the case in point, the services provided by UPS had to be exempted from the statutory requirement for authorisation and IBPT/BIPT's decision on the matter was overturned.

*Cour d'Appel de Bruxelles, judgment of 3 December 2009, 2007/AR/2742, www.juridat.be*

IA/32529-A

[CHEE]

**Denmark**

***Preliminary questions - Referral to the European Court of Justice - Appeal against a decision ordering reference for a preliminary ruling - Consequences of the Cartesio judgment***

Having been asked to rule on an appeal against a decision to refer (see pending case C-398/09, Lady & Kid and others), the Højesteret (Supreme Court) ruled on the effects of the European Court of Justice's judgment of 16 December 2008 on the right to appeal against a decision ordering reference for a preliminary ruling:

"It emerges from points 93-98 of the Cartesio judgment that Article 267(2) [TFEU] (Article 234(2) [EC]) does not preclude the fact that a decision ordering reference to the European Court of Justice for a preliminary ruling, when handed down by a court whose decisions can be appealed, is still subject to the usual channels of appeal provided for in national legislation. However, the appeal court cannot reverse the decision ordering reference for a preliminary ruling in such a way that the lower court will have to amend, omit or revoke the decision. It should be assumed that these principles also apply to cases where the decision to refer is covered by Article 267(3) [TFEU] (Article 234(3) [EC]).

According to the rules of the Danish code of procedure, a decision ordering reference for a preliminary ruling can be appealed just as other decisions can, and an appeal court decision that amends or revokes the decision to refer is to be considered binding by the lower court, so that it must amend, omit or revoke the decision to refer. This means that the lower court can only make a new decision if significant new information relating to the matter for reference emerges at a later date. The fact that a decision on reference for a preliminary ruling is a procedural decision – and can therefore be revoked at will by the court that issued it (see Article 222 of the code of procedure) – does not mean that a lower court is not bound by the appeal court's decision.

We believe that it would not be compatible with the Danish judicial and procedural system to have a system according to which appeal against a decision ordering reference for a preliminary ruling cannot lead to the appeal court revoking the decision with binding effect for the lower court. Furthermore, we think that there is no real need for such a system, given that the appeal court must exercise restraint when examining the lower court's assessment of the case anyway.

We therefore find that given the Danish judicial and procedural system, the consequence of the European Court of Justice's judgment in the Cartesio case is that the appeal in question cannot be examined thoroughly, so we vote to dismiss the appeal as inadmissible."

The Højesteret therefore overturned the rule in Danish law that allows appeal against a decision ordering reference for a preliminary ruling. This was done with a view to avoiding the creation of a system where appeal against such a decision could not lead to the appeal court revoking the decision with binding effect for the lower court, which the Højesteret believed would be the effect of the Cartesio judgment if the right to appeal were retained.

However, with regard to decisions refusing to refer cases for a preliminary ruling, the Højesteret found that:

"finally, a decision refusing to refer preliminary

questions to the European Court of Justice [was] subject to appeal as per the usual rules".
*Højesteret, order of 11 February 2010, (Sag 344/2009),*
*www.domstol.dk/hojesteret/nyheder*

QP/06503–I1

[JHS]

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***Trademarks - Council Directive 89/104/EEC - Use of a trademark in a way that is likely to be forbidden by the trademark's proprietor - Use of trademark or keywords mentioning the trademark to create promotional links - Google***

By its order of 13 October 2009, the Højesteret (Supreme Court) rejected a request for interim measures brought by the Danish importer of Škoda cars in the aim of preventing a former dealership from using the word "Škoda" (among others) and keywords containing this word to generate publicity for the former dealership or create promotional links to its website on Internet search engines such as Google.

The Højesteret found that the decision to grant an appeal depended on the interpretation of the provisions in national law transposing Articles 5 and 6(1c) of Council Directive 89/104/EEC to approximate the laws of the Member States relating to trademarks.

The court refused to suspend the case to await the European Court of Justice's judgment in the Google cases (judgment of 23 March 2010, cases C-236/08 to C-238/08), which also relate to the use of trademarks to create promotional links, and/or to refer preliminary questions on the interpretation of the relevant articles of Council Directive 89/104/EEC to the European Court of Justice. It argued that suspending the case in this way would not be compatible with the temporary nature of the injunction.

The Højesteret then ruled that there was so much uncertainty as to the interpretation of the relevant articles of Council Directive 89/104/EEC that it could not be considered probable that the former dealership had infringed upon the importer's right to the trademark by registering them as search terms. This means that one of the legal conditions for issuing an interim injunction could not be viewed as fulfilled, the condition being that it had been proven or was probable that the actions for which the injunction is requested infringe upon the requester's rights.

*Højesteret, order of 13 October 2009,*
*Ufr. 2010.228H, 173/2008,*
*www.domstol.dk/hojesteret/nyheder*

IA/31690-A

[JHS]

## France

***International private law - Injunction from a court in a non-EU country preventing a party from commencing or continuing a proceeding before a court in a Member State - Anti-suit injunction - Request for an enforcement order - Admissibility - Consistency with international public policy***

In a case relating to a request for an enforcement order so that the French courts would enforce an American judgment imposing an anti-suit injunction, the Cour de Cassation ruled, in its judgment of 14 October 2009, that "an anti-suit injunction with the sole aim of prohibiting the violation of a pre-existing contractual clause (outside the scope of application of conventions or Community law) was not contrary to international public policy", thus creating, in the case in point, a contractual clause conferring jurisdiction.

It should be reiterated at this point that by imposing an anti-suit injunction, a court prevents a party from commencing or continuing a legal action in a foreign court. Since these injunctions frequently give rise to significant judicial and doctrine-related debates, reactions to the judgment were mixed (see, for example, C. Nourissat, "By Jove!", Procédures no. 12, Dec. 2009, rep. 11; C. Legros, JCP, 30 Nov. 2009, no. 49, p. 18; S. Bollée, Rec. Dalloz 2010, p 177). It is true that this judgment differs significantly from a previous judgment by the Cour de Cassation, pronounced on 30 June 2004 (no. 01-03248 and no. 01-15452), which stated that such injunctions infringed upon the jurisdictional powers of the State to which the request is made. It is also true that although the Cour de Cassation insisted on having a clause conferring jurisdiction that was freely accepted by the parties in question and demanded that there be no fraud, and despite the reservation in

favour of Community law, the solution reached by the judgment of 14 October 2009 goes against the solutions provided by the European Court of Justice in its judgments on the Allianz case (10 February 2009, C-185/07, Rec. p. I-663) and the Turner case (27 April 2004, C-159/02, Rec. p. I-3565). In the Allianz judgment, the European Court of Justice ruled that an anti-suit injunction that aims to prevent a person from commencing or continuing proceedings before the courts of another Member State would not be compatible with Council Regulation (EC) no. 44/2001 since such proceedings would be contrary to an arbitration agreement. According to the Turner judgment, the Brussels Convention precludes the granting of an anti-suit injunction, even where the party being targeted by the injunction is acting in bad faith with a view to frustrating the existing proceedings.

*Cour de Cassation, 1st Civil Chamber, 14 October 2009, no. 08-16.369 and no. 08.16-549, www.legifrance.gouv.fr*

IA/32078-A

[VGP]

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***State aid – Provisions of the Treaty – Scope of application - Taxes partly earmarked for funding an aid measure - Included - Conditions – Binding hypothecation between the tax and the aid***

The Conseil d'État put an end to the debate around the levy on meat purchases' compliance with Community requirements on state aid with the two judgments it handed down on 27 July 2009. The court decided that to the extent that there was no legally binding hypothecation between the levy and the public carcass-disposal service (*de jure* disconnection) and no relationship between the revenue from the tax and the amount of public funding allocated to the service (*de facto* disconnection), the levy on meat purchases could not be viewed as a tax measure funding an aid system and forming an integral part thereof, so the Commission did not have to be notified of the tax. When making this decision, based on the principle of budgetary universality (i.e. that no revenues in the State's general budget can be earmarked for a specific purpose), the administrative court decided to perform a thorough check to determine whether the tax and the aid system really were unconnected, the first time a check of this kind has been performed. However, the court did not give many details of the check's implementation, simply stating that there was no relationship between the revenue from the tax and the amount of public funding allocated to the relevant service. These two cases can be compared to the two judgments by the European Court of Justice (the judgment of 13 January 2005, Streewest Westelijk Noord-Brabant, C-174/02, Rec. p. I-85 and the judgment of 13 January 2005, F. J. Pape, C-175/02, Rec. p. I-127).

*Conseil d'État, 27 July 2009, Sté Boucherie du marché, no. 312098 and Société Montaudis, no. 313502, www.legifrance.gouv.fr*

IA/32074-A
IA/32081-A

[NRY]

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***Competition – Illegal cartel – Market for trade in metal products – Penalising the cartel – Method for calculating the financial penalty***

The judgment pronounced by the Cour d'Appel de Paris (Paris Court of Appeal) on 19 January 2010 on the case on trade in steel products significantly altered decision no. 08-D-32 by the French competition authority, since it reduced the fines imposed by the competition authority from €575 million to €75 million[s2]. The cartel was active in the coal and steel sector, which was covered by the ECSC Treaty until 23 July 2002. That being the case, could the competition authority apply Article 81(1) of the EC Treaty to various offences, some of which were committed before 23 July 2002, that is, at a time when the Commission was the only body competent to deal with such practices? The Cour d'Appel responded that it could, thus confirming the competition authority's position. It observed that the "wording, purposes and general spirit" of the ECSC and EC treaties aimed to achieve fair competition and that the specific, temporary provision, which had since been repealed, gave way to the general standard (in this case, the EC Treaty), which gives national competition authorities and courts jurisdiction in such matters.

The Cour d'Appel drastically reduced the fines imposed after evaluating several factors:

a) Assessment of how serious the practices were: the Cour d'Appel held that the seriousness of the practices in question should be evaluated as a whole, based on "the cartel's overall intention to commit an offence and from the point of view of legality and the economic categories protected by the law" rather than concentrating on the individual members of the cartel.

The Cour d'Appel agreed with the competition authority's analysis regarding the nature of the practices, but criticised it for not having taken account of an extenuating factor, namely the fact that some companies were acting independently of the others, since, in the court's opinion, it shows that the cartel's anti-competitive system was not particularly robust. The Cour d'Appel also found that the competition authority had failed to take account of the economic crisis "finally, and most importantly, in view of the fact that the competition authority paid too little attention to the context of the economic crisis, its general effects and its effects in the metalworking industry when it held that the turnovers serving as a basis for calculating the fines automatically took account of the way the crisis may be affecting the companies in question and when it held that the moratoria imposed by the French Treasury would allow the companies to pay the fines".

b) The significance of the damage to the economy: the Cour d'Appel criticised the competition authority for not having given an appropriate response to observations highlighting that the sector for trade in steel products is characterised by the fact that branches of a company have a certain degree of autonomy in decision-making due to the local nature of their activities, price volatility, a nullifying lack of clarity and the unknown factors linked to local practices.

c) The individualisation of practices: the Cour d'Appel found that the competition authority's decision sufficiently took account of how the cartel's characteristics encouraged individualisation. These characteristics included the low market share held by smaller operators; the purely private-law status of the companies being prosecuted; the adoption of a 'free agent' attitude, which saw some companies become more or less resistant to pressure, or the adoption of a 'follower' attitude, where some companies' involvement was less intense and covered a shorter period; the proportion of the companies' overall turnover accounted for by revenue linked to cartel activities and finally, the short time that the companies joining the cartel after its inception were actually involved in anti-competitive practices. With regard to the actual procedural and financial situation after the cartel, the Cour d'Appel then added that the competition authority should have borne in mind that three of the appellants were part of the Arcelor group and taken account of the financial situation (i.e. the effects of the financial crisis on each company or the poor state of the company's finances) and the companies' poor ability to pay.

Based on this, and with regard to the amount of the fines imposed, the Cour d'Appel stated that although Article L.464-2-1 of the commercial code refers to a group's turnover, "the competition authority can still take account of the turnover for each individual company being prosecuted, even if a company's accounts are consolidated within a group".

The Cour d'Appel then outlined the percentage of its turnover that each company should be fined: before the entry into force of ordinance no. 2001-420 of 15 May 2001, a company could be fined up to 5% of the total turnover (before tax) realised in France over the last full financial year, and under the new law, a fine can be up to 10% of the highest total global turnover (before tax) realised in any of the full financial years before the year in which the company began implementing anti-competitive practices.

Based on the principle of non-retroactivity of laws, the Cour d'Appel held that the new, harsher law could only be applied to offences committed after its entry into force, unless the competition authority was dealing with complex and continuous anti-competitive behaviour. Given the existence of such behaviour in the case in point, the new law could be applied to practices that began under the old law and which continued beyond the adoption of the new law.

The court concluded that the fines should not exceed "a median share of the highest global turnover (before tax) realised over the period in which the company under prosecution implemented anti-competitive practices". In practice, this means taking into account a median share, limited to 10%, of the highest global turnover (before tax) realised by the company being prosecuted, if the company did not have support from its group when developing its anti-competitive behaviour. The maximum amount of the fine is therefore the point of departure for calculating this median share.

The Minister for the Economy did not lodge a cassation complaint against this judgment, but did announce the creation of an ad hoc committee tasked with making the penalties "deterrent, commensurate with the amount of damage caused to the economy, appropriate given the position of the company at fault and foreseeable".

The Cour d'Appel's judgment has launched a major competition policy debate around the court's role in the matter. The judgment is also problematic in that it has led to divergent policies on penalties within the European Competition Network.

*Cour d'Appel de Paris, 19 January 2010, no. 2009/00334,*
*www.autoritedelaconcurrence.fr*

IA/32079-A

[ELBT]

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***Agriculture – Approximation of laws – Placing of plant protection products on the market – Council Directive 91/414/EEC – Incorrect transposition and application – Lack of a specific procedure for parallel imports – State responsibility – Company that had not requested authorisation for parallel imports – Irrelevant circumstance***

The fact that the French authorities did not set up a specific procedure for parallel imports constitutes, in itself, neglect of the responsibilities bestowed on them by virtue of Article 28 of the Treaty establishing the European Community.

The damage caused to the operator who was deterred or prevented from carrying out parallel imports due to the lack of a specific procedure governing the process is directly linked to the State's failure and incurs the State's responsibility, and would have done so even if the appellant company had not submitted an application for authorisation.

It was the responsibility of the Member States to transpose Council Directive 91/414/EEC concerning the placing of plant protection products on the market in such a way as to create a procedure for authorising the placing on the market of plant protection products imported from other Member States. This requirement was met in France by the publication of decree no. 94-359 of 5 May 1994 on checking plant protection products. However, Council Directive 91/414/EEC's provisions on issuing authorisation for placement on the market do not apply to imports of 'parallel' plant protection products, that is, imports of products authorised in one Member State (the country of origin) that have the same active ingredients, formulae and effects as products that have already been authorised in another Member State (the destination country), as ruled by the ECJ in its judgments on the British Agrochemicals Association Ltd (11 March 1999, C-100/96, Rec. p. I-1499) and Escalier and Bonnarel (8 November 2007, C-260/06 and C-261/06, Rec. p. 9717) cases. The Member States were responsible for creating a specific procedure for these imports. This procedure had to be separate from the procedure for placing imported products on the market and have the sole purpose of checking whether the plant protection products authorised in the country of origin and the destination country had the same origin, used the same active ingredients, were prepared according to the same formulae and had the same effects. No such system was established by French legislation. The State's failure in this matter incurs its responsibility with regard to the economic operators in the sector who, as the ECJ ruled in its judgment on Danske Slagterier v. Germany on 24 March 2009 (C-445/06, Rec. p. I-2119), were given certain rights by Article 28 of the Treaty establishing the European Community and can assert these rights directly before the national courts. The court was asked to make a ruling by an economic operator who wished compensation for the damage resulting from the State's

failure and it falls to the court to decide whether the investigation shows that lack of a specific procedure deterred or discouraged the operator from carrying out parallel imports, without the company in question having submitted applications for authorisation that would prove the existence of a direct link between the failure and the damage, the extent of which the company must yet prove.

*Conseil d'État, judgment of 24 July 2009, no. 296140, Minister for Agriculture v. Société Bruyagri, www.legifrance.gouv.fr*

IA/32075-A

[VMD]

## Greece

***Trademark law – National symbol - Concept - Distinction between a State symbol and a historical figure (Napoleon) – Toilet paper brand using the name Napoleon not violating public policy***

In a judgment pronounced on 30 March 2009, the Symvoulio tis Epikrateias (Council of State) made a decision relating to trademark law, and more specifically, the admissibility of registering a trademark using the name Napoleon for a brand of toilet paper. With a view to ruling on the admissibility of registration, the court drew a distinction between the concept of "historical figures" and that of "symbols of State", of which registration as a trademark is banned by the Paris Convention for the Protection of Industrial Property of 1883 to 1967 (Article 6-3), Article 3(1)(h) of Council Directive 1989/104/EEC to approximate the laws of the Member States relating to trademarks and, resulting from Council Directive 1989/104/EEC, Article 3(2a) of Greek law no. 2239/1994, which transposes the directive.

In the case in point, the trademark that the appellant wished to register consisted of a picture of a man wearing Napoleon's uniform and with one arm tucked inside his jacket, a position associated with Napoleon. The man is holding a roll of toilet paper in his other hand. Furthermore, the word 'Napoleon' is clearly visible underneath the picture.

The trademark committee initially rejected the application for registration on the grounds that the trademark defamed a national symbol. Indeed, the legal texts mentioned above state that the competent authorities must refuse or invalidate the registration, in particular, and prohibit by appropriate measures the use, either as trademarks or as elements of trademarks, of the armorial bearings, flags and other State emblems of the countries of the Union (for the protection of industrial property established by the Paris Convention, mentioned above) and official signs and hallmarks indicating control.

Moreover, this initial decision was confirmed by the Athens Administrative Court of Appeal on the grounds that the figure depicted in the trademark was a State symbol linked to the creation of the Republic in France, so registering the trademark would be unacceptable within the meaning of the aforementioned provisions.

However, the Symvoulio tis Epikrateias held that the concept of a State symbol only covered signs concerned with national identity or sovereignty and did not include historical figures. Hence, regardless of the proposed trademark's aesthetics, it did not violate public policy or the accepted principles of morality and so could not be deemed inadmissible for registration. Based on this argument, the Symvoulio tis Epikrateias set aside the lower court's judgment as there was insufficient legal substantiation and the case was referred back to the original court for its merits to be ruled on again.

*Symvoulio tis Epikrateias, judgment no. 1104/2009 of 30 March 2009, NOMOS database, www.lawdb.intrasoft.com*

IA/32526-A

[RA] [GANI]

## Hungary

***Registered partnership – Review of constitutionality – Fundamental rights – Right to human dignity – Registered partnerships declared consistent with the constitution***

The Alkotmánybíróság (Constitutional Court) has had to focus on the legislation establishing registered partnerships on two occasions since 2008.

On the first occasion, the Alkotmánybíróság's judgment no. 154 of 2008, which was handed down on 17 December 2008, repealed law no. CLXXXIV of 2007 on registered partnerships before it had entered into force. This was because the court held that by creating a form of registered partnership for opposite-sex and same-sex couples, the law would result in a

system that duplicated and undermined the institution of marriage. It also highlighted that the law would violate Article 15 of the constitution, which outlines the State's duty to ensure that the legal system of marriage is given preference over all other forms of partnership.

Subsequently, in 2009, Hungary's lawmakers adopted a new law on registered partnerships (law no. XXIX of 2009, which entered into force on 1 July 2009). The content of this law differed significantly from that of the old law, in that only same-sex couples would be allowed to enter into registered partnerships.

Having received nine requests for a review of constitutionality, the Alkotmánybíróság examined the law on registered partnerships for a second time. In its judgment of 23 March 2010, it decided in a majority ruling that law no. XXIX of 2009 did not breach the constitution since registered partnerships, which are only open to same-sex couples, do not contend with the institution of marriage, which is limited to opposite-sex couples.

The Alkotmánybíróság also confirmed that acknowledging the possibility of concluding a registered partnership between two people of the same sex is justified by the right to human dignity, which is enshrined in Article 54(1) of the constitution.

In addition, the Alkotmánybíróság found that the new law on registered partnerships was consistent with the constitution and no longer undermined the institution of marriage because the legislation had created significant, fundamental differences (relating to the possibility of adoption, the right to take the other partner's name or the human reproduction process, for instance) between the institution of marriage and the institution of registered partnerships.

*Alkotmánybíróság, 25 March 2010, no. 32/2010, published in Magyar Közlöny 2010/43,*
*www.magyarkozlony.hu/nkonline/MKPDF/hiteles/mk10.043.pdf*

IA/32602-A

[KVS]

## Ireland

In December 2009, the Supreme Court handed down two judgments on medically assisted procreation. The Supreme Court noted that the lack of legislation on the matter in Irish law was an urgent and serious problem.

***European Convention on Human Rights – Right to the respect of private and family life – Concept of a family – Constitutional protection – Lesbian couple with a child - Excluded – Rights of a sperm donor***

In a judgment handed down on 10 December 2009, the Supreme Court ruled on sperm donors' rights, in the context of an appeal against a High Court judgment. The appellant was a homosexual man who had donated sperm to a lesbian couple so that they could perform artificial insemination. The parties had signed an agreement that was intended to control the relationship between the parties and the child. The agreement stipulated that the couple would have custody of the child and that the sperm donor's role would be similar to that of an uncle. However, after the birth of the child, the appellant changed his mind and attempted to assert his rights as the child's biological father. More specifically, he demanded visitation rights and requested that he be appointed the child's guardian.

Firstly, the Supreme Court found that the agreement between the parties was not enforceable given the nature of the issues raised in the case in point, which must be resolved in the best interests of the child. The Supreme Court observed that the lesbian couple and the child did not form a family within the meaning of the Irish constitution. According to established case law in the matter, the family referred to in the constitution is based on marriage between a woman and a man. Consequently, the Supreme Court found that the High Court had been wrong to talk about a "*de facto* family" in the case in point. Moreover, the Supreme Court believed that Article 8 of the European Convention on Human Rights (hereafter referred to as "the Convention"), which related to respect of private and family life, did not provide a solution either. The High Court had suggested that the lesbian couple and the child formed a *de facto* family with rights by virtue of Article 8 of the Convention. The Supreme Court found that the High Court was not competent to apply Article 8 directly in the case in point and pointed out that in any case, the ECHR's case law had not yet acknowledged that same-sex couples fell within the scope of "family life" within the meaning of Article 8.

In the grounds for its judgment, the Supreme Court expressed the opinion that the High Court had failed to respect the fact that the appellant was the child's biological father (even if this was not a decisive factor) and had not taken into account that the child would benefit from contact with his father. In the case in point, it was also relevant that the appellant was not an anonymous sperm donor and that provisions had been made for him to have contact with the child. In view of this, the Supreme Court unanimously decided to grant the appellant visitation rights but not guardianship. With regard to guardianship, the Supreme Court observed that due to his status as the child's biological father, the appellant was entitled to ask to be appointed the child's guardian by virtue of the Guardianship of Infants Act 1964, but that the court would have to decide what was in the child's best interest. The Supreme Court's judgment was primarily based on the wellbeing of the child.

*Supreme Court, judgment of 10 December 2009, JMcD v PL & BM [2009] IESC 81, www.courts.ie*

IA/31695-A

[SEN]

***Medically assisted procreation – A foetus's right to life – Constitutional protection – Concept of a foetus – Embryo created by in vitro fertilisation - Excluded***

In a judgment handed down on 15 December 2009, the Supreme Court unanimously ruled that an embryo created by in vitro fertilisation did not have a legal status equivalent to that of a foetus (referred to in the judgment as "the unborn") within the meaning of the Irish constitution. However, the court also ruled that although embryos are not protected by the constitution, this does not mean that they should not be treated with respect as entities that have the potential to become human beings.

Article 40.3.3 of the Irish constitution protects the right to life of the unborn: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right". This provision is the legal basis for abortion being illegal in Ireland.

The case in point concerned a woman who wanted to be implanted with frozen embryos against the wishes of her husband, from whom she was separated. The key issue in the case was that of knowing whether constitutional protection of the unborn also extended to fertilised embryos that had been frozen and stored at a fertility clinic, that is, whether fertilised embryos can be human lives within the meaning of the aforementioned provision. The Supreme Court ruled that constitutional protection only applied after embryos had been implanted.

The Supreme Court did not look into the exact legal status of the unborn, finding that this was the role of the country's lawmakers. However, the Supreme Court did stress that there was an urgent need for legislation in this domain given the fact that fertilised embryos have no legal status in Irish law.

*Supreme Court, judgment of 15 December 2009, Roche v Roche & Ors [2009] IESC 82, www.courts.ie*

IA/ 31696-A

[SEN]

## Italy

***Extraordinary administrative appeal to the President of the Republic and legal recourse before the administrative court – Reversal of the case law of the Consiglio di Stato – Amending rules of procedure due to the direct effect of judgments by the European Court of Justice***

The direct effect of judgments by the European Court of Justice prompted the Consiglio di Stato to decide to amend its case law regarding the rules of procedure that apply to extraordinary appeals to the head of State and legal recourse before the administrative court on 19 March 2010.

First of all, we should explain that the rules of procedure in question stipulated that a person wishing to contest a government measure could choose to present an extraordinary appeal to the head of State (the President of the Republic) or appeal to the administrative court.

The rule of procedure that applied in such cases (known as the *principe de l'alternatività*) also stated when there is concurrence of means, he who has chosen one cannot have recourse to the other. More

specifically, this implies that appellants who have chosen to appeal to the President of the Republic may not then transfer their appeal proceedings to the administrative court. However, respondents were allowed to do so on the condition that they asked to transfer the proceedings before the President of the Republic reached a decision.

The case in point related to an appeal to the head of State made by a company that provides public transport services between different regions. The appeal requested that the government compensate the company for the financial burdens it incurred, as per the provisions of Council Regulation (EEC) no. 1191/69. The head of State decided to dismiss the appellant's appeal. The appellant went on to contest the head of State's decision before the regional administrative court, which once more dismissed the appeal because of the rule of procedure mentioned above (*principe de l'alternatività*). The appellant opposed the court's decision and lodged an appeal with the Consiglio di Stato.

Before the Consiglio di Stato's judgment, the European Court of Justice handed down a judgment in the Altmark Trans and Regierungspräsidium Magdeburg case (24 July 2003, C-280/00, Rec. p. I-7747), which interpreted the regulation mentioned above. The ECJ's judgment confirmed that public transport service providers were entitled to compensation for the financial burdens they incurred.

Consequently, the appellant company asked the Consiglio di Stato to grant it the right to compensation despite the President of the Republic's dismissal of its appeal, which had since become a binding decision.

The administrative court found that the effect of European Court of Justice's judgment interpreting the regulation was comparable to the effect of directly applicable provisions in Community law, so the Consiglio di Stato could set aside the *principe de l'alternatività* and open new proceedings before the court itself, despite the existence of a binding decision by the head of State.

*Consiglio di Stato, sezione IV, judgment of 9 March 2010, no. 1405*, www.lexitalia.it

IA/32330-A

[VBAR] [GLA]

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***Distribution of powers between the administrative court and the civil court – Change in case law - Directive 66/2007/EC of the European Parliament and of the Council with regard to improving the effectiveness of review procedures concerning the award of public contracts - Application – Request for the annulment of a contract with the government – Jurisdiction of the administrative court***

The Corte di Cassazione altered its established case law when it was asked to determine which court was competent to hear requests for the annulment of contracts with the government in relation to the award of public contracts.

According to former case law, the administrative court has jurisdiction over requests to annul administrative decisions, while the civil court has jurisdiction over requests to annul any contracts concluded between the government and parties that had won the contracts illegally.

This case law was altered by giving the administrative court the power to rule in all matters relating to the award of public contracts, that is, requests to annul documents awarding contracts and requests to annul contracts signed by the government.

The Italian court justified this change of direction by referring to the new Directive 66/2007/EC of the European Parliament and of the Council, which deals with improving the effectiveness of review procedures concerning the award of public contracts.

We should point out that the Corte di Cassazione passed judgment in the case before the aforementioned directive came into force in Italy. However, the court stated that provisions in Italian law should be interpreted in a way that is consistent with provisions in Community law, even if these have not yet come into force.

For this reason, the Corte di Cassazione decided to give the power to rule on requests relating to the award of public contracts to the administrative court only, since the aforementioned directive requires that such requests be ruled on by a single court.

*Corte di Cassazione, sezioni unite, order of 25 February 2010, no. 2906 in, www.lexitalia.it.*

IA/32328-A

[VBAR]

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***Taxation – Broad interpretation of a European Court of Justice judgment concerning failure by a Member State – Italian provisions creating discharges for taxpayers – Decision by an Italian court not to apply a provision in Italian law that was not one of the subjects of the European Court of Justice's judgment***

The Corte di Cassazione opted for a broad interpretation of a judgment by the European Court of Justice, despite the fact that the European Court of Justice's case law tends to indicate that judgments on infringement proceedings should be subject to restrictive interpretations. The judgment in question was the judgment concerning failure by a Member State of 17 July 2008 (European Commission v. Italy, C-132/06, Rec. p. I-5457).

In the case in point, the Court of Justice had ruled that certain provisions in Italian law contravened Articles 2 and 22 of the Sixth Council Directive on VAT (77/388/EEC) and Article 10 EC. More specifically, the Italian provisions in question allowed for the State to waiver verification of taxable transactions effected in a series of tax years.

Basing its actions on the reasoning behind judgment C-132/06, the Italian court did not apply another provision of the same Italian law, finding that it also contravened Community law.

Similarly to the provisions that were contested before the European Court of Justice, the provision in question created a discharge for taxpayers. This took the form of a 25% reduction in the amount due and an exemption from paying interest on arrears.

The Corte di Cassazione held that a discharge of this type had to be considered illegal since it also seemed to flout the principle of effectiveness, that is, the principle that payment of the full amount due is always required and, consequently, does not allow payment of a lesser amount.

*Corte di Cassazione, sezioni unite civili, judgment of 17 February 2010, no. 3674 in, www.dejure.it*

IA/32329-A

[VBAR] [GLA]

**The Netherlands**

***Social policy – Occupational health and safety at work - Directive 2003/88/EC of the European Parliament and of the Council – Annual leave – Financial compensation for annual leave not taken before expiry of the employment contract - Interpretation consistent with the directive – Impossibility of accepting an interpretation that is against the law***

In a judgment handed down on 10 November 2009, the Gerechtshof Amsterdam found that it would not be possible to interpret national law in line with Directive 2003/88/EC of the European Parliament and of the Council for the purposes of awarding a worker who had been ill for two years financial compensation amounting to four weeks' pay for the annual leave he had not taken.

The case related to a worker's request that his former employer pay him financial compensation for annual leave that he had not taken before the end of his working relationship with that employer. The worker became completely and permanently unable to work on 5 April 2004, and so could not take annual leave before the expiry of his employment contract in 1 January 2007.

At the first instance, Alkmaar Court found that the worker was entitled to financial compensation taking the form of pay for 10 days' leave by virtue of Article 7:635(4) of the Civil Code. Under this article, annual leave for workers who are unable to perform their duties over a certain period is calculated based on only the last six months of the period during which the worker could not work. In fact, this article constitutes an exception to Article 7:364(1) of the Civil Code, which provides that all workers are entitled to annual leave that is equivalent to four times their agreed weekly working hours, or a period that is at least equivalent to this if their working hours are expressed as hours worked per year.

In the case in point, the worker lodged an appeal against this decision with the Gerechtshof Amsterdam, arguing that by

virtue of Article 7 of the directive, he was entitled to 40 days' annual leave rather than 10 days' annual leave, based on the two years of his incapacity. Indeed, Article 7 of the directive does stipulate that Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks.

The Gerechtshof Amsterdam began by stating that the directive sets down minimum requirements with regard to paid annual leave and that, by virtue of Article 17 of the directive, Member States could not derogate from Article 7 of the directive.

According to the Gerechtshof Amsterdam, and with reference to the European Court of Justice's judgment in the Schultz and Hoff cases (judgment of 20 January 2009, C-350/06 and C-520/06, Rec. p. I-179), correct interpretation of the directive would tend to imply that the worker in question was entitled to 40 days of paid annual leave rather than the 10 days to which he was entitled under Article 7:635(4) of the Civil Code. Consequently, the Gerechtshof Amsterdam found that Article 7:635(4) of the Civil Code went against Article 7 of the directive, which had therefore been transposed into Dutch law incorrectly.

Nevertheless, the Gerechtshof Amsterdam observed that the appellant could not use Article 7 of the directive against his employer because directives bound Member States rather than individuals. Furthermore, it found that it was not possible to interpret Article 7:635(4) of the Civil Code consistently with the directive as this would result in an interpretation that was against the law, given that the exception mentioned in Article 7:635(4) of the Civil Code was put in place to prevent accumulation of holiday and to reduce the costs to companies of incapacity for work. The Gerechtshof Amsterdam acknowledged that national courts must interpret their national legislation in line with the directive, but also argued, referring to the European Court of Justice's judgment in the Maria Pupino case (C-105/03, Rec. p. I-5285), that the national court's obligation to refer to the content of a directive when interpreting or applying the relevant rules in domestic law could not be based on a *contra legem* interpretation of national law. The Gerechtshof Amsterdam found that it fell to each country's law-making bodies to make legislation consistent with the directive and therefore ruled that it could not find in favour of the worker.

*Gerechtshof Amsterdam, 10 November 2009, appellant v. private limited liability company, www.rechtspraak.nl, LJN BK4648*

IA/32527-A

[SJN] [SGAR]

## Czech Republic

***Equal treatment - Non-discrimination – Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – Concept of harassment – Lack of proper grounds for the judicial decision – Violation of the fundamental right to a fair hearing***

By its judgment of 27 January 2010, the Ústavní soud (Constitutional Court) followed up on a constitutional appeal by setting aside the decisions made by the Vrchní soud v Praze (Prague High Court) and the Nejvyšší soud (Supreme Court), finding that there was a lack of convincing grounds for these judgments on whether there had been harassment within the meaning of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

In the case in point, a person belonging to the Roma ethnic group held that having a statue holding a baseball bat inscribed with the words "For gypsies!" inside a restaurant constituted harassment according to the definition provided in the aforementioned directive (Article 2(3)).

With regard to the actual reasons behind the main dispute, the courts of first and second instance stated that there were other inscriptions on the baseball bat and that these led them to draw the conclusion that the bat was not intended to cause any kind of offence to anyone but was meant to be a hoax. From a legal viewpoint, the courts held that there was no proof that the appellant's right to protection of personality had been breached. Given that under the provisions of the national civil code for protecting the dignity of natural persons, responsibility is only incurred if there is an objective and unjustified violation of an individual's guaranteed and protected rights, the appellant's subjective feeling of having been degraded, humiliated or discriminated against did not, in itself, constitute a violation of the appellant's right to protection of personality. The courts of first and second instance therefore concluded that placing a baseball bat bearing a message like that

mentioned above in a restaurant did not create an intimidating, hostile, degrading, humiliating or offensive environment for Roma visitors and that consequently, there had been no harassment within the meaning of Council Directive 2000/43/EC.

While the Ústavní soud agreed with the courts of first and second instance regarding the need for an objective element in violations of guaranteed rights, it found that the courts did not have proper grounds for their judgments on the lack of objectivity. The Ústavní soud reasoned that the courts were "not comparing like with like" when they compared visible, dominant inscriptions on baseball bats with inscriptions that were barely visible. Moreover, the Ústavní soud highlighted that an individual's dignity could also be violated by unintentional behaviour, finding that the fact that other visitors to the restaurant had not reacted negatively to the inscriptions did not, in itself, constitute a proper argument showing a lack of objectivity. Based on this, the Ústavní soud concluded that the other courts' decisions were not supported by proper arguments and, to that extent, violated the appellant's right to a fair hearing.

Furthermore, the Ústavní soud observed that the failure by the courts of first and second instance was all the more striking when viewed against the backdrop of the case law of the Nejvyšší správní soud (Higher Administrative Court – see IA/28203-A). It stressed that it was the national courts' duty to interpret national legal provisions that were adopted to bring Czech law closer to Community law in the light of the Community legislation that had served as a basis for the national provisions, even in cases connected to events that had taken place before the Czech Republic joined the European Union. On that basis, the Ústavní soud criticised the court of first instance for not giving proper grounds for its conclusion that there had been no harassment within the meaning of Council Directive 2000/43/EC and criticised the court of appeal for not having examined the other court's conclusion, even if the existence of harassment had not been ruled out in that instance.

*Ústavní soud, judgment of 13 January 2010, II. ÚS 1174/09*,
http://nalus.usoud.cz/Search/Search.aspx [s3]
*English version available at:*
www.concourt.cz/view/726

[s4]IA/32241-A

[PES] [KSTE]

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***Repeal of the constitutional act on shortening the term of office of members of the Chamber of Deputies– The Ústavní soud's power to rule on the constitutionality of constitutional acts – Reference framework for the review of constitutional acts***

By its judgment of 10 September 2009, the Ústavní soud (Constitutional Court) repealed constitutional act no. 195/2009 Sb., which shortened the term of office of members of the Chamber of Deputies.

In the case in point, the Ústavní soud was asked to rule on a constitutional appeal lodged by a member of parliament who claimed, among other things, that the constitutional act in question was constitutional in form only. The appellant argued that substantively speaking, the act violated constitutional order by suspending it and changing the very foundation of the democratic state governed by the rule of law.

The Ústavní soud's reasoning was based, first of all, on determining whether it had the power to check constitutional acts and, if it did, whether it had the power to define a reference framework for a check. It also focused on the constitutionality of constitutional act no. 195/2009 Sb.

The Ústavní soud brought 'constitutional acts', as a category, within the framework of the concept of a 'law' as established in the constitutional provision on repeal of laws, set out the imperative of the non-changeability of the constitution's material core and determined that it did have the power to repeal constitutional acts. It then observed that the constitutional act in question was unconstitutional as it was inadmissible and retroactive.

The main reasons for the repeal of the constitutional act were its breach of the principle of generality and the fact that it violates legitimate expectations by establishing false retroactivity. The Ústavní soud concluded that the constitutional act contravened the principle of the constitution that states that changes to the essential requirements for a democratic state governed by the rule of law are inadmissible.

The Ústavní soud's judgment of 10 September 2009, which rules that the Ústavní soud has the power to rule on repealing constitutional acts, is one of the most

important judgments in the court's history. Admittedly, the court's actual reasoning on the impossibility of using an ad hoc constitutional act to shorten the term of office of members of the Chamber of Deputies lost its practical impact as soon as it was pronounced due to the adoption of a new constitutional act on allowing the president to dissolve the Chamber of Deputies, which had been put forward by 120 members of the Chamber. Nevertheless, the Ústavní soud's interpretation of the constitution in the case in point, in which it found that it had the power to rule on the constitutionality of constitutional acts (under certain circumstances), is an important step in the development of the court's case law and will have significant consequences for Czech constitutional law.

It is important to note that two of the fifteen judges participating in the plenary session expressed a minority opinion.

*Ústavní soud, judgment of 10 September 2009, Pl. ÚS 27/09,*
*http://nalus.usoud.cz/Search/Search.aspx,*
*English version available at:*
*http://www.concourt.cz/view/726*

IA/32239-A

[PES] [KSTE]

**United Kingdom**

***Anti-discrimination law - Education - Application of criteria for membership of the Jewish faith when selecting pupils for a Jewish school – Refusal to admit a child whose mother converted to Judaism under the auspices of a non-Orthodox synagogue – Violation***

On 16 December 2009, the Supreme Court ruled that the enrolment policy for a Jewish school in London, which had been accused of refusing to admit a child because his mother was not born Jewish, was discriminatory.

The Jews' Free School, which was founded in 1732, is a leading educational establishment in London's Jewish community and has over 2,000 pupils. The school is renowned for its teaching quality and attracts twice as many applicants as it can admit. It therefore decided to give priority to children classed as Jewish under the criteria set by the Office of the Chief Rabbi. Children are recognised as Jewish if they were born to a Jewish mother or if their mother converted to Judaism, by Orthodox standards, before their birth

These criteria were challenged in court by the father of a 13-year-old boy who was refused admission to the school for the sole reason that his mother, who is of Italian Catholic origin, converted to Judaism in a non-Orthodox synagogue. The mother's conversion is nonetheless recognised by the Masorti Jewish community. Masorti is a progressive denomination of Judaism and is the form practised by the boy's parents, who are divorced. The boy's father questioned the school's application of these criteria for membership of the Jewish faith and raised the issue of whether these criteria were compatible with the Race Relations Act, which outlaws all forms of discrimination based on a person's colour, race, nationality or ethnic or national origins.

The appeal was rejected in the first instance because the school was deemed to have discriminated on the grounds of religion, which does not fall within the scope of the Race Relations Act. This decision was then quashed by the Court of Appeal, which held that the membership criteria tested a person's ethnicity rather than their religion.

When asked to rule on the matter, the Supreme Court confirmed the Court of Appeal's decision by five votes to four. It rejected the school's argument that the membership criteria were purely religious in nature and had been recognised for millennia. Most of the judges believed that claiming the ancestry test was a test of religion rather than ethnicity was not a justification, since the reasons for implementing a discriminatory practice are absolutely irrelevant. Given that ancestry was the relevant criterion, irrespective of religious beliefs, the discrimination practised by the school was based on ethnic origins and therefore constituted direct racial discrimination. The boy was a victim of discrimination because of his ancestry and, hence, the ethnic group to which he belonged. In view of this, the key issue was not that of determining whether the boy belonged to a different ethnic group than that mentioned by the criteria, but of determining whether the boy had been given less favourable treatment because of his ethnicity. The school's application of membership criteria was judged to be discriminatory on this basis.

*Supreme Court, judgment of 16 December 2009, R (on the application of E) v. JFS Governing Body and Admissions Panel of JFS [2010] 2 WLR 153, www.bailii.org*

IA/31698-A

[PE]

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***Law on implementing the resolutions of the United Nations Security Council – Room for manoeuvre left to the executive branch - - Limits – Asset-freezing measures based on suspicions alone - Illegality – Parliamentary scrutiny required***

In a judgment pronounced on 27 January 2010, the Supreme Court repealed two measures enacted by the Treasury, ruling that the Treasury had misused its power. The measures had authorised the freezing of the assets of people suspected to have facilitated terrorism and were taken based on suspicions alone. The Supreme Court stated that measures interfering with the fundamental rights of an individual had to be adopted by parliament.

As regards the implementation of decisions of the United Nations Security Council, the United Nations Act 1946 allows appropriate domestic measures to be taken to implement the Council's resolutions in domestic law. The Al-Qaida and Taliban (United Nations Measures) Order 2006 (hereafter referred to as "the AQO") was adopted on the basis of this legislation, its primary purpose being to fulfil the requirement, as set down by resolution 1267(1999), of freezing the funds of anyone featured in a list drawn up by a committee that would be formed by virtue of the resolution. The AQO did not provide for any opportunities for appeal against the decision to include a person's name on the list.

For its part, the Treasury adopted the Terrorism (United Nations Measures) Order 2006 (hereafter referred to as "the TO") to give effect to resolutions 1373(2001) and 1453(2002) on freezing terrorists' assets. This measure freezes the UK assets of the people listed in Council Decision 2006/379/EC and those of anyone for whom there are "reasonable grounds for suspecting" that they are committing, attempting to commit, participating in or facilitating acts of terrorism. The Security Council's resolutions do not allow for asset-freezing measures to be based on suspicions. The TO enables the people on the list to contest the decision in court. The TO and the AQO were both decreed by the executive branch, without any parliamentary intervention. They are Orders in Council, that is, decrees drawn up by the executive branch that become law after receiving the monarch's approval. The right to contest such measures was recently recognised in the Bancourt case (see *Reflets no. 1/2009*, p.23-29 [only available in French]).

The measures criminalise any transaction involving the designated person's account, no matter how small it is. This affects all aspects of the designated person's life, rendering them a 'prisoner of the State', so to speak. Appeals were lodged against these measures by three brothers who are British citizens and were designated by the Treasury, a person who holds both British and Syrian citizenship and was designated by both the Treasury and the committee created under resolution 1267(1999) and an Egyptian citizen who was designated by the committee. The appellants contested the legality of one or both measures, arguing that the implementation of asset-freezing measures should be the subject of a parliamentary vote and that, in any case, the measures were inconsistent with the European Convention on Human Rights, interfering with the right to an effective remedy in particular.

The court of first instance found in the appellants' favour, but their appeal was then rejected by the Court of Appeal, which found that the 1946 Act left the executive branch considerable room for manoeuvre when it comes to implementing Security Council resolutions.

When ruling on the appeal, the Supreme Court welcomed the appeal, stating that although the 1946 Act gave the executive branch the power to choose appropriate measures allowing the fulfilment of the obligations resulting from the United Nations Charter, this did not mean that the question of the expediency and necessity of the measures should not be subject to judicial review. Indeed, giving the government unlimited discretion as to how the resolutions should be implemented would go against the basic rules underpinning the United Kingdom as a state governed by the rule of law.

By making it possible, under the contested measure, to adopt asset-freezing measures based on suspicions alone, the Treasury misused the power conferred on it by the 1946 Act. The executive branch may not interfere with citizens' fundamental rights without having obtained prior parliamentary approval. The Supreme Court thus repealed the TO and a provision of the AQO that allowed the Treasury to take measures against people on the list drawn up by the committee formed under resolution 1267(1999) without giving the

designated individuals the possibility of appealing against their inclusion on the list.

*Supreme Court, judgment of 27 January 2010, HM Treasury v. Ahmed and Others [2010] 2 WLR 378, www.bailii.org*

IA/31699-A

[PE]

**Slovakia**

***International agreements – Community agreements - Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) - Access to justice - Article 9(3) of the Aarhus Convention –Direct effect - Excluded***

By its judgment of 17 September 2009, the Najvyšší súd Slovenskej republiky [s5](Supreme Court of the Slovak Republic) decided not to accord an environmental protection association (the appellant) the status of party to the proceedings. The appellant claimed this status by virtue of the provisions of Article 9(3) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).

In the case in point, the appellant asked to be accorded the status of party to the proceedings in a case about the use of chemical fertilisers in forestry activities so that it could take judicial action against the decisions made by the government body for environmental protection, since it believed that these decisions contravened national law. The government body dismissed the appellant's administrative appeal against its initial decision not to uphold its request as national law did not recognise the appellant's status as an 'affected party', meaning it could not participate in judicial proceedings.

The appellant then lodged a court appeal with the Krajský súd (Regional Court) against this decision by the government body (the respondent), since the Krajský súd is the court of first instance for administrative disputes. The Krajský súd overturned the contested decision and referred the case back to the government body. The court held that the appellant was authorised to take part in the administrative and court proceedings by virtue of Article 9(3) of the Aarhus Convention. Given that the Aarhus Convention is an international agreement within the meaning of Article 7(5) of the Slovak constitution, the constitutional principle of giving primacy to international agreements must be applied. Moreover, the Aarhus Convention grants the appellant, as a member of the public, a real right with regard to the proceedings, namely the right to participate in proceedings as a party to the proceedings, lodge an appeal, and so on.

However, the respondent lodged an appeal against this decision with the Najvyšší súd on the grounds that a national legal provision would have to be adopted to implement the Aarhus Convention, as per Articles 3(1) and 9(3) of the Aarhus Convention. According to the respondent, the Convention itself could not directly bestow rights upon the appellant. Rather, the Convention is only implemented through a measure adopted in national legislation. This means that the public does not automatically have direct access to administrative or judicial proceedings.

The Najvyšší súd amended the Krajský súd's judgment and dismissed the appellant's appeal against the government body's decision. It found that Article 9(3) of the Aarhus Convention should be interpreted in conjunction with Article 6(1)(b) of the same Convention. The form and scope of the public's access to an administrative and judicial procedure are governed by national law, which, within the meaning of Article 6(1)(b) of the Convention, may regulate them according to the significance of the impact that the project in question could have on the environment. The appellant may participate in proceedings as an affected party, a status that the court deemed to be reasonable and proportionate given the environmental impact of the decision-making process on approval for applying chemical products to the ground. This activity is not among those listed in the Convention as having a significant impact on the environment (Annex I of the Convention).

It should be noted that another chamber of the Najvyšší súd referred a similar case (dispute on the same subject, different decision by the government body) to the European Court of Justice for a preliminary ruling on the interpretation of the direct applicability of Article 9(3) of the Aarhus Convention (case pending, Lesoochranárske zoskupenie, C-240/09). We should stress that the judgment mentioned above was pronounced after the request for a preliminary ruling was made but before the European Court of Justice delivered its judgment on the matter.

*Najvyšší súd, judgment of 17 September 2009,*

*3 Sžp 4/2009,* [http://nssr.blox.sk/blox/cms/main/sk/rozhodnutia/id11/linkState/formDisplay/displayForm/form/displayAttr/pdf/upload/binary/3_Szp_4_2009.pdf](http://nssr.blox.sk/blox/cms/main/sk/rozhodnutia/id11/linkState/formDisplay/displayForm/form/displayAttr/pdf/upload/binary/3_Szp_4_2009.pdf)

IA/ 32248-A

[VMAG]

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***Visas, asylum and immigration – Non-EU citizens – Rejection of an application for a residence permit – Article 8(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms – Right to the respect for family life - Violation***

In its judgment of 16 December 2009, the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) ruled that the appellant's right to respect for his family life had been violated by the Aliens and Border Police's decision to reject an Indian citizen's (the appellant's) application for a permanent residence permit and by the judgments handed down by the Krajský súd (Regional Court) and the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) as part of the process for the judicial review of administrative decisions.

In the case in point, the appellant had made an initial application for a residence permit on the basis of the residence law for aliens. The competent body of the Aliens and Border Police rejected his application on the basis that he was an inadmissible person within the meaning of Article 2(d) of the residence law for aliens. This action was consistent with the decision to ban the appellant from entering the Schengen area, which was based on a decision by the German immigration office. The decision by the body within the Slovak Aliens and Border Police was confirmed by the police's body of second instance. Likewise, the Krajský súd and the Najvyšší súd both confirmed the legality of this decision as part of the process for the judicial review of administrative decisions. The appellant then lodged an appeal with the Ústavný súd, asking the court to rule on the violation of his right to respect for his family life within the meaning of Article 8(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention"). He explained that he had married a Slovak citizen after his arrival on Slovak territory. He and his wife have known one another for a long time and lived and worked together in Germany and Italy.

In response to an enquiry addressed to the Ústavný súd, the Najvyšší súd stated that the appellant was banned from entering the Schengen area. In the past, he was deported for entering and residing in Germany illegally. He has been in the Schengen area since 1998 (in Germany, Italy and Slovakia). The actions of the Slovak bodies in question were consistent with the residence law for aliens (which was amended following the transposition of Council Directive 2001/40/EC), according to which the police shall enforce an expulsion decision by another Member State of the European Economic Area if the third-country national in question has failed to comply with that State's rules on the entry and residence of aliens. This implies that if the appellant is an inadmissible person in Germany, he is also an inadmissible person in Slovakia. In the Najvyšší súd's opinion, any violation of the appellant's family life had to be viewed in relation to his behaviour, given that he has been residing illegally in the Schengen area for ten years. The court also took into account that no children had been born of the appellant's marriage to his Slovak wife.

Unlike the Najvyšší súd, the Ústavný súd concluded that proper evaluation of the appellant's application would entail examination of his personal and family circumstances including, for instance, an interview with his wife or the production of other pieces of evidence to show the circumstances under which they married, when and how they entered Slovak territory and how long they have been together. The criteria established under Article 8(2) of the Convention require that a relevant judicial evaluation be carried out to determine whether the refusal to grant a residence permit could, in this case, be viewed as a violation of the appellant's family life, whether this violation had a legitimate purpose (as defined in Article 8(2) of the Convention) and finally, if the refusal was proportionate in terms of striking a balance between the seriousness and urgency of public interest and the protection of the appellant's family life. The Aliens and Border Police, the Krajský súd and the Najvyšší súd all failed to meet that requirement. The Ústavný súd pointed out that even when it came to the application of Community law or national legal provisions transposing acts of the EU institutions, the Slovakian authorities were obliged to respect the right to respect for family life, as enshrined in the Convention.

Finally, the Ústavný súd did not award the appellant any compensation on the grounds that he had contributed to his current situation by illegally entering and residing in the Schengen area.

*Ústavný súd, judgment of 16 December 2009, III. ÚS 331/09-37, http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=328581*

IA/32249-A

[VMAG]

### Sweden

***Civil law – Naming law – Changing a given name - Conditions – Names that cause offence or are clearly inappropriate***

Three linked judgments handed down by the Regeringsrätten (Supreme Administrative Court) on 28 September 2009 (RÅ 2009 ref. 55) played an important part in the development of the case law on naming law, and especially of the concept of a given name as set out in Article 34 of the Naming Act (Namnlag 1982:670).

In the Madeleine judgment, the issue at hand was that of determining whether a given name usually used for women could also be given to a man. The man in question had been a transvestite for most of his life and used the name Madeleine along with his ordinary given name. He wanted to add the name Madeleine to his ordinary given name. He filed a complaint after the national tax office, the Skatteverket, which is responsible for name changes, refused his request. The Skatteverket based its decision on existing case law, which indicates that the gender of the requester must be taken into account when deciding whether a name is valid. To this end, a feminine name is clearly an inappropriate name for a man. Nonetheless, the Skatteverket agreed with the requester that Swedish law and its preparatory documents were not clear enough about the decisive criteria in evaluating whether a name is appropriate.

The Regeringsrätten allowed the requester to add Madeleine to his name, observing that Madeleine is a common name in Sweden and thus cannot possibly cause offence in itself. Given that the requester chose the name himself, it cannot possibly cause him any discomfort or embarrassment either. The Regeringsrätten held that choosing a given name was such a personal business that an individual must be given a lot of freedom to choose, particularly when the individual in question is an adult wishing to change their given name or add to it. Although the name Madeleine is usually given to women, it is not completely inappropriate to use it as a man's name.

The Q judgment concerned a given name consisting of a single letter, Q, that two parents had given to their son. All of the lower administrative courts based their judgments on existing case law, which indicates that a person may not be accorded a name consisting of a single letter because a single letter is not a real name. Various other factors were mentioned, including that the name could be misleading and be interpreted as an abbreviation and that a name consisting of a single letter goes against Swedish naming tradition. These arguments were also raised in the A-C judgment, which concerned a woman called Anne-Christine who wanted to change her name to A-C.

The Regeringsrätten allowed the requesters to use the two names mentioned above, observing that neither of the names would cause discomfort or embarrassment to those using them, nor could they be viewed as clearly inappropriate. It also stressed that individuals should be given a free choice in this matter. The fact that a name consists of a single letter and/or could be confused with an abbreviation does not necessarily mean that the name is clearly inappropriate.

*Regeringsrätten, judgment of 28 September 2010, RÅ 2009 ref 55, www.domstol.se*

IA/32603-A

[LTB] [LZE]

## 2. Non-EU countries

### Norway

***European Economic Area – Free movement of goods – Freedom to provide services – Ban on advertising alcohol - Protection of public health – Principle of proportionality***

Following the EFTA Court's judgment in the Pedicel case on 28 February 2005, E-4/04 (see *Reflets no. 2*/2005 [only available in French]), which related to the general ban on advertising alcohol in Norway, the Høyesterett (Norwegian Supreme Court) dismissed an appeal against a decision to apply the ban to a specialist

magazine that claims to target gourmets and wine enthusiasts and contains a lot of articles on food and wine.

The EFTA Court had ruled that Article 11 of the EEA Agreement, which corresponds to Article 28 EC, should be interpreted as not applying to the wine trade, since agricultural products do not fall within the scope of the Agreement. Likewise, the Court had ruled that Article 36 of the EEA Agreement, which corresponds to Article 49 EC, should be interpreted as not applying to the provision of advertising services for wine such as those being disputed in the main proceedings, since such services are closely linked to the wine trade.

However, the Court had also ruled that a general ban on advertising alcohol, such as the ban being contested in the main proceedings, would constitute a measure with an effect equivalent to a quantitative restriction on imports within the meaning of Article 11 of the EEA Agreement as regards alcoholic beverages other than wine falling within the scope of the Agreement.

With regard to justification of the general ban on advertising alcohol for public health reasons by virtue of Article 13 of the EEA Agreement, which corresponds to Article 30 EC, the EFTA Court had found that there was no evidence to suggest that the ban in question constituted a means of arbitrary discrimination or a disguised restriction on trade between the EEA Contracting Parties. Furthermore, it had stated that the referring court was responsible for carrying out the proportionality test and listed a number of aspects that should be considered.

After agreeing with the conclusion drawn by the parties and the EFTA Court, i.e. that a general ban on advertising alcohol was liable to protect public health, the Høyesterett assessed whether the ban was necessary.

Contrary to the arguments presented by the specialist magazine, the Høyesterett found that in the case in point, there was no need to weigh up the interests linked to the general ban on advertising alcohol against the indirect effects on trade when determining whether the ban was necessary.

The Høyesterett then noted that the level of public health protection established by each State should be viewed as the point of departure for assessing the need for the ban. In this connection, it referred to the EFTA Court's judgment and the European Court of Justice's judgment of 13 July 2004 (Bacardi, C-429/02, paragraph 33, Rec. p I-6613), according to which Member States must decide on the degree of protection they wish to afford to public health and on the way in which that protection is to be achieved, while respecting the principle of proportionality.

In the Høyesterett's opinion, the condition of necessity is met when there are no other measures that would be just as effective in achieving the purpose but would be less restrictive on trade.

In this regard, the court stated that the specialist magazine had not pointed out the existence of alternative measures that did not restrict marketing. The court held that the magazine had, on the contrary, argued that refusing to publish marketing materials in a specialist magazine would have no effect on overall alcohol consumption and that the purpose of the general ban on advertising alcohol could also be achieved through restrictions on the nature of marketing.

In this respect, the EFTA Court [s6]found that the alternative measure of allowing alcohol to be advertised in specialist magazines would be nothing other than a limitation of the scope of the general ban on advertising alcohol and would be likely to dilute the ban's impact. On that basis, the argument in question does not demonstrate that the general ban is unnecessary.

Finally, the specialist magazine asserted that no evidence had been presented to show that restrictions on the nature of marketing (such as making it a condition that alcohol adverts must contain warning notices about the dangers of alcohol consumption) had no effect on overall alcohol consumption. With regard to this argument, the Høyesterett noted that the theoretical possibility that restrictions on the nature of marketing could have the same effect as a total ban did not automatically mean that a ban was disproportionate. According to the court, the usual assumption is that advertising affects total consumption, even when it is subject to restrictions, and that there were no special circumstances suggesting that the State should have to prove anything beyond this assumption. In this connection, the Høyesterett referred to the EFTA Court's judgment, according to which a measure can only be considered unnecessary if it is apparent that alternative measures achieve the purpose just as effectively.

*Høyesterett, judgment of 24 June 2009, Norsk*

*Retstidende, 14/2009, HR-2009-01319-A, www.domstol.no/hoyesterett*

IA/26805-B

[JHS]

# B. Practice of international organisations

**World Trade Organisation**

***WTO - Measures prohibiting the importation and marketing of seal products - Complaints by Canada and Norway***

On 16 September 2009, the European Parliament and the Council adopted Regulation (EC) no. 1007/2009 on trade in seal products, which provides for restrictions on the marketing of such products on the European Union market.

On 2 November 2009, Canada requested consultations with the European Communities regarding the said Regulation in the framework of the World Trade Organisation (dispute DS400). On 5 November 2009, Norway did likewise (dispute DS401). The two countries claimed that the measures taken were inconsistent with the obligations of the European Communities under Article 2.1 and 2.2 of the Agreement on Technical Barriers to Trade (hereafter referred to as "the TBT"), Articles I:1, III:4 and XI:1 of the 1994 General Agreement on Tariffs and Trade (hereafter referred to as "the GATT") and Article 4.2 of the Agriculture Agreement. On 16 November 2009, Iceland requested to join the consultations in connection with the two disputes. On 20 November 2009, Canada did likewise in connection with dispute DS401.

On 11 January 2010, some 10 Inuit hunters and trappers, individuals in another way engaged in other activities involving seal products, organisations representing the interests of Inuit as well as other individuals and companies active in processing of seal products brought an action for annulment of Regulation (EC) no. 1007/2009 of the European Parliament and of the Council before the General Court of the European Union (Inuit Tapiriit Kanatami e.a. v. Parliament and Council, T-18/10). The applicants put forward three arguments in support of their claims: (i) the European Parliament and the Council erred in law when using Article 95 EC (currently Article 114 TFEU) as the legal basis for adopting the contested regulation; (ii) they infringed the principles of subsidiarity and proportionality as they did not demonstrate why intervention at European Union level was required; and (iii) the contested regulation unduly limited their subsistence possibilities, relegating their economic activities to traditional hunting methods and subsistence.

*WT/DS 400 & WT/DS40: European Communities - Measures prohibiting the importation and marketing of seal products, http://www.wto.org*

[CHEE]

# C. National legislation

**Germany/France**

***Bilateral agreement between France and Germany on the establishment of a common matrimonial property regime***

Under the agreement of 4 February 2010 between France and Germany establishing a common matrimonial property regime, the two countries introduced an optional regime known as *participation aux acquêts* (share in acquired property). This is open to all couples whose matrimonial property regime is subject to the law of a contracting state. Couples can only adopt the common regime by means of an official marriage contract. *Participation aux acquêts* operates along similar lines to the German *Zugewinngemeinschaft*: in other words, separation of goods applies during the marriage, but if the marriage ends the spouses divide up the difference between their respective gains. The spouse that has acquired least can therefore claim from his/her partner a share in the latter's gains that is equal to half of the difference between the gains of each spouse.

The agreement is intended as an experimental project paving the way for more widespread future harmonisation of Community family law. The other Member States are invited to sign up to the agreement. The regime could therefore be extended in future to other European bi-national couples.

*http://www.bmj.bund.de*

[BBER]

**Belgium**

The law of 11 January 1993 on preventing use

of the financial system for the purpose of money laundering and terrorism financing was amended by a law of 18 January 2010, mainly in response to a number of judgments handed down by Belgian courts and by the European Court of Justice regarding the compatibility of Directive 2001/97/EC of the European Parliament and of the Council on prevention of the use of the financial system for the purpose of money laundering with the right to a fair trial and lawyers' professional secrecy (see, in particular, *Reflets no. 2/2008* [only available in French]). The persons subject to the obligations laid down in the law now include lawyers, although only for some operations:

"a) when assisting their client in the planning or execution of transactions concerning the:

1. buying or selling of real property or business entities;

2. managing of client money, securities or other assets;

3. opening or management of bank, savings or securities accounts;

4. organisation of contributions necessary for the creation, operation or management of companies;

5. creation, operation or management of trusts, companies or similar legal structures;

b) or when acting on behalf of or for their client in any financial or real estate transaction."

In other words, only lawyers acting as business lawyers appear to be affected.

*Law of 18 January 2010 amending the law of 11 January 1993 preventing use of the financial system for the purpose of money laundering and terrorism financing, and the Belgian Company Code (Code des societies/Wetboek van vennootschappen), Moniteur belge/ Belgisch Staatsblad, 26 January 2010, p. 3135*

[CREM]

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Following on from the Royal Decree of 29 September 2009 aimed primarily at completing transposition of Directive 2004/17/EC of the European Parliament and of the Council and Commission Directive 2007/18/EC in the wake of the judgments handed down by the Court of Justice of the European Union on 23 April 2009 (Commission v. Belgium, C-287/07 and C-292/07) and the entry into force on 1 January 2010 of the new 'European' thresholds, the law of 23 December 2009 implements Directive 2007/66/EC of the European Parliament and of the Council on information and review procedures for public contracts. It introduces a Book IIa into the law of 24 December 1993 and repeals the articles of the law dealing with the information provided to candidates/tenderers and with the stand-still period (Articles 21bis, 41sexies and 62bis). It entered into force on 25 February 2010 and applies to all contracts announced after that date. Its entry into force was established by the Royal Decree of 10 February 2010, published in the Moniteur belge/Belgisch Staatsblad of 16 February 2010, which also amends the Royal Decrees of 8 January 1996, 10 January 1996 and 18 June 1996, to bring them into line with the new rules introduced by the law of 23 December 2009.

*Law of 23 December 2009 introducing a new book on justification of decisions, information and review procedures into the law of 24 December 1993 on public contracts and certain contracts for work, supplies and services, Moniteur belge/ Belgisch Staatsblad, 28 December 2009, p. 81856*

[CHEE]

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On 31 March 2010, the Chamber of Representatives' Committee on the Interior, General Affairs and the Civil Service unanimously approved a bill prohibiting the wearing of any item of clothing that wholly or largely obscures the face. The bill provides for the insertion into the Penal Code (Code pénal/Strafwetboek) of an article 563bis, worded as follows: "Save where otherwise provided by law, anybody appearing in places accessible to the public with their face fully or partially masked or obscured such that they cannot be identified shall be liable to a fine of between €15 and €25 and imprisonment of between one and seven days or to only one of these penalties.

However, paragraph 1 shall not apply to persons whose presence in places accessible to the public with their face fully or partially

masked or obscured such that they cannot be identified is justified on the basis of work regulations or of a police order at festive events."

The adopted text no longer refers to the partial or total obscuring of the face by "an item of clothing", as stipulated in the bill initially tabled on 1 December 2009, but simply makes it a requirement to be identifiable at all times in public places. Unlike France, which consulted widely before taking steps to implement a partial ban on face veils, the Chamber Committee in Belgium did not seek any outside input before voting on the bill, refusing even to consult the Conseil d'État/Raad van State. The bill was passed by the plenary session of the Chamber of Representatives on 29 April 2010. However, the Senate is entitled to review the bill until 17 May 2010.

*Bill prohibiting the wearing of any item of clothing that wholly or largely obscures the face. Text adopted by the Committee on the Interior, General Affairs and the Civil Service, Doc. Parl., Ch. Repr., sess. ord. 2009-2010, Doc 52 n° 2289/006, www.lachambre.be*

[CHEE]

**Bulgaria**

***New Family Code - Special protection for children***

The new Family Code (hereafter referred to as "the FC") was adopted on 12 June 2009 and published in the Official Journal on 23 June 2009. It entered into force on 1 October 2009.

The new code is a response to the need to adapt family law to contemporary social realities. The code introduces major changes in the two main areas of family law, namely marriage and parent-child relations.

The main aim of regulations on parent-child relations is to safeguard the best interests of children. Accordingly, the code introduces new rules in this area and fleshes out the existing regulations. The role of the Social Welfare Directorate is explicitly recognised in accordance with the Child Protection Act. The new code explicitly requires a greater sense of responsibility in the exercise of parental responsibilities. It also gives children the right to be heard and requires their opinion to be taken into account during judicial proceedings. For the first time, children have the option of contacting the Regional Social Welfare Directorate and in the event of disagreement between the child and his or her parents, the matter can be brought before a court.

On the question of parentage, a number of changes relating to children's right to know the identity of their parents have been introduced in accordance with Article 7 of the Convention on the Rights of the Child. Chapter 6 of the new code deals with paternity and maternity following medically assisted reproduction, as well as the right of a child who has reached the age of 14 to contest the presumption of paternity (Article 64(2) of the FC).

To safeguard the interests of children as effectively as possible, new legal solutions have been introduced in relation to recognition. For the first time, a child's parentage with respect to the mother and the father can be established extra-judicially. Recognised children have the same status in the family as other children and have the security and legal stability associated with known parentage. Recognition of a child can take place before the birth certificate is issued. Under the new code, it is no longer possible for third parties to contest recognition.

Some major legislative amendments and changes feature in Chapter 8 of the new code, which deals with adoption. The main idea of lawmakers as expressed in these amendments is to make adoption easier and faster while effectively protecting the interests of adopted children.

In the new code, Bulgarian lawmakers have introduced child protection measures aimed at speeding up the process of getting children out of institutions, adopted and integrated into a family. Legislative amendments in the new Family Code facilitate the system of adoption for children who have been in specialised institutions for over six months, as well as children with health problems and special needs and children aged over seven. A national register of persons willing to adopt a child under the conditions of complete adoption and a national information system for children who can be adopted under the conditions of complete adoption have been introduced. The judicial procedure for entering a child onto the complete-adoption registers has been replaced by a system whereby children are registered based on an order issued by the Director of the Regional Social Welfare Directorate. The criteria used by the

Adoption Council to select adoptive parents, in collaboration with the Regional Social Welfare Directorates, are specified in detail in the new code.

Following the entry of the child in the register, the adoption council has one month to identify suitable adoptive parents from among the persons on the register of prospective adopters, taking into account their preferences as well as circumstances of importance to the interests of the child.

The new Family Code allows a child who has been housed in a specialised institution for over six months to be adopted without the consent of his or her parents. Adoption without parental consent will also be permitted when the child is placed in an institution under the administrative procedure provided for in the Child Protection Act and his/her parents, without any valid reason, have not requested that the placement be ended or the measure be modified. The aim of these amendments is to get children out of specialised institutions more quickly and find them adoptive families to ensure their normal physical mental, moral and social development. The regional court must examine the application for full adoption within 14 days. It will only allow the adoption if it is in the interests of the child being adopted.

Intercountry adoption is governed by the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption and the international Convention on the Rights the Child. The new code explicitly states that intercountry adoption is only permitted if attempts to identify a suitable adoptive parent in the country have failed and if, within six months of the child being entered on the regional register, at least three prospective adoptive parents have been identified for the child and nobody has filed an adoption application or efforts to find an appropriate adoptive parent have failed.

*New Family Code*
*www.justice.government.bg/new/Documents/Adoptions/Legislation/Familycodex2009082.doc*[s7]

[NTOD]

## France

### *Examination of the constitutionality of laws by way of a plea in objection: the priority question on constitutionality*

As of 1 March 2010, any person involved in legal proceedings in progress before an administrative or judicial court of law can argue that "a statutory provision infringes the rights and freedoms guaranteed by the Constitution" (Article 61-1 of the Constitution). Such an "application for a priority preliminary ruling on the issue of constitutionality", or "priority question on constitutionality", can be raised at first instance, appeal or cassation, but cannot be raised by the examining court or tribunal of its own motion. When it is raised before a trial judge, the court or tribunal asked to examine the question must rule "without delay" regarding its referral to the supreme courts (Conseil d'État or Cour de Cassation) provided that the contested provision is applicable to the dispute, has not already been declared constitutional and that the application is not devoid of substance.

The Conseil d'État or the Cour de Cassation must, within three months, verify that the application is new and of substance. If these courts decide to refer the question to the Conseil constitutionnel, the latter also has three months to rule on the said question. If the Conseil constitutionnel rules that the law is constitutional, the interrupted trial resumes before the court where the application originated. If it rules that the law is unconstitutional, the law is repealed.

Where arguments are made before the court challenging both the constitutionality of the law and its consistence with "France's international commitments", the court must rule as a matter of priority on whether to submit the question of constitutionality to the Conseil constitutionnel. The Cour de Cassation decided to refer to the European Court of Justice the question of whether the priority given to the constitutional question is compatible with Article 267 TFEU (cases C-188/10 and C-189/10, pending; to be viewed in conjunction with case C-457/09, pending, concerning a similar procedure in Belgium).

*Organic Law no. 2009-1523 of 10 December 2009 on the application of Article 61-1 of the Constitution, JORF no. 0287 of 11 December 2009, p. 21379; Decree no. 2010-148 of 16 February 2010 on the priority question on constitutionality, JORF no. 41 of 18 February 2010, p. 2969; Decree no. 2010-149 of 16 February 2010 pertaining to the continuity of legal aid in the event of the examination by the Conseil d'État, the Cour de cassation and the Conseil constitutionnel of an*

*application for a priority preliminary ruling on the issue of constitutionality, JORF no. 41 of 18 February 2010 p. 2973; Circular on the presentation of the priority question on constitutionality of 24 February 2010, to be published in the Bulletin official*

*www.legifrance.gouv.fr*

[NRY]

**Ireland**

***Reform of defamation law***

A new law introducing major changes with respect to defamation entered into force on 1 January 2010. The Defamation Act 2009, which repealed the former Defamation Act 1961, aims to update and improve the rules on defamation. The Act establishes a new framework for handling complaints about media attacks on the good name of a person or body corporate. The new features include faster recourse for plaintiffs as well as new procedures for media to make amends, the introduction of new forms of appeal, including access to a Press Council (an independent body that will have statutory recognition), the simplification of judicial proceedings and the introduction of new defences for the media.

Some aspects of the Act are controversial, most notably the fact that blasphemy is considered as an offence punishable by a maximum fine of €25,000. Blasphemy is defined as follows in Section 36(2)(a) of the new Act: "a person publishes or utters blasphemous matter if- he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion". The Act provides for a defence under this section in that blasphemy is precluded if a reasonable person would find genuine literary, artistic, political, scientific or academic value in the matter to which the offence relates. The Justice Minister justified the retention of the provision in the new Act on the grounds that the Irish Constitution defines blasphemy as an offence punishable in accordance with the law (Article 40.6.1 (i)).

*Defamation Act 2009, http://www.irishstatutebook.ie/2009/en/act/pub/0031/index.html*

[SEN]

**Sweden**

***Changes relating to the name of Swedish administrative courts (Länsrätter)***

As of 15 February 2010, Swedish county administrative courts or Länsrätter have been substantially reorganised. Their number has been reduced from 23 to 12 and they are now known as "Förvaltningsrätter i (place name)". Given the sharp increase in case numbers and the wide variety of cases handled, the measures aim to ensure high quality and efficiency of handling while reducing the time taken and allowing courts to specialise.

However, the provisions of the new law 2009:773 amending law 1971:289 on Swedish administrative courts [(Lag (2009:773) om ändring i lagen (1971:289) om allmänna förvaltningsdomstolar)], which entered into force on 15 February 2010, are purely organisational. The biggest change relates to the new legal districts, which will decrease in number and increase in size. This change affects nine out of the 12 new courts. The remaining three keep their existing administrative structure, and merely change their name: Förvaltningsrätten i Skåne Län, Förvaltningsrätten i Västerbottens Län and Förvaltningsrätten i Norrbottens Län.

Pending cases will be transferred to the new courts and the judicial hierarchy remains unchanged. The rules on the conduct of court trials and the appointment of judges and staff are not affected.

*Communication of the Swedish National Courts Administration (Domstolsverket): www.domstol.se/pages/9485/proposition%202008_09_165.pdf*

The text of the final law and preparatory documents can be found at: *http://www.riksdagen.se/webbnav/index.aspx?nid=3911&bet=1971:289*

*http://www.domstol.se/templates/DV_InfoPage____7%20785.aspx*

[LTB] [LZE]

# D. Extracts from legal literature

***European citizenship and free movement of students***

"Are economically inactive migrant students,

as EU citizens, entitled to student grants from their host State? This question relating to the balance between citizens' freedom of movement and the preservation of Member States' financial interests, which was already addressed in the Bidar case [judgment of 15 March 2005, C-209/03, ECR I-2119], returned to the Grand Chamber in the Förster case" (Dautricourt, C., "Citoyenneté (Arrêt 'Förster')", RDUE, No. 1/2009, p. 133). The Förster case gave the Court "the opportunity to clarify the conditions in which students who have chosen to study in Member States other than their own are entitled to a maintenance grant" (Broussy, E., Donnat, F. and Lambert, C., "Interdiction de discrimination selon la nationalité", AJDA, 2008, p. 2331. "Falling within the context of existing case law on the free movement of worker students who are Community nationals", the judgment handed down by the Court on 18 November 2008 "is further evidence of the continuing relevance, over and above the recognition of European citizen status, of separate original categories within the body of individuals entitled to freedom of movement" (Lafuma, E., "Libre circulation et octroi d'aides financières aux étudiants ressortissants d'États membres: les réticences subsistent", RJS 3/09, p. 199).

Although the importance of the judgment "is underlined by the composition of the court that handed it down, i.e. the Grand Chamber", it nonetheless seems to "mark a backward step compared with the earlier judgments on the 'social status' of European citizens […]. The question of the scope of Member States' obligations regarding the awarding of grants to non-national students unleashes national fears of an influx of students, so much so that eight Member States saw fit to submit observations to the Court. The question of the scope of the principle of non-discrimination contained in Article 12 EC remains controversial and elicited a contrary Opinion from Advocate General J. Mazàk". (Kauff-Gazin, F., "Modalités de libre circulation des étudiants", Europe, January 2009, comm. 3). In that Opinion, "the Advocate General presented arguments […] which, in the wake of Lair [judgment of 21 June 1988, 39/86, ECR 3161], Brown [judgment of 21 June 1988, 197/86, ECR 3205] and Ninni-Orasche [judgment of 6 November 2003, C-413/01, ECR I-13187], sought to link the applicant's right to a grant to her status as a former worker, on the basis of Article 7 of Regulation 1612/68 ('social advantages'). The Court's response, which is based solely on the status of European citizenship, seems to break with this case-law trend." Although "such a break, which some people had been calling for" for a number of years (cf. in particular Lhernould, J.-Ph., "Libre circulation des travailleurs, bourses d'études et droits sociaux à l'épreuve de la Communauté de l'Union", RDSS, 2004, p. 73), "was desirable" to some (Lafuma, E., op. cit., p. 200), others are quite critical of the Court's approach in this regard. "Unfortunately for those who have not acquired the right to permanent residence in the host Member State, in Förster the Court of Justice offers an unsatisfactory analysis of the status of a 'Community worker'" (Golynker, O., Annotation on Case C-158/07, Jacqueline Förster, C.M.L.Rev., 2009. p. 2021, on p. 2035). "The existence of established case law on Article 39 EC and the educational rights of former workers […] makes the Court's silence on the applicability of this Treaty provision remarkable. According to that case law, a Member State national who has worked and then studies is entitled to equal treatment as regards entitlement to maintenance grants, provided there is a link between the occupational activity and the studies. It therefore seems odd that a person who has worked while studying, worked full-time and then recommenced their studies full-time, continuity having been preserved throughout this period between the work and the studies, would be denied access to maintenance grants" (O'Leary, S., "Equal treatment and EU citizens: a new chapter on cross-educational mobility and access to student financial assistance", E.L.Rev., 2009, p. 612, on p. 620). Clearly, although there have undoubtedly been major advances in the free movement of inactive citizens over the past two decades, "such movement remains restricted to this day" (Lafuma, E., op. cit., p. 200). "[While] [t]he initial bold statements of the Court of Justice in Martínez Sala [judgment of 12 May 1998, C-85/96, ECR I-12691] encouraged commentators to conclude that, following the introduction of Union citizenship, the categories of Community worker, self-employed or economically inactive person had become otiose [cf. Fries, S. and Shaw, J., "Citizenship of the Union: First Steps in the European Court of Justice", EPL, 1998, p. 533] […] , the Förster judgment is a good example of how […] the conditions and the consequences of a right to reside in a host Member State differ depending on the activities of the migrant […]. Had Förster been classified as a Community worker, she would have been able to enjoy the same scope of social advantages in the host Member States as national workers, on the basis of Article 7(2) of Regulation 1612/68" (Golynker, O., op. cit.,

p. 2034).

Some of the literature takes the following line: "It is [also] to be regretted that the Court ignores the arguments put forward by the Advocate General concerning the disproportionate nature of the residence requirement of five years" as laid down by the disputed national regulation (Lafuma, E., op. cit., p. 200). By upholding the legality of the residence requirement, "the Court gives concrete substance to the criterion derived from the [aforementioned] Bidar judgment […]. Though designed to preserve the interests of the State, the chosen solution […] is nonetheless questionable in so far as it reflects a narrow understanding of the very idea of integration within a State […]. Indeed, the solution arising from the judgment minimises the flexibility and adaptability of this criterion" (La Rosa, S., "La citoyenneté européenne à la mesure des intérêts nationaux. À propos de l'arrêt Förster", CDE, 3-4/2009, p. 549, on p. 561). "The courage of the Trojani [judgment of 7 September 2004, C-456/02, ECR I-2703] [and] Bidar judgments […] which established a social protection standard for nationals of other Member States based on the degree of integration of the citizen concerned in the Member State which was more favourable and more flexible than the requirement for five years' residency, seems a thing of the past. Although one can understand the principle behind the Court's position, i.e. its keenness to safeguard States' public finances, one cannot but be surprised at this solution being applied to Ms Förster, who was obviously well integrated in the Netherlands (over three years' paid employment, studies, successful completion of a bachelor's degree, originally from a cross-border region, living with a Dutch national with whom she was in a relationship). The approach chosen [… ] by the Court, whose implications will no doubt be swiftly incorporated into national legislations, eliminates the possibility of any assessment in concreto of the situations experienced by Union citizens and makes it virtually impossible to award a maintenance grant to a student from another Member State" (Kauff-Gazin, F., op. cit). This approach may be considered surprising. "[It] contrasts starkly with the Court's previous requirement of a case by case assessment of the circumstances of the benefit claimant and his or her demonstration of a real or effective link with the host Member State, and its rejection of the imposition of blanket requirements which might favour an element which is not necessarily representative of such a degree of connection to the exclusion of other representative elements" (O'Leary, S., op. cit., p. 623). Moreover, "by categorically admitting that the disputed national provision is consistent with Community law, the Court weakens the content of the principle of proportionality in similar cases". (Lafuma, E., op. cit., p. 200). "[T]he proportionality test performed by the Court in this particular case is quite loose" (Martin, D., Comments on Förster e.a., EJML, 2009, p. 95, on p. 100). "[T]he Court seems to abandon its previous approach adopted in Grzelczyk [judgment of 20 September 2001, C-184/99, ECR I-6193] and Baumbast [judgment of 17 September 2002, C-413/99, ECR I-7091; cf *Reflets No. 3/2003,* p. 32] - which was branded by academic commentators as rewriting the rules of secondary Community law by interpreting them liberally in the light of Union citizenship and the principle of proportionality [cf. in particular Dougan, M. and Spaventa, E., "'Wish you weren't here…' New models of social solidarity in the European Union", in Social Welfare and EU Law, Hart, 2005, p. 181, on p. 214). It should come as no surprise that, as result of this change, the reasoning of the Court hardly leaves any room for the concept of a 'real link' […]. The Förster judgment asserts that Article 24(2) of Directive 2004/38 only requires the Member States to comply with the outer limit of five years of residence in order to ensure the existence of a sufficient connection between a student from another Member State and the host society […]. Member States can immune their national provisions containing the requirement of a 'real link' from the effects of the principle of proportionality by opting for the outer limit on the residence requirement under Article 24(2) [of Directive 2004/38/EC][LING8]. Yet, if a 'real link' is simply equated with the period of residence for the acquisition of an unconditional right of residence, is the concept of a 'real link' still meaningful?" (Golynker, O., op. cit., p. 2025). "Moreover, in those Member States that have opted for the maximum five-year residence requirement, the Förster judgment means, effectively, a near exclusion of migrant students from the entitlement to student grants and loans, as, in most cases, the studies will have been completed before the residence requirement is satisfied. But perhaps, this is what was intended by the Member States when the provisions of Article 24(2) of Directive 2004/38 were drafted" (ibid., p. 2026).

The Court's choice also raises questions "about the compatibility of the chosen solution with the fundamental rights associated with European citizenship, as laid down in Title V

of the Charter […]. [The Charter] includes freedom of movement and of residence as fundamental rights, and states, moreover, that any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of those rights and freedoms subject to the principle of proportionality. Is it not then the case that the residence requirement in question, leaving aside any other criterion for assessing the student's situation, disproportionately impairs the very substance of this right? Not necessarily, if the impairment is proportionate to the objectives being pursued. However, the question remains relevant where the test of the measure's proportionality is not considered comprehensively, as in the case in question". Indeed, "[a]lthough liable to dissuade a student from studying in another Member State, the residence requirement is justified by a requirement for proximity between the student and the host State, which de facto relaxes the constraint applying to the Member State. Moreover, the proportionality test is subject to a flexible appraisal that favours procedural guarantees at the expense of a more substantial review" (La Rosa, S., op. cit, p. 563-565). This is perfectly illustrated by the fact that the Court concluded, in its proportionality test, that the disputed national legislation was such as to a guarantee a high level of legal certainty and transparency, "which may seem doubtful given the retroactive nature" of its provisions (ibid., p. 566).

Furthermore, the position adopted by the Court in the Förster judgment regarding the interpretation of the degree of integration in the host State seems out of step with the interpretation of the same criterion in its case law on jobseekers. As one author points out, "it is […] difficult to reconcile Förster with the Collins judgment [judgment of 23 March 2004, C-138/02, ECR I-2703; cf. *Reflets no. 1/2005,* p. 29 (only available in French)] concerning application of the concept of a 'real link' to jobseekers […] [where] the Court established a rule that the period of residence required to establish a sufficient link with the host Member State could not exceed what was necessary in order for the national authorities to satisfy themselves that the person concerned was genuinely seeking work […]. The comparison between Förster and Collins raises a serious question of inconsistency in the Court's approach to the concept of a 'real link' and its relationship with the provisions of secondary Community law. As both students and […] jobseekers fall within the scope of derogations of Article 24(2) of Directive 2004/38, such a striking disparity is simply unacceptable. Does this mean that […] the Förster approach should apply not only to students, but also to jobseekers? This would certainly solve the problems created by the conceptual untidiness of the Collins judgment […] [y]et, the recent Vatsouras […] judgment [judgment of 4 June 2009, C-22/08 and C-23/08, not yet published; for an initial assessment cf. Simon, D., "Droit aux prestations en faveur des demandeurs d'emploi, Europe", August 2009, comm. 306 and Fahey, E., "Interpretive legitimacy and the distinction between 'social assistance' and 'work seekers allowance': Comment on Cases C-22/08 and C-23/08 Vatsouras and Koupatantze", E.L.Rev., 2009, p. 933] shows that extrapolation of case law concerning the effects of Article 24(2) of Directive 2004/38 for students and jobseekers is not a straightforward matter. Vatsouras […] confirms the Collins approach and seems to endorse Advocate General Maduro's interpretation of Directive 2004/38 that jobseekers are subject to a special regime which, unlike in the case of students, is not conditional on the completion of five years of residence". (Golynker, O., op. cit., p. 2027-2028). "Juxtaposition of Förster with Collins and Vatsouras […] [ultimately] confirms that the concept of a 'real link', as a tool of judicial analysis, complicates the task of […] conceptualisation of social solidarity, as it creates contextual fragmentation of entitlement criteria for different categories of Union citizens, which has already been criticised by commentators [O'Brien, C., "Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity", E.L.Rev., 2008, p. 643]. On the contrary, the criterion of integration into the host society as a socio-economic rational behind the extension of social solidarity to nationals of other Member States helps put the various elements of social solidarity together in a systematic way" (Golynker, O., op. cit., p. 2030-2031).

In short, "[t]he Förster decision prompts more concern than agreement" (La Rosa, S., op. cit., p. 566). "Those who believe that Union citizenship is to become the fundamental status of nationals of the Member States, eventually capable of generating full and immediate membership in the host society, will find it hard to see how the restrictive interpretation by the Court of Justice of the concept of a 'real link' can help strengthen the edifice of Union citizenship and the new foundations of social solidarity laid down by the Court in its previous case law. Even more analysts are likely to be

disappointed by [the] inconsistency and unpredictability of the Court's position […] on the effects and limitations of the EC Treaty provisions on Union citizenship with regard to the right to equal treatment which, as was evident from the disagreement between Advocate General Mazák and the Grand Chamber […], is confusing and misleading" (Golynker, O., op. cit., p. 2038). "The decision will [however] no doubt be welcomed by the Community legislature, by Member States and by those who have expressed concern about the effects of the Court's rulings on EU citizenship for the organisation and financing of national welfare systems […]. While the stable door may not have been secured entirely in Förster, the horse which bolted in Martínez Sala may have been reined in to a very great extent, at least as regards some of the most mobile (and costly) EU citizens […]. That being said […] [t]here is […] a telling omission in the decision of the Court […]. Nowhere in the judgment is there any reference to the fact that citizenship of the Union is destined to be the fundamental status of nationals of the Member States. Is this the end of an era?" (O'Leary, S., op. cit., pp. 625-626). However, "the risk in the short term is that it will result in the issuing or retention of very strict conditions for Community students to be awarded study grants in host States. It may be that national courts, instead of looking for the existence in concreto of a 'certain degree of integration' in the host State, rely on the Förster solution and conclude that residence requirements of five years or less are not discriminatory […]. More fundamentally […], [the] decision is particularly illustrative of a case law on European citizenship which still appears to be searching for its meaning and scope. The move towards a Community integration context that is more favourable to the preservation of national interests is hardly conducive to an appreciation of the rights associated with European citizenship. This is to be regretted in a period of Community construction when citizens' sense of belonging […] is very much in question" (La Rosa, S., op. cit., pp. 566-567).

[PC]

# E. Brief summaries

* *Germany*: The Bundesgerichtshof found that German courts had international jurisdiction to rule on disputes concerning an alleged violation of a person's right to protection of personality by Internet publications if the content in question had a clear and objective connection to Germany. The court stated that this could be considered the case when the conflict of interests – i.e. between the plaintiff's interests in protecting their individual rights and the defendant's interests regarding Internet publication – was mainly present in Germany, bearing in mind the content of the page under discussion.

In the case in point, the plaintiff, who was resident in Germany, had launched proceedings for a restraining injunction against the editor of the newspaper The New York Times and a journalist living in New York. The journalist had published an article about an ongoing investigation of the plaintiff on the newspaper's website. The article mentioned the plaintiff's name and stated that he was involved in organised crime. .

The Bundesgerichtshof's judgment has certain points in common with another case that it referred to the European Court of Justice for a preliminary ruling (C-509/09, currently pending). The other case is also concerned with determining where a harmful event occurred and thus identifying the court that has jurisdiction in cases where an individual's rights may be violated by the content of a website. Although Council Regulation (EC) no. 44/2001 applies to the case that was referred for a preliminary ruling, it does not apply to the case in point.

By virtue of the relevant provision of the Code of Civil Procedure, the Bundesgerichtshof declared that the German courts have jurisdiction to rule in the matter, since the article in question is likely to be read in Germany and has a negative influence on the plaintiff's personal and working life.

*Bundesgerichtshof, judgment of 2 March 2010, VI ZR 23/09, www.bundesgerichtshof.de*

IA/ 32747-A

[BBER]

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The Bundesgerichtshof refused to recognise a Polish court's judgment on paternity and refused to follow up on the resultant request that it ensure child support be paid. The basis for this decision was that the Polish court's judgment violated German public policy.

The plaintiff in the case was a minor who resided in Poland, while the defendant was a resident of Germany. The plaintiff had brought

an action before the Polish courts in the aim of obtaining child support payments. When the defendant was questioned during the proceedings, he denied ever having had a sexual relationship with the child's mother and argued that he was not the child's father. He offered to undergo a paternity test.

The court that was handling the case did not act on his offer. Basing its decision on the statement of a witness who had "heard something said about the matter", the court declared that the defendant was the plaintiff's father and ordered him to pay child support.

The Bundesgerichtshof found that a violation of the adversarial principle would not necessarily lead to a refusal to enforce the judgment in question. However, in the case in point, by failing to take account of the defendant's statement and not running a paternity test, the Polish court had violated the adversarial principle to such an extent that its judgment could not be considered to have followed a procedure worthy of a state governed by the rule of law.

The Bundesgerichtshof therefore refused to recognise the Polish court's judgment by virtue of Article 34 of Council Regulation (EC) no. 44/2001.

*Bundesgerichtshof, order of 26 August 2009, XII ZB 169/07* www.bundesgerichtshof.de

IA/ 32452-A

[AGT]

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The Bundesverfassungsgericht (Federal Constitutional Court) declared unconstitutional a law of the *Land* of Berlin allowing retail trade on Sundays during Advent (Berliner Ladenöffnungsgesetz, hereafter referred to as "the BerlLadöffG").

The Bundesverfassungsgericht found that Article 3 of the BerlLadÖffG breached Article 4 of the Basic Law (Grundgesetz, hereafter referred to as "the GG"), which protects freedom of faith and conscience, read in conjunction with Article 139 of the constitution of the Weimar Republic, which protects Sunday rest and is part of the GG by virtue of Article 140 GG. The Bundesverfassungsgericht's judgment states that the BerLadÖffG infringed on the constitutional protection of Sunday rest by allowing retail businesses to open for the four Sundays of Advent. The provision in question was not only established for the purposes of freedom to practice religion, but also because of the social importance of having a day set aside for private activities. Since Sunday rest is guaranteed under the GG, German lawmakers are required to ensure that Sunday opening remains the exception rather than the rule.

It should be noted that the European Court of Justice has made several rulings on the interpretation of Article 30 EC in the light of national legislation prohibiting retail trade on Sundays (see, for instance, the judgment of 20 June 1996, Semeraro Casa Uno, C-418/93, Rec. p. I-2975).

*Bundesverfassungsgericht, judgment of 1 December 2009, 1BvR 2857/07 and 1 BvR 2858/07* www.bundesverfassungsgericht.de

IA/32748-A

[BBER] [TLA]

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* *Belgium*: The Belgian Conseil d'État/Raad van State overturned two separate decisions to award a public works contract due to a lack of consistency with the case law of the European Court of Justice in the matter. In the two cases in question, the awarding authority made its decision based on selection criteria and weighting factors that were not shared with the tenderers when the bidding procedure was launched. When handing down its judgments, the Conseil d'État/Raad van State referred to the ECJ's judgments of 12 December 2002 (Universele-Bau AG, C-470/99, Rec. p. I-11617), 24 November 2005 (ATI EAC, C-331/04, Rec. p. I-10109) and 24 January 2008 (Lianakis, C-532/06, Rec. p I-251) to criticise the fact that the criteria and weighting factors had not been shared with tenderers and to overturn the decisions to award a public works contract on that basis. In the judgments mentioned above, the ECJ had ruled that the principles of equal treatment and transparency required tenderers to be informed of all criteria being used by the awarding authority to identify the most economically advantageous tender, as well as the relative weight of these criteria. This information had not been given to tenderers in the cases brought before the Conseil d'État/Raad van State.

*Conseil d'État, judgment of 15 December 2009, no. 198.917,* www.raadvst-consetat.be

IA/32530-A

*Conseil d'État, judgment of 5 January 2010,*

*no. 199.336, www.raadvst-consetat.be*

IA/32531-A

[CHEE]

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In a judgment pronounced on 4 February 2010, the Cour d'Appel de Bruxelles (Brussels Court of Appeal) decided that an offer to place a classified advertisement in a newspaper and, at the same time, publish the same advertisement on the newspaper's website for free should be classed as a linked offer, a form which is prohibited under Article 54 of the Belgian law on trade practices and the information and protection of consumers. However, the Cour d'Appel also highlighted the ECJ's judgment of 23 April 2009 (VTB-VAB, C-261/07 and C-299/07), in which the ECJ ruled that Article 54 of the Belgian law mentioned above contravenes Directive 2005/29/EC of the European Parliament and of the Council as it prohibits all forms of linked offer, without taking into account the specific circumstances of the case in point. The legality of the linked offer in question should therefore be determined in light of the concept of unfair trade practices within the meaning of the aforementioned directive. The directive states that trade practices are unfair if, bearing in mind their characteristics and the factual background, they cause or are likely to cause the average consumer to make an economic decision that they would not otherwise have made. The Cour d'Appel ruled that in the case in point, it had not been demonstrated that the newspaper editor's offer was likely to materially distort the average consumer's economic behaviour with regard to the product, so the offer could not be prohibited and the contested decision should be overturned.

*Cour d'Appel de Bruxelles, judgment of 4 February 2010, www.juridat.be*

IA/32532-A

[CHEE]

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* *France*: The criminal chamber of the Cour de Cassation, sitting in plenary, ruled that a sentence pronounced by a judgment of the Cour d'assises and based solely on the answer to the questions put to the court and the jury meets the requirements for a fair trial. In the case in point, the defendant was prosecuted for murder in conjunction with theft. The Cour d'assises sentenced her to a prison term accompanied by a custodial sentence and permanent exclusion from French territory. She lodged an appeal in cassation, arguing that reasoning based on a single answer to questions put to the court and the jury went against the requirements for a fair trial. In support of her appeal, the defendant mentioned the European Court of Human Rights' judgment in Taxquet v. Belgium (ECHR, 13 January 2009, appeal no. 926/05), in which the ECHR found that the wording of the questions put to the jury, which was both vague and abstract and left the defendant unable to understand why the jury had answered in the affirmative or the negative, did not meet the requirements for a fair trial.

The Cour de Cassation considered that this judgment could not be applied to the French proceedings. Moreover, it stated that the judgment meets legal and conventional requirements, since the sentencing judgment mentioned the answers given, based on their own personal conviction, by the jurors and judges to the questions asked and the rights to defence, a public hearing and an adversarial debate were all respected. The proceedings therefore meet the requirements set by Article 6(1) of the European Convention on Human Rights and Article 593 of the Code of Criminal Proceedings. For this reason, the appeal against the judgment of the Cour d'assises was dismissed.

*Cour de Cassation, criminal chamber, judgment of 14 October 2009, no. 5345, www.legifrance.gouv.fr*

IA/32076-A

[VMD]

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An employee of RATP, the public transport company for the Ile-de-France region, asked to be given the breaks set by Article L. 3121-33 of the Labour Code. This article was created as part of the transposition into national law of Council Directive 1993/104/EC on the organisation of working time, which was replaced by Directive 2003/88/EC of the European Parliament and of the Council. Article 4 of the latter directive requires Member States to adopt "the necessary measures to ensure that, where the working day is longer than six hours, every worker is entitled to a break".

However, Article L. 3121-33 of the Labour Code does not apply to RATP employees since Article 17 of Directive 2003/88/EC of the European Parliament and of the Council

allows derogations from the rules on breaks, particularly for activities involving the need for continuity of service, such as regular urban transport services. Nevertheless, derogations are only permitted on the condition that "the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection".

The chamber for social and legal matters (*chambre sociale*) of the Cour de Cassation ruled that the various stipulations of the directive on minimum rest periods were "rules of social law social law of particular importance from which every worker must benefit, since they are the minimum requirements necessary to ensure protection of their safety and health", thus echoing the European Court of Justice's evaluation in the Pfeiffer case (judgment of 5 October 2004, C-397/01, Rec. p. I-8835).

Even so, the Cour de Cassation did not contradict the other courts that had ruled on the case as regards the fact that Article 4 of the aforementioned directive does not have direct effect since it does not set down the duration of breaks and the terms on which they are granted. The court confined itself to recognising the direct effect of Article 17, and consequently ruled that the Cour d'Appel could not dismiss the employee's request without "checking if the national legal provisions granting RATP employees a derogation from the breaks system created by the Labour Code also gives these employees equivalent periods of compensatory rest or, in the exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, provides them with appropriate protection".

*Cour de Cassation, chamber for social and legal matters, judgment of 17 February 2010, no. 08-43.212, www.legifrance.gouv.fr*

IA/32080-A

[ELBT]

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The Prime Minister asked the Conseil d'État to study judicial solutions enabling a ban on wearing the full veil. The Conseil d'État presented its study to the Prime Minister on 30 March 2010. It examined the various principles that could be used as a basis for a ban on wearing the full veil in public places or, more generally, concealing one's face. In the Conseil d'État's opinion, a general ban on the full veil alone would be subject to significant legal uncertainties.

The Conseil d'État ruled out using the principle of secularism as the basis for a ban since "secularism mainly applies to the relationship between government bodies and religions or those who claim to follow them". It would be difficult to apply the fundamental principle of human dignity to the case in point as it has more than one interpretation: it can be understood as the collective moral obligation to protect the dignity of the human person, at the expense of freedom of choice, or it can be understood as protecting freedom of choice as an inherent characteristic of the human person. The principle of gender equality cannot serve as a basis either, as it can be used against others but not against an individual themselves, i.e. their right to exercise their personal freedoms.

The Conseil d'État then investigated the possibility of placing a general ban on concealing one's face in public places. However, the legal definitions of public policy (as a possible basis for the ban) are divergent. The revised, expanded concept of public policy – defined as "the essential rules of society" – is not consistent with the traditional definition used in constitutional case law.

Given these conditions, the only principles that could act as a basis for requiring that people always show their faces are public safety – which is a key element of public policy – and the obligation to fight fraud, but these could only apply in particular circumstances linked to time and place. Basing a ban on these principles would involve setting up two mechanisms. The first of these would consist in supporting and expanding existing possibilities for bans on concealing one's face with a view to preventing violations of the safety of people and goods, as part of the exercise of the prefect's, or, failing that, the mayor's general police powers. Prefects could exercise a special police power to ban people from concealing their faces in public places, depending on the local situation.

The second requirement that could be created would be rooted in the constitutional aim of fighting fraud and would derive from the need to be able to recognise people in certain places. It would mean banning people from covering their faces:
- when a person's identity or age must be checked for them to enter and moving around

in certain places, given the nature of these places or the requirements associated with proper functioning of public services;
- when individuals must be identified for the purposes of the provision of certain goods or services.

Finally, the Conseil d'État suggested two types of penalty: an order to attend civics lessons and, if the court deems it necessary, an additional fine and a criminal charge specifically targeting "anyone who forces another person, whether by violence, threats, pressure, abuse of power or abuse of authority, to conceal his or her face in public because that other person belongs to a certain category of people, particularly a specific gender".

*www.conseiletat.fr/cde/node.php?articleid=2000*

[ELBT]

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In French law, the system for withdrawing decisions to award subsidies stems from the Ternon (CE, 26 October 2001, no. 197018) and Soulier (CE, 6 November 2002, no. 223041) judgments, according to which the government can only withdraw an unlawful individual decision that creates rights in the four months after the decision was taken, unless there are any regulatory or legal provisions stipulating otherwise, and according to which a decision that gives a financial benefit should be viewed as a decision that creates rights, even if the government was under obligation to refuse to award such a benefit.

On 28 October 2009, the Conseil d'État settled the question of whether the system for withdrawing administrative decisions should be adapted for recovering Community aids.

The Conseil d'État decided to retain the solution by which the government can only withdraw an unlawful individual decision that creates rights in the four months after the decision was taken, but found nevertheless that "an individual administrative decision, particularly when it relates to payment of aid, could come with various resolutive conditions that, when implemented, would allow the aid in question to be withdrawn, regardless of the timeframe". The courts ruling on the merits of the case should have looked into whether the rules on withdrawing decisions should have been set aside or interpreted in the case in point, with a view to guaranteeing the effectiveness of Community law (the European Court of Justice's judgment of 21 September 1983 on the Deutsche Milchkontor case, 205/82 to 215/82, Rec. p. 2633, is a particularly useful source for more details on the Community principles of equivalence and effectiveness).

This decision could be viewed in relation to the Conseil d'État's judgment of 16 March 2006, in particular (CELF, no. 274923). The judgment related to State aids rather than Community aids and stated that the rule according to which financial decisions that create rights can only be withdrawn in the four months after the decision was taken should be set aside because it hampers the recovery of wrongly-paid State aids (see also the European Court of Justice's judgments of 20 September 1990, Commission v. Germany, C-5/89, Rec. p. I-3437 and 20 March 1997, Land Rheinland-Pfalz, C-24/95, Rec. p. I-1591).

*Conseil d'État, 28 October 2009, no. 302030* *www.legifrance.gouv.fr*

IA/32077-A

[VGP] [ELBT]

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* *Czech Republic*: In its judgment of 23 July 2009, the Nejvyšší soud (Supreme Court) ruled on the enforceability of a decision made by the commander of a military unit belonging to a foreign country (Slovakia, in the case in point) within the context of Council Regulation (EC) no. 44/2001.

In the case in point, the Nejvyšší soud quashed the judgment of the appeal court, which had contested the civil or commercial nature of the decision in question and, hence, the applicability of Council Regulation (EC) no. 44/2001. The Nejvyšší soud observed that a decision by the commander of a military unit that required a soldier to remedy harm caused could not be viewed as a public law decision in the domain of government or civil service, but as a decision relating to pecuniary law and thus private law, i.e. civil law. The Nejvyšší soud concluded that although foreign State bodies of this kind were not courts, their decisions should be deemed comparable to court decisions and considered enforceable.

*Nejvyšší soud, judgment of 23 July 2009, 20*

*Cdo 2867/2007*, www.nsoud.cz

IA/32242-A

[PES] [KST]

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In its judgment of 20 May 2009, the Nejvyšší soud (Supreme Court) ruled that the amount of compensation for non-material damage by government bodies, whether awarded after compensation proceedings by virtue of the national law on liability for damage caused by a decision or after incorrect official proceedings, does not necessarily need to reach the level for just satisfaction determined by the European Court of Human Rights as per Article 41 of the European Convention on Human Rights.

When outlining the reasons for its judgment, the court referred to the consistent practice of the ECHR when it comes to just satisfaction (see, for example, its judgment of 29 March 2006 in Apicella v. Italy), which states that "apart from the fact that the existence of a domestic remedy is fully in keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court, is faster and is processed in the applicant's own language; it thus offers advantages that need to be taken into consideration".

*Nejvyšší soud, judgment of 20 May 2009, 25 Cdo 1145/2009, www.nsoud.cz*

IA/32238-A

[PES] [KSTE]

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* *United Kingdom*: In a decision handed down on 9 December 2009, the Supreme Court ruled that a national court did not have to adhere to the case law of the European Court of Human Rights if it believed that the ECHR had not fully taken into consideration the special characteristics of national legal order. The Supreme Court referred specifically to the ECHR's judgment of 20 January 2009 in Al-Khawaja and Tahery v. the United Kingdom (appeals no. 26766/05 and 22228/06), in which the ECHR ruled that basing a conviction to a decisive degree on the depositions of absent witnesses violated Article 6 of the European Convention on Human Rights. In the Supreme Court's opinion, national legislation provides enough guarantees to protect the right to a fair trial under such circumstances, so there is no need to adhere to the judgment of 20 January 2009.

*Supreme Court, judgment of 9 December 2009, R. v. Horncastle [2010] 2 WLR 47, www.bailii.org*

IA/31700-A

[PE]

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In a judgment handed down on 8 January 2010, the Court of Session confirmed that primary legislation emanating from the Scottish Parliament could be contested from the point of view of its compatibility with both the Scotland Act 1998 (the law that created the Scottish Parliament) and common law. Consequently, in a case questioning the validity of a law that identifies the diseases related to asbestos exposure for which compensation may be claimed, the appellant was competent to raise an argument based on it being illegal for the executive to exercise its legislative discretion because of the irrationality of its actions. The criterion of irrationality implies that no reasonable authority could ever have adopted the provisions in question in the circumstances of the case in point. However, the Court of Session stressed that for such an argument to be founded, the appellant would also have to prove the existence of bad faith, improper motives or manifest absurdity. The court did not uphold the argument in the case in point, believing the law to be consistent with Article 6 of the European Convention on Human Rights.

*Court of Session (Outer House), arrêt du 08.01.10, Axa General Insurance Ltd v Lord Advocate [2010] CSOH 2, www.bailii.org*

IA/32601-A

[PE]

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* *Sweden*: In a judgment handed down on 7 July 2009, the administrative court of second instance, the Kammarrätt, decided that allocating a personal identification number made up of a person's date of birth and the number 0666 did not violate the right to religion.

The question was raised following a complaint by the parents of a newborn baby, who opposed the Swedish authorities' decision to

give their child a personal identification number containing the number 0666. The authorities' decision is incontestable under Article 39 of law (1991:481) on national registration (Folkbokföringslag (1991:481)). They claimed that assigning their child this number, which, to them and all other Christians, represents the devil, violated the fundamental rights to which they were entitled under Swedish constitutional law, and more specifically, the right to manifest and practice their religion, as enshrined in Chapter 2, Article 1(1)(6) of the constitution (Regeringsformen), and their freedom not to be subject to public constraints, which is guaranteed under Chapter 2, Article 2 of the constitution. They also argued that the fact that the authorities' decision was incontestable violated their right to a fair trial, which is guaranteed under Article 6.1 of the European Convention on Human Rights (hereafter referred to as "the Convention").

Basing its reasoning on the preparatory documents and the ECHR's case law in Schouten and Meldrum v. The Netherlands (judgment of 9 December 1994, Schouten and Meldrum v. The Netherlands, appeal no. 19005/91), the Kammarrätt observed that the allocation of a personal identification number was not a right or basic civil duty that was subject to appeal. Even though personal identification numbers play an important role in society and may be associated with personal characteristics, they do not exist to be used in legal acts between individuals. Their function is purely government-related. Since assigning a personal identification number is a purely government-related action, it does not fall within the scope of Article 6.1 of the Convention. The decision in question does not affect a right or civil duty either and therefore cannot be contested. For the reasons mentioned above, the fact that a decision to assign a personal identification number has the absolute authority of a final decision does not violate fundamental rights.

*Sundsvall Kammarrätten, judgment of 7 July 2009, no. 2614-08, http://www.domstol.se/templates/DV_InfoPage aspx?id=11143#2614-08*

IA/32604-A

[LTB] [LZE]

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* *International Criminal Court:* On 8 February 2010, Pre-Trial Chamber I of the International Criminal Court (ICC) handed down a judgment that did not confirm the charges against Bahar Idriss Abu Garda in the trial of those accused of war crimes and crimes against humanity in the Darfur conflict. This was the first time that the ICC had refused to confirm the charges against a defendant. The Chamber found that there was not enough proof to demonstrate that there were reasonable grounds to believe that Bahar Idriss Abu Garda was criminally responsible for the crimes of which he was accused by the prosecution. It seems that the court's refusal to confirm the charges was largely due to the poor quality of the depositions. The chamber's decision was unanimous, although one judge issued a separate opinion. This decision does not prevent the prosecution from asking to confirm the charges at a later date if it is able to support its request with further pieces of evidence. The prosecution may also appeal to Pre-Trial Chamber I for permission to appeal against the decision on the confirmation of the charges. However, the Prosecutor made such a request and it was rejected on 23 April 2010.

*International Criminal Court, ICC-02/05-02/09 Case The Prosecutor v. Bahar Idriss Abu Garda, http://www.icc-cpi.int/*

[SEN]

## Notice

The texts and documents referred to in the information below are generally taken from publications found in the Court's Library.

The references provided beneath case-law decisions (IA/..., QP/..., etc.) refer to the file numbers in the DEC.NAT. and CONVENTIONS[C9] internal databases. The files relating to these decisions can be consulted at the Research and Documentation Service.

The law reports featured in the "Extracts from legal literature" section have been selected with the utmost care. A comprehensive record of published reports can be found in the REPORT[s10]S internal database.

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