



REFLETS

Brief information on legal developments of Community interest

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A. Case law

I. European and international courts

European Court of Human Rights

European Convention on Human Rights – Prohibition of discrimination – Right to free elections – Roma and Jewish citizens denied the right to be elected to the House of Peoples of the Parliamentary Assembly and the Presidency of Bosnia and Herzegovina – Breach of Article 14 of the Convention in conjunction with Article 3 of the 1st Protocol to the Convention and Article 1 of the 12th Protocol to the Convention

On 22 December 2009, the Grand Chamber of the ECHR handed down a judgment in the cases of *Sejdić and Finci v. Bosnia and Herzegovina*. The Court decided, by fourteen votes to three and sixteen votes to one respectively, that there had been a breach of Article 14 of the Convention in conjunction with Article 3 of the 1st Protocol to the Convention and Article 1 of the 12th Protocol to the Convention.

The appellants are nationals of Bosnia and Herzegovina. Mr Sejdić is of Roma origin, while Mr Finci is of Jewish origin. The preamble to the constitution of Bosnia and Herzegovina draws a distinction between two categories of citizen, namely the “constituent peoples” (Bosniaks, Croats and Serbs) and “others” (Jews, Roma, other ethnic minorities

and those who do not declare affiliation with any ethnic group). The House of Peoples of the Parliamentary Assembly (the second chamber of parliament) and the Presidency of Bosnia and Herzegovina are made up exclusively of people declaring affiliation with one of the three constituent peoples. Mr Finci had consulted the Central Election Commission about his intention to stand for election to the Presidency and the House of Peoples of the Parliamentary and received a written rejection on the grounds that he was of Jewish origin.

Referring to Articles 3, 13 and 14 of the Convention, Article 3 of the 1st Protocol to the Convention and Article 1 of the 12th Protocol to the Convention, the appellants argued that the constitution and national law prevented them from running for the aforementioned offices based solely on their ethnic origin.

With regard to the admissibility of the case, the ECHR observed that the appellants, given their active involvement in political life, had been directly affected by the disputed measure and could therefore claim to have suffered a violation of the rights conferred upon them by the Convention. The ECHR also ruled on whether the respondent State could be held responsible for provisions in question. Although the constitution of Bosnia and Herzegovina is an appendix to the Dayton Peace Agreement, itself an international treaty, the power to amend it was vested in the Parliamentary Assembly of Bosnia and Herzegovina, which is clearly a domestic body. The ECHR therefore declares the appellants' principal complaints admissible.

As regards the House of Peoples of Bosnia and Herzegovina, the ECHR noted that although its members are elected indirectly, it has very extensive legislative powers and that Article 14 of the Convention, in conjunction with Article 3 of the 1st Protocol to the Convention, was applicable. Under the constitution, Bosnia and Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina and Republika Srpska. The rule limiting the appellants' eligibility to stand for office is based on power-sharing mechanisms that make it impossible to adopt decisions against the will of the representatives of one of the constituent peoples. The ECHR acknowledged that the system was originally established in the legitimate aim of restoring peace, but that the situation had improved considerably since the system's creation. The

ECHR recognised the recent positive developments that had taken place since the Dayton Peace Agreement. While the Court shared the government's view that the time was not yet ripe for a political system that simply reflected majority rule, the Venice Commission's Opinion of 11 March 2005 clearly demonstrated that there existed power-sharing mechanisms that did not automatically lead to the exclusion of communities not affiliated with the constituent peoples. Moreover, by becoming a member of the Council of Europe in 2002 and ratifying a Stabilisation and Association Agreement with the European Union in 2008, Bosnia and Herzegovina committed itself to amending its electoral legislation.

Based on these observations, the ECHR ruled, by fourteen votes to three, that there had been a breach of Article 14 of the Convention in conjunction with Article 3 of the 1st Protocol to the Convention. It also determined that the finding of a violation constituted in itself just satisfaction for any non-pecuniary damage suffered by the appellants.

The appellants referred to Article 1 of the 12th Protocol with regard to their ineligibility to run for the Presidency of Bosnia and Herzegovina. The ECHR reiterated that the concept of discrimination must be interpreted in the same way as it is interpreted in Article 14, even though the scope of the former disposition is different. For the reasons mentioned in connection with election to the House of Peoples of the Parliamentary Assembly, it follows that the constitutional provisions preventing the appellants from running for the Presidency must also be considered discriminatory.

Based on this, the ECHR ruled, by sixteen votes to one, that there had been a breach of Article 1 of the 12th Protocol to the Convention. It also determined that the finding of a violation constituted in itself just satisfaction for any non-material damage suffered by the appellants.

European Court of Human Rights, judgment of 22 December 2009, Sejdić and Finci v. Bosnia and Herzegovina, www.echr.coe.int/echr

IA/32785-A

[JUU]

European Convention on Human Rights – Right of access to a court – Embassy employee lodging a complaint about sexual harassment – National court declaring that it does not have jurisdiction due to State immunity – Violation of Article 6(1) of the Convention

On 23 March 2010, the Grand Chamber of the ECHR issued passed judgment in the case of *Cudak v. Lithuania*. The Court unanimously ruled that the Lithuanian courts' refusal to hear a complaint about sexual harassment lodged by an employee of the Polish embassy constituted a breach of Article 6(1) of the Convention.

The appellant, who is a Lithuanian national, worked as a secretary at the embassy of the Republic of Poland in Vilnius. While working there, she was a victim of sexual harassment. This was confirmed by the Equal Opportunities Ombudsman. Following this, she became ill and was eventually dismissed. The civil courts before which the appellant lodged a wrongful dismissal claim declared that they did not have jurisdiction in the matter due to the principle of immunity from the jurisdiction of foreign courts.

The ECHR first found that there is a trend in international law towards limiting the application of State immunity. However, immunity still applies to diplomatic and consular staff where the subject of the dispute is the recruitment, renewal of employment or reinstatement of an individual, where the employee is a national of the employer State or where the employer State and the employee have otherwise agreed in writing.

The ECHR noted that none of these exceptions applied to the appellant and that, moreover, it did not appear from her case file that she actually performed any functions related to the exercise of sovereignty by the Polish State. In addition, neither the Lithuanian Supreme Court nor the respondent government were able to show how the appellant's duties could objectively have been related to the sovereign interests of the Polish State. The mere claim that the appellant could have accessed certain documents or overheard confidential telephone conversations is insufficient.

According to the ECHR, it follows that by upholding in the case in question an objection based on State immunity and declining jurisdiction to hear the appellant's claim, the

Lithuanian authorities, in failing to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the appellant's right of access to a court.

The ECHR therefore unanimously ruled that Article 6(1) of the Convention had been violated and awarded the appellant the sum of €10,000 in respect of material and non-material damage.

European Court of Human Rights, judgment of 23 March 2010, Cudak v. Lithuania, www.echr.coe.int/echr

IA/32786-A

[JUU]

European Convention on Human Rights – Prohibition of torture and inhuman treatment – Right to a fair trial – Inhuman treatment of an accused perpetrator by police – Confession obtained under duress – Evidence collected in violation of Article 3 of the Convention and not having an impact on the accused's conviction or sentence – Violation of Article 3 but not of Article 6 of the Convention

The Grand Chamber of the ECHR handed down a judgment in the case of *Gäfgen v. Germany* on 1 June 2010, in which it found, by eleven votes to six, that Article 3 of the Convention had been violated but Article 6 had not.

The appellant had abducted the eleven-year-old son of a well-known Frankfurt banking family and killed him by suffocating him. He then deposited a ransom note at the boy's parents' house and hid the corpse under a jetty at a pond. A few days later, the appellant collected the ransom at a tram station. At this point, the police began tracking him and arrested him a few hours later. By order of the deputy chief of Frankfurt police force, one of the officers responsible for questioning the appellant threatened to ill-treat him with a view to making him reveal the child's whereabouts. After the appellant divulged this information, the police went to the pond with the appellant and found other pieces of evidence, such as tyre tracks left by the appellant's car, and the child's corpse.

The ECHR acknowledged that the police officers had acted in the aim of saving the

child's life when they threatened to ill-treat the appellant, but stressed that the prohibition of ill-treatment applies regardless of the victim's actions or the authorities' reasons. The immediate threats against the appellant for the purpose of extracting information from him were severe enough to be counted as inhuman treatment falling within the scope of Article 3 of the Convention. The ECHR pointed out that the police officers had been sentenced to very modest, suspended fines and that the domestic courts had taken several mitigating factors into account, including the fact that the officers were trying to save the child's life. As regards the possibility of receiving compensation for the violation of the Convention, the ECHR pointed out that no decision had yet been made on the merits of the appellant's compensation claim. Hence, the ECHR ruled, by eleven votes to six, that Article 3 of the Convention had been breached.

With regard to whether the proceedings against the appellant were, as a whole, unfair given the use of evidence obtained through the application of methods that contravened Article 3 of the Convention, the ECHR stated that the fairness of criminal proceedings was only at stake if evidence obtained through breaching Article 3 had an impact on the accused's conviction or sentence. In the case in point, the appellant had freely confessed again at the trial, both out of remorse and in order to take responsibility for his offence, so the disputed evidence was not necessary for proving the appellant's guilt or determining his sentence. The ECHR therefore considered that the failure to exclude the disputed real evidence, which was secured following a statement extracted by means of inhuman treatment, did not have a bearing on the appellant's conviction and sentence. As the appellant's defence rights had been respected, his trial as a whole must be considered to have been fair. Accordingly, there had been no violation of Article 6 of the Convention.

Given that the appellant had not lodged a claim for compensation for material or non-material damage, stressing instead that the objective of his appeal had been to obtain a retrial, the ECHR found that there was no basis for the appellant to request a retrial or the reopening of the case before the domestic courts since it had concluded that Article 6 of the Convention had not been violated.

European Court of Human Rights, judgment of 1 June 2010, Gäfgen v. Germany,
www.echr.coe.int/echr

EFTA Court

European Economic Area – Action for failure to act – Natural or legal persons – Failures likely to give rise to legal action – Failure to investigate an existing State aid – Conditions for admissibility – Requirement to establish locus standi

The EFTA Court rejected an action filed by Magasin- og Ukepresseforeningen against the EFTA Surveillance Authority, which had not investigated an existing State aid, on the grounds of inadmissibility.

With regard to the matter, it found that:

“For the present action to be admissible, three requirements must be fulfilled: the Defendant must be under an obligation to act on existing aid, the action must aim at obtaining a challengeable act and the Applicant must have locus standi to bring the action.

The Court will first deal with the issue of locus standi and the Applicant's argument that it is entitled, as a "party concerned", to protect its procedural rights under Article 1(2) of Part I of Protocol 3 SCA. The Court does not find the comparison with the procedure concerning new aid convincing. In new aid cases, a “party concerned” challenging a decision not to raise objections under Article 4(3) of Part II of Protocol 3 SCA must base its action on the particular ground that the Defendant made a mistake in holding that there were no doubts as to the compatibility of the aid scheme with the functioning of the EEA Agreement (...).

Articles 17 to 19 of Part II of Protocol 3 SCA, dealing with existing aid, do not contain a criterion of “doubts”. Nor can such a criterion be inferred by way of analogy. In Article 4 concerning the preliminary examination of notified aid, the criterion of doubts is linked to the obligation for the Defendant, under paragraph 5, to make a decision on the case or initiate the formal investigation procedure within a period of two months. The consequence of exceeding that time period is that the aid shall be deemed to have been authorised (...).

In that context, the obligation to initiate the formal investigation procedure when doubts

remain after the preliminary investigation as to their compatibility with the functioning of the EEA Agreement serves the purpose of preventing fast-track authorisation of new aid schemes. In cases of existing aid, there are no provisions corresponding to Article 4(5) and (6) of Part II of Protocol 3 SCA. Articles 17 to 19 of the same Protocol provide for a more complex and comprehensive procedure to be followed prior to a formal investigation procedure being initiated. Therefore, the criterion of ‘no doubts’ is not appropriate for deciding when to progress from one step in the procedure to the next.

The steps taken by the Defendant under the procedure for review of existing aid are thus not challengeable in the same way as they would be if the Defendant was assessing a new aid scheme. The option to challenge a decision not to raise objections under Article 4(3) of Part II of Protocol 3 SCA is therefore not available to ‘parties concerned’.

With regard to the Applicant’s right to challenge any decision on substantive grounds, the Court notes that in order to establish locus standi as individually concerned by the contested measure the Applicant must demonstrate that the position on the market of at least some of its members is substantially affected by that measure.

The mere fact that a measure may exercise an influence on the competitive relationships existing on the relevant market and that the undertaking concerned was in a competitive relationship with the addressee of that measure does not suffice for that undertaking to be regarded as being individually concerned by that measure. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking receiving aid to establish that it is an undertaking concerned by the contested measure. It must show in addition that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (...). That would in particular apply where the position of the undertaking on the market is substantially affected by the aid (...).

In the case at hand, the Applicant has failed to demonstrate that any of its members are affected in this sense. It cannot suffice in this respect that the Applicant represents a large part of the magazine business in Norway, that the total value of the aid may exceed NOK 1,000 million and that foreign periodicals sold in Norway may be less affected than

Norwegian periodicals.” (points 39-46).

EFTA Court, judgment of 30 March 2010, E-6/09, Magasin- og Ukepresseforeningen v. EFTA Surveillance Authority, www.eftacourt.int

IA/32622-A

[LSA]

International Court of Justice

International Court of Justice – Recognition by the courts of one Party to the Charter of the United Nations of the right to reparations of the victims of human rights violations committed during World War Two – Appeal against such practices based on the jurisdictional immunity granted under international law – Counterclaim – Inadmissibility

On 6 July 2010, the International Court of Justice (hereafter referred to as “the ICJ”) rejected as inadmissible Germany’s counterclaim against Italy in the context of the dispute between the two countries about reparations claimed by Italian victims of violations of international humanitarian law committed by the Third Reich during World War Two (see *Reflets no. 3/2008*, plus p. 33 of the current issue for the suspension of the Italian court decisions that gave rise to the dispute).

The dispute was first brought before the ICJ on 23 December 2008, when Germany filed an application following a series of decisions by the Corte di Cassazione. The Italian court had allowed civil claims by victims of the violations mentioned above and Germany held that this breached its jurisdictional immunity. Furthermore, some of the decisions ordered measures of constraint against German property situated on Italian territory (most notably the Villa Vigoni, which the German State uses for cultural purposes), while others declared Greek judgments based on similar occurrences to be enforceable in Italy, which, according to Germany, constituted a further breach of its jurisdictional immunity. The European Court of Justice examined similar issues in its judgment of 15 January 2008 (*Lechouritou and others, C-292/05, Rec. p. I-1519*), which concerned Council Regulation (EC) no. 44/2001 and the possibility of classifying similar offences and reparations requirements as ‘civil matters’

within the meaning of the regulation.

In the application filed with the ICJ, Germany asked the ICJ to recognise that its opponent's responsibility had been engaged by this conduct and the breaches by the Italian courts. It also asked that the Italian government, by means of its own choosing, take all measures necessary to ensure that the decisions in question became unenforceable and that Italian courts did not entertain such legal actions in future.

Italy's counterclaim was presented as part of its counter-memorial, which was filed on 23 December 2009 and in which it requested, with regard to the substance, the rejection of Germany's request and recognition of the fact that Germany had violated its obligation to provide reparation to the victims of war crimes committed by the Third Reich.

In its assessment of the reclaim, the ICJ first reiterated that by virtue of Article 27(a) of the European Convention for the Peaceful Settlement of Disputes (hereafter referred to as "the Convention"), which was cited by both parties, the Convention does not apply to disputes relating to facts or situations prior to the entry into force of the Convention as between the parties to the dispute. The ICJ then pointed out that in its case law, this temporal limitation did not refer to the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose, or in other words, the facts or situations that were the "real cause" of the dispute "rather than those which are the source of the claimed rights". To determine whether the subject of the dispute that Italy intended to bring before the Court could be classed as facts or situations that were the real cause of the dispute, the ICJ made particular reference to the Peace Treaty of 1947 between the Allied Powers and Italy and the agreements of 2 June 1961 and 16 September 1963 between Germany and Italy, which contain specific and limited commitments for Germany to pay reparations to Italian nationals persecuted by the National Socialist regime. The first of the treaties, which concerned the fate of Italian property in Germany, includes in Article 77(4) a waiver by which Italy agreed, with certain exceptions, to waive "on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945". Likewise, although the 1961 agreements provided compensation to certain Italian nationals, the ICJ held that "they did not

affect or change the legal situation of the Italian nationals at issue in the present case". Moreover, the Court believed that "the legal situation of those Italian nationals [was] inextricably linked to an appreciation of the scope and effect of the waiver contained in Article 77, paragraph 4 of the 1947 Peace Treaty and the different views of the Parties as to the ability of Germany to rely upon that provision".

The ICJ then determined that neither the various German laws adopted between 1953 and 2000 on reparation for certain victims of serious violations of humanitarian law committed by the Third Reich nor the fact that certain Italian victims did not receive compensation under that legislation constituted "new situations" with regard to any obligation of Germany under international law to pay compensation to the Italian nationals at issue in the case in question and "did not give rise to any new dispute in that regard".

Based on the above considerations, the ICJ found that the dispute referred to by Italy in its counter-claim related to facts and situations existing before the entry into force of the Convention between the Parties, so the dispute fell outside the temporal scope of the Convention. Accordingly, the ICJ declared the counter-claim inadmissible.

International Court of Justice, order of 6 July 2010, Germany v. Italy, counterclaim, www.icj-cij.org

IA/32256-A

[RA]

Environment – Dispute between Argentina and Uruguay - Construction of two wood pulp mills on the River Uruguay – Breach of the 1975 Statute of the River Uruguay – Obligation to evaluate the environmental impact in international law

On 20 April 2010, the International Court of Justice (hereafter referred to as "the ICJ") handed down a judgment in an environmental dispute between Argentina and Uruguay. The case concerns plans, authorised by Uruguay, to build a CMB pulp mill and the construction and operation of an Orion pulp mill on the banks of the River Uruguay.

On 4 May 2006, Argentina filed an application instituting proceedings against Uruguay in respect of a dispute concerning a breach of obligations under the Statute of the River Uruguay, a treaty signed by Argentina and Uruguay at Salto (Uruguay) on 26 February 1975. With regard to the ICJ's jurisdiction, the parties agreed that the court's jurisdiction was based on Articles 36(1) and 60(1) of the 1975 Statute of the River Uruguay. Argentina argued that the construction of two paper mills on the banks of the River Uruguay had caused irreversible pollution and asked that Uruguay "re-establish on the ground and in legal terms the situation that existed before [the] internationally wrongful acts were committed" in accordance with the principle of *restitutio in integrum*. In this connection, Argentina asked that the Orion mill be demolished.

The main reason for the judgment's significance is the ICJ's position as regards environmental impact assessments in international law. With respect to this matter, the ICJ stated that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".

Consequently, it was the view of the ICJ that "it [was] for each State to determine in its domestic legislation or in the authorisation process for the project, the specific content of the environmental impact assessment required in each case". Moreover, "throughout the life of the project, continuous monitoring of its effects on the environment [should] be undertaken".

In conclusion, the ICJ found that Uruguay had neglected its procedural obligations to cooperate with Argentina and the Administrative Commission of the River Uruguay when developing the projects relating to the CMB and Orion paper mills. However, with respect to the substantive obligations in the matter of environmental protection, which were set down in the 1975 Statute, the ICJ found that Argentina had not proved its allegations and therefore ruled that Uruguay had not neglected its obligations by authorising the construction and operation of the Orion mill.

The ICJ considered that its "finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina". Furthermore, the ICJ found that the demolition of the Orion mill did not constitute an appropriate remedy for the breach of procedural obligations as Uruguay was not barred from building and operating the mill after the expiration of the period for negotiation and Uruguay had not breached any of the substantive obligations imposed on it by the 1975 Statute.

The judgment provoked great outcry in Argentina, particularly among the environmentalists who had been blocking the international bridge between Argentina and Uruguay since 2006.

International Court of Justice, judgment of 20 April 2010, Argentina v. Uruguay,
www.icj-cij.org

IA/32637-A

[SEN]

II. National courts

Germany

European Union – Principle of conferred powers – German Constitutional Court – Mangold judgment – Ultra vires review – European Court of Justice had not obviously acted outside its powers

Having been asked to rule on a constitutional appeal, the Bundesverfassungsgericht found, by its order of 6 July 2010, that the European Court of Justice had not created unlawful court-made doctrine and had not clearly acted outside its powers when it handed down the Mangold judgment (judgment of 22 November 2005, C-144/04, ECR p. I-9981). In this judgment, the European Court of Justice had ruled that the German legislation authorising the conclusion of fixed-term employment contracts once an employee has reached the age of 52 – even if there is no objective reason for concluding such contracts – contravened EU law. It based its conclusion on the general principle of not discriminating on grounds of age and on Council Directive 2000/78/EC. Although the deadline for transposing the directive had not yet passed, the national court should not have applied any national legal provision that breached the general principle of not discriminating on

grounds of age to guarantee the full effectiveness of the principle.

In the case in point, the Bundesverfassungsgericht was asked to rule on a constitutional appeal against a judgment that the Bundesarbeitsgericht (Federal Labour Court) handed down in a dispute between a car parts manufacturer and an employee aged over 52 over the fact that the latter had been given a fixed-term contract for no objective reason. In its judgment, the Bundesarbeitsgericht had upheld the employee's request, basing its decision on the Mangold judgment and the principle of not discriminating on grounds of age.

In its appeal before the Bundesverfassungsgericht, the car parts manufacturer argued that the Bundesarbeitsgericht's judgment was based on unlawful court-made doctrine that had been beyond the European Court of Justice's power to create when it stated that the general principle of not discriminating on ground of age should be upheld. The matter raised before the Bundesverfassungsgericht was therefore that of knowing whether the European Court of Justice's actions meant that it had violated the principle of conferred powers set down in Articles 5(1)(1) and 2(1) of the Treaty on European Union.

In their order of 6 July 2010, the Karlsruhe judges asserted that they had a right and a duty to monitor the acts of the European institutions and bodies in case they act outside their powers. Nevertheless, the judges believed that it would be appropriate to coordinate the examination of grievances based on ultra vires behaviour with the task assigned to the European Court of Justice, namely that of interpreting treaties and ensuring their application.

The Bundesverfassungsgericht recognised that the primacy of EU law would be compromised if every Member State demanded that its courts be given the power to rule on the validity of the EU's judicial acts. Consequently, in the aim of not jeopardising the uniform application of EU law, ultra vires review must be carried out with respect and consideration on both sides.

With this in mind, the Bundesverfassungsgericht considered that from now on, an ultra vires review should only

be performed in cases where the European institutions and bodies have acted outside their powers sufficiently seriously. More specifically, a review would be performed if the EU authorities had blatantly acted outside their powers and the contested act caused a significant structural change in the balance of powers between the EU and the Member States to the detriment of the latter.

Moreover, an ultra vires review should only be performed in a spirit of openness towards EU law. If the European Court of Justice has not had the chance to rule on matters covered by EU law, the Bundesverfassungsgericht cannot state that EU law is not applicable. This is why a preliminary question should be referred to the European Court of Justice before it is determined that an ultra vires action has taken place, as this gives the ECJ the opportunity to interpret the treaty and rule on the validity and interpretation of the act in question. Furthermore, ultra vires reviews should be performed with restraint and should respect the analysis methods that are inherent to European law and connected to the specific nature of the treaties.

The Bundesverfassungsgericht added that the European Court of Justice could turn to court-made doctrine to help it interpret and apply the treaties, and that this fell within the powers accorded to it under the principle of conferred powers. In view of this, the Karlsruhe judges found that the European Court of Justice had not committed a sufficiently grave breach of the principle of conferred powers by declaring the existence of a general principle of not discriminating on grounds of age. After all, the ECJ neither created a new power nor extended an existing one. By the same token, in line with its case law, the European Court of Justice was able to make Council Directive 200/78/EC effective before the deadline for its transposition had elapsed.

Bundesverfassungsgericht (Second Chamber), order of 6 July 2010, 2 BvR 2661/06, Mangold-Urteil EuGH, Honeywell, www.bundesverfassungsgericht.de

IA/32768-A

[AGT]

Copyright – Directive 2001/29/EC of the European Parliament and of the Council – Right of reproduction – Exception for private copying – Fair compensation – Royalties for devices for making copies – Failure to consider referring the matter to the European Court of Justice for a preliminary ruling – Breach of the right access to the court appointed by law

In its order of 30 August 2010, the Bundesverfassungsgericht (Federal Constitutional Court, hereafter referred to as “the BVerfG”) ruled on a constitutional appeal against the judgment issued by the Bundesgerichtshof (Federal Court of Justice, hereafter referred to as “the BGH”) on 6 December 2007. In its judgment, the BGH had ruled that Article 54a of the German Copyright Act (old wording) did not allow for charges to be imposed on printers and plotters.

Under the German Copyright Act (hereafter referred to as “the UrhG”), it is legal to make individual copies of a work for private use, within certain limits. In return, Article 54a of the version of the UrhG in force at the time of the case in point provides that when it can be expected that a work will be photocopied, the author of the work is entitled to receive fair compensation from the manufacturer or importer of devices for making such copies.

The appellant, a management company, had lodged a complaint against a company that manufactures and imports printers and plotters, requesting (among other things) that the BGH recognise the defendant’s obligation to pay royalties for those devices. The BGH threw out the request on the grounds that Article 54a of the UrhG only provided that royalties be paid for the reproduction of printed works (hard copies) and not for the reproduction of digital versions, thus excluding printers and plotters.

Following the revision of the UrhG in 2008, it seems that the requirement to pay royalties also applies to printers and plotters.

The BVerfG found that the BGH ought to have considered referring the matter to the European Court of Justice for a preliminary ruling. Referring to its established case law in such matters, the BVerfG stressed that the ECJ is the court designated by the law, within the meaning of Article 101(1)(2) of the German Basic Law (hereafter referred to as “the GG”) and that a national court must refer to the ECJ

if the conditions mentioned in Article 267(3) TFEU are met. Nevertheless, the BVerfG can perform a check, but only if the interpretation and application of this article are manifestly indefensible. In such situations, the court ruling on the substance of the case must stipulate in its judgment that it took account of both EU law and the possibility of requesting a preliminary ruling, thus allowing the BVerfG to perform a check. Since it was likely that a preliminary ruling should have been requested in this case, the BGH should at least have analysed the possibility of requesting such a ruling from the ECJ in its judgment, with a view to meeting the requirements set by Article 101 of the GG. Yet there is no such analysis in the BGH’s judgment.

Opinions differing from that of the BGH could well be formed on the basis of Directive 2001/29/EC of the European Parliament and of the Council.

In particular, the question is raised as to whether EU law (and specifically Article 5(2) of the aforementioned directive) could limit the application of legislation providing for royalties to be paid for devices for making copies to copies of printed works. In the BVerfG’s view, the interpretation of the legal provision in question is not covered by established case law of the European Court of Justice and it is not clear how to apply it correctly. It is therefore neither an *acte éclairé* nor an *acte claire*. The Audencia Provincial de Barcelona’s request for a preliminary ruling on the concept of “fair compensation” (SGAE, C-467/08, closed by the judgment of 21 October 2010), in particular, shows that there is uncertainty around the interpretation of the article in question.

Consequently, given that the BGH had not considered referring the matter for a preliminary ruling and had thus committed a (near) fundamental breach of the right of access to the court appointed by law, the BVerfG overturned the contested judgment and referred the matter back to the BGH. When considering whether it is required to refer the case to the ECJ for a preliminary ruling, the BGH should also investigate whether Article 14 of the GG (property law) requires Article 54a of the UrhG to be interpreted in such a way as to allow the appellant’s request to be followed up, copyright being protected as property within the meaning of the GG. If this is indeed the case, a preliminary ruling may not be needed for the judgment to be made.

IA/32779-A

[TLA]

Belgium

Preliminary question – Reference to the ECJ – Decision to refer – Administrative measure against which no appeal may be made

In its judgment of 30 March 2010, the Cour de Cassation/Hof van Cassatie ruled that the decision through which a court refers a preliminary question to the ECJ is an administrative decision that may not be opposed or appealed against.

By an interlocutory judgment issued on 31 May 2007, the Correctionele Rechtbank van Antwerpen (Antwerp Criminal Court) had referred to the ECJ several preliminary questions about the provisions of the EU Customs Code. This decision was appealed, with the result that the contested decision was overturned. After reopening proceedings, the Cour d'Appel/Hof van Beroep pronounced several sentences against the defendants.

In their appeal in cassation against this judgment, the appellants claimed that there had been, among other things, a breach of Articles 1046 and 1050 of the Judicial Code. They argued that the decision to refer a preliminary question to the European Court of Justice was an administrative decision within the meaning of Article 1046 and therefore could not be appealed as such. The Cour de Cassation/Hof van Cassatie upheld their argument. In its view, such decisions are indeed administrative decisions, that is, decisions with which the court does not resolve a point of fact or dispute or make a preliminary ruling, and so does not directly cause grievances to either party.

In the opinion of the Cour de Cassation/Hof van Cassatie, the fact that the ECJ's decisions could have consequences on the settlement of the substantive dispute and that they could, being binding, end up being harmful to one of the parties does not alter the nature of a decision to refer. A decision to refer, in itself, does not harm the parties and may not be appealed.

*Cour de Cassation/Hof van Cassatie,
30 March 2010, P.09.1592.N, www.cass.be*

International private law – Recognition of foreign registration certificates – Birth certificates of children born to a surrogate mother – Commercial surrogacy agreement – Breach of public law and order – Refusal to recognise and transcribe birth certificate

On 22 March 2010, the Tribunal de Première Instance de Huy (Huy Court of First Instance) refused to recognise as valid the birth certificates of twin girls born abroad to a surrogate mother and naming the children's biological father and his husband as their legal and natural parents.

The plaintiffs, a homosexual couple who were married in Belgium, had concluded a commercial surrogacy agreement with a surrogate mother in the United States. After obtaining a paternity declaration there, they came back to Belgium with the children and asked for the children's birth certificates to be transcribed into the Belgian civil status registers. However, their request to have the birth certificates recognised and transcribed, brought before the Tribunal de Première Instance, was rejected for reasons of public law and order.

The court began by recognising its jurisdiction to assess the compatibility of the surrogacy agreement with public law and order on the grounds that one of the effects of the documents to be transcribed was the legal recognition of the consequences of such an agreement.

The court then found that despite the fact that surrogacy agreements are not explicitly prohibited or condemned in Belgian law, they should not be considered lawful. In the court's view, the practice goes against the principles of the unavailability of a person's status and of the human body, which makes it unlawful under current Belgian law. To back up its reasoning, the court also mentioned a concept from international public law and order, namely the principle that foreign laws should be respected unless there are any exceptional reasons not to apply them. In this regard, the court noted that a court cannot decide to break higher constitutional or international legal rules. If the issue at stake concerns compliance with such a rule, a court must dismiss the foreign legal text that would violate it and find

that the legal text, in itself, would clearly be a breach of public law and order.

Among these higher rules, the court specifically referred to Articles 3 and 7 of the UN Convention on the Rights of the Child, holding that the practice of surrogacy raised serious objections with regard to the continuity of parenthood, including motherhood, and the parents' responsibility towards the child. The court also referred to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits inhuman and degrading treatment, and Article 23 of the Belgian constitution, which enshrines the right of each individual to lead a life in keeping with human dignity. Vis-à-vis this latter provision, the court held that while altruistic surrogacy could be viewed as being in keeping with human dignity, this was not the case for surrogacy arrangements that are commercial in nature. For this reason, the court considered that recognising the birth certificates in question as valid would mean giving effect to the surrogacy agreement and supporting the principle that children, even before they are born, can be the subject of a commercial agreement.

Finally, the court found that through their actions, the plaintiffs had gone through the judicial system of the state of California to circumvent the applicable principles of Belgian law.

Consequently, the court refused to recognise and transcribe the birth certificates.

Tribunal de Huy (fourth civil chamber), 22 March 2010, Journal des Tribunaux, 2010, p. 420-422

IA/32546-A

[CREM]

Social policy – Equal treatment as regards employment and occupation – Council Directive 2000/78/EC – Prohibition of age-based discrimination – Shorter notice period for employees aged over 65 – Admissibility

On 30 September 2010, the Cour Constitutionnelle/Grondwettelijk Hof found that Article 83(1) of the law of 3 July 1978 on employment contracts, which provides for a shorter notice period for employees aged over 65, did not violate the principles of equality

and non-discrimination. The appellants mentioned the general ban on age-based discrimination, as applied in the European Court of Justice's judgment in the Mangold case (judgment of 22 November 2005, C-14/04, ECR p. I-9981) and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The Cour Constitutionnelle/Grondwettelijk Hof considered that the contested difference in treatment was actually based on an objective criterion, namely, whether the employee being dismissed had reached the age of 65 or not. It is also based on legitimate social aims. The reason for establishing shorter notice periods for employees approaching retirement age is connected to the introduction of the rule that renders null and void any termination clause in an employment contract that automatically terminates the contract when the employee reaches retirement age. Once this rule was introduced, employers had to adhere to normal notice periods if they wished to give notice to employees who had reached retirement age and had worked at the company for a long time. This meant that they sometimes had to decide whether they wanted to keep these employees several years in advance.

The court also believed that the discrimination was reasonably justified, given that the shorter notice period only applies to employees approaching retirement age, that is, 65. The age of 65 was not chosen arbitrarily: it is the age at which employees are entitled to receive a full retirement pension. Moreover, the court noted that employers are not required to apply shorter notice periods, as individual employment contracts may contain more favourable provisions. Finally, the court found that Council Directive 2000/78/EC did not preclude the contested legislation either. In this connection, it referred to the European Court of Justice's judgments in the Palacios de la Villa (judgment of 16 October 2007, C-411/05, ECR p. I-8531) and Age Concern England (judgment of 5 March 2009, C-388/07, ECR p. I-1569) cases. According to the ECJ's judgments, age-based differences in treatment do not constitute discrimination if they are objectively and reasonably justified, within national law, by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Cour Constitutionnelle/Grondwettelijk Hof
30 September 2010, 107/2010,
www.const-court.be

Protection of individuals with regard to the processing of personal data – Directive 95/46/EC of the European Parliament and of the Council – Right to respect of privacy – Law creating a platform for the secure exchange of medical data between healthcare professionals - Admissibility

On 18 March 2010, the Cour Constitutionnelle/Grondwettelijk Hof dismissed the action for annulment of the law of 21 August 2008 on the creation and organisation of the eHealth platform. The platform constitutes a public institution that was established to enable the secure exchange of health-related personal data between healthcare professionals.

The appellants mentioned several arguments in support of their action, including the view that the law violated the right to privacy as set down in Articles 6 and 8 of Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (among others). More specifically, the appellants claimed that the vague wording used to describe the aims and purposes of the platform allowed the processing of almost all data collected through medical files. With regard to this argument, the Cour Constitutionnelle/Grondwettelijk Hof pointed out that the platform had been created for the secure exchange of existing data and that in principle, it did not have the power to collect new health-related data or store such data. The platform's sole purpose is to foster the secure exchange of electronic data between various healthcare professionals, with the healthcare professionals remaining responsible for storing the data. The appellants also argued that the consent of the patients concerned was not requested for any of the platform's tasks or at each stage of data processing. The court's response to this argument was that the medical databases, for which the contested law only sets out a secure exchange system, remain entirely subject to the law of 8 December 1992 on the protection of privacy with regard to the processing of personal data. Consequently, the right to respect of privacy was not violated.

Cour Constitutionnelle/Grondwettelijk Hof, 18 March 2010, 29/2010, www.const-court.be

Spain

State aids – Recovery of aid – Principle of the protection of legitimate expectations – Principle of legal certainty – Principle of proportionality

In its Green Paper (COM(2000) 769 final) on the security of energy supply, the European Commission stated that security of supply must be clearly recognised, on a par with environmental protection, as an essential public service objective. It also underlined that while European coal is not competitive, it would not be strategically beneficial to move away from it altogether. In this connection, the preamble to Directive 96/92/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity contains declarations on services of general economic interest and public service obligations. The direct consequence of this was the creation of Article 8(4) of the directive, which establishes a rule in response to these concerns. Article 8(4) provides that a Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to generate the electricity consumed in the Member State concerned. This was intended as a temporary solution, to be implemented until such times as more advanced, environmentally-friendly technologies are developed.

The Commission applied this solution when it assessed the Spanish system of subsidies for volumes of electricity generated from indigenous coal. The system was created by law 54/1997 of 27 November 1997 on the electricity sector (BOE 28 November 1997, hereafter referred to as "the law on the electricity sector") and, insofar as concerns the present case, was developed by royal decree 2017/1997 of 26 December 1997 (BOE 27 December 1997). The Commission's decision of 25 July 2001 (SG (2001) D/290553) first described the temporary system. The Commission began by underlining that in line with Commission Decision 3632/93/ECSC on the Community system for

aid to the coal industry, the product is sold at the same price as the imported product and that the subsidy, despite being intended to support the coal industry, is actually paid to the electricity generator. The Commission went on to look at the characteristics of the assistance. Nevertheless, it did not deem it necessary to determine whether the contribution collected by the State from some companies and paid to other companies could be viewed as transferred State resources (see points 57 to 66), to the extent that the Commission arrived at the same conclusion as if the assistance had had to be classified as State aid, as can be deduced from other sections of the decision (particularly points 107 to 109). In this respect, the Commission examined whether the assistance met the conditions for adjustment of the competition rules set out in Article 86(2) EC (Article 106(2) TFEU), given that security of supply constitutes a service of general economic interest as described in the Green Paper. In this respect, the decision establishes a comparative framework between electricity generated using indigenous coal, which is subsidised, and the 15% of the overall primary energy necessary to generate the electricity consumed in Spain. This comparison results in a difference that must be recovered by the Kingdom of Spain, to the extent that the Commission considers that it cannot be protected by Article 106(2) TFEU.

Within the Spanish legislative framework, the law on the electricity sector authorises the government to adopt the necessary measures to guarantee the operation of the electricity generation units using indigenous coal to cover up to 15% of the total quantity of primary energy sources needed to generate the required amount of electricity (Article 25.1). The fourth temporary provision of the law allows the government to create subsidies, which are set each year by the minister responsible for these matters. These subsidies had to respect the 15% limit from 2004 on.

The electricity companies lodged appeals against the ministerial orders, and their appeals were upheld by the Tribunal Supremo. In the end, the government adopted royal decree 1261/2007 of 24 September 2007, which set subsidies for the consumption of indigenous coal for the years 1999 to 2006 (BOE 11 October 2007). The companies also lodged an appeal against this decree, arguing that there was no legal basis in Spanish law that allowed the public authorities to unilaterally recover subsidies that had been

granted lawfully. They also cited the breach of legitimate expectations arising from the fourth temporary provision of the law on the electricity sector.

After elucidating the content of the Commission's decision and providing technical explanations of domestic law, the Tribunal Supremo dismissed those of the appellant's arguments that were based on the principle of legitimate expectations, referring directly to the obligation to pay back any State aid that is received unlawfully, as long as there are no exceptional circumstances allowing the recovery of illegal state aids to be blocked. The court explicitly mentioned the European Court of Justice's judgments of 18 June 2007 (Lucchini, C-119/05, ECR p. I-6199) and 15 December 2005 (Unicredito Italiano, C-148/04, ECR p. I-11137), of which the Tribunal Supremo transcribed paragraph 104.

This is a significant development in case law and could act as a guide for lower courts responsible for monitoring the autonomous communities or local entities.

Tribunal Supremo. Sala de lo Contencioso-Administrativo, Sección Tercera. judgment of 23 September 2009(RJA-2010-897), www.poderjudicial.es/jurisprudencial

IA/32805-A

[MBF]

France

Checking the consistency of national legislation with both EU law and the national constitution – National law prioritising separate proceedings for checking constitutionality – Consistent with EU law

A series of four judgments handed down by the French supreme courts – civil, constitutional and administrative – have clarified the connection between checking constitutionality by way of a plea in objection and checking the consistency of national legislation with EU law.

Since the constitutional revision of 23 July 2008, the Conseil Constitutionnel has had the power to check the constitutionality of laws after they are passed (see *Reflets no. 2/2010*, p. 31). One significant result of Article 23-5(2) of the organic law creating a mechanism for “priority questions on constitutionality” (hereafter

referred to as “QPC”) is that in a dispute challenging both the constitutionality of a legal provision and its consistency with “France’s international commitments”, the QPC procedure requires the court in question to rule “as a matter of priority on whether to submit the question of constitutionality to the Conseil Constitutionnel”.

Against this backdrop, the Cour de Cassation asked the European Court of Justice about the consistency of the QPC mechanism with EU law, and more specifically, about the priority given to constitutional questions (interlocutory judgments of 16 April 2010, nos. 10-4001 and 10-4002). The dispute at the root of the decision to refer the matter to the ECJ raised a question about the constitutionality of a provision of the Code of Criminal Procedure dealing with internal border controls. The appellants had contested that the provision infringed on the rights and freedoms guaranteed by the constitution to the extent that Article 88-1 of the constitution recognises France’s commitments within the European Union, which, in turn, has established the principle of free movement of persons (Article 67 TFEU).

The Conseil Constitutionnel (decision of 12 May 2010, no. 2010-605 DC) and the Conseil d’État (judgment of 14 May 2010, no. 312305) then adopted a position on the matter and both declared that the QPC mechanism does not contradict EU law.

The Conseil Constitutionnel began by reiterating that according to its case law to date, it does not rule on the consistency of national laws with conventions, so it is the sole preserve of administrative and judicial courts to examine issues relating to the compatibility of a national legal provision with France’s European and international commitments (decision of 15 January 1975, law on the voluntary interruption of pregnancy, no. 74-54 DC, Recueil Cons. const. p. 19). It then provided further explanations of the conditions for applying the QPC mechanism and concluded that it was consistent with EU law. This means that a court referring a QPC, while awaiting the decision of the constitutional court, is not prevented from “immediately suspending any effects of the law that is inconsistent with EU law” and is not deprived of “the option to [refer] or [...] [prevented from] referring a preliminary question to the European Court of Justice in application of Article 267 [TFEU]”. The Conseil Constitutionnel also pointed out that, in

exceptional cases, it can still take cognisance of any clear breach by lawmakers of their obligation to transpose directives. Nevertheless, it added that the obligation to transpose directives should not fall within the QPC mechanism’s scope of intervention.

For its part, the Conseil d’État clarified that the conditions for applying the QPC mechanism did not prevent administrative courts from ensuring that EU law was enforced or from referring a preliminary question to the European Court of Justice, in application of Article 267 TFEU.

The European Court of Justice then approved the QPC procedure “implicitly at least” (see F. Donnat, *“La Cour de justice et la QPC: chronique d’un arrêt prévisible et imprévu”*, D. 2010, p. 1640) with regard to EU law (judgment of 22 June 2010, Melki and Abdeli, C-188/10 and C-189/10).

The Cour de Cassation took the European Court of Justice’s decision into consideration in a judgment issued on 29 June 2010. It decided not to apply the provisions on the QPC procedure on the grounds that the court would otherwise be prevented from ruling on the consistency of the national legal disposition with EU law. In fact, the Cour de Cassation considered that it was unable to ensure that EU law was enforced as long as a solution had not yet been found to the QPC issue, to the extent that the Cour de Cassation is not authorised to take provisional or protective measures (Article 23-3 of the aforementioned organic law only gives this option to the courts examining the substance of a case).

Although these decisions have clarified the connection between the priority mechanism for checking constitutionality by way of a plea in objection – the QPC mechanism – and the requirements of EU law, they have provoked strong reactions from French legal experts, who have been very much divided over appropriate responses to this issue.

Cour de Cassation, 16 April 2010, interlocutory judgments nos. 10-40.01 and 10-40.02; Conseil Constitutionnel, 12 May 2010; Conseil d’État, 14 May 2010, 10th and 9th sub-sections, 312305; Cour de Cassation, Plenary Session, 29 June 2010, appeals no. 10-40001 and 10-40002, new, www.legifrance.gouv.fr

[MHD]

Greece

Free movement of goods – Freedom to provide service – Electrical, electromechanical and electronic games – Ban in national legislation on installing and operating such games on all public or private premises, except casinos – Articles 28 EC, 29 EC and 49 EC – Protection of public law and order and general interest - Disproportionality

In its judgment of 29 June 2009, and following on from the European Court of Justice's judgment of 26 October 2006 (C-65/05, Commission v. Greece, ECR p. I-10341), the Symvoulio tis Epikrateias (Council of State) recognised that Articles 28 EC, 29 EC and 49 EC had been breached by certain provisions of law no. 3037/2002, which establishes, in national legislation, a ban on installing and exploiting electrical, electromechanical and electronic games on all public or private premises, except casinos. The law also provides for criminal and/or administrative penalties to be applied in the event of non-compliance with the ban.

In the case in point, the high administrative court was asked to rule on an action for the annulment of certain administrative measures that had been taken by virtue of joint ministerial decision no. 1107414/1491/T. and E.Φ./2003, for which the legal basis was the aforementioned law.

Applying the case law of the European Court of Justice, the Symvoulio tis Epikrateias declared that a general ban at national level contravened the provisions of Articles 28 EC and 30 EC. If a Member State places a ban on the installation of electrical, electromechanical and electronic games, including recreational games of skill and computer games, on all public or private premises except casinos, this could create obstacles to sale of these games within the Community and breach the principle of free movement of goods, as set down in Article 28 EC. A ban of this sort therefore constitutes a quantitative restriction within the meaning of the article.

A ban could be justified by the overriding

requirements linked to general interest listed in Article 30 EC, such as the protection of public morality, public policy and public safety, providing that it was proportionate to the aims pursued. Nonetheless, the court found that the Greek authorities could achieve their legislative aim with other, more appropriate measures that would place fewer restrictions on intra-Community trade.

Furthermore, the Symvoulio tis Epikrateias found that law no. 3037/2002 was not consistent with Greece's obligations under Articles 43 EC and 49 EC. National legislation that only authorises the operation of games in casinos harms both freedom to provide services and freedom of establishment. These measures make it more difficult – or even impossible – for service providers from other Member States to establish themselves and provide the services in question in Greece. This restriction cannot be justified by compelling reasons of general interest either, given that the measure was found to be disproportionate to the aims pursued.

Consequently, the Symvoulio tis Epikrateias ruled that this legislation was inconsistent with Community law and declared invalid the provisions of the joint ministerial decision that complemented and explained the law.

Symvoulio tis Epikrateias, 29 June 2009, judgment no. 2144/2009, NOMOS database

IA/32288-A

[GANI]

Social policy – Equal treatment as regards employment and occupation – Social benefits – Scope – National law providing for different treatment of married couples and unmarried cohabiting couples as regards social security cover - Admissibility

On 22 June 2010, the Nomiko Symvoulio tou Kratous (Judicial Council of State, hereinafter referred to as “the NSK”) handed down opinion no. 258/2010, in which it answered in the negative the question of whether unmarried cohabiting couples were covered by one another's social security cover. This issue gained special significance following the adoption of law no. 3719/2008, which institutionalised non-marital unions between individuals of different sexes by giving such couples the right to conclude a cohabitation

agreement recognising their mutual rights and duties. The law does not directly cover the right to social security cover and inheritance of pension rights, which is why the NSK was asked to give its opinion on the matter.

To arrive at its negative conclusion, the NSK first referred to the report outlining the reasoning behind law no. 3719/2008. The report states that non-marital unions understood to be an alternative form of conjugal living and not a type of “flexible marriage”. From this, the NSK deduced that marriage is “hierarchically superior” to non-marital unions and considered this to be borne out by the fact that anyone who is married may not form a non-marital union, while the reverse is not true, and by the fact that a non-marital union is dissolved, ipso jure, if one partner marries a person who is not involved in the marital union. In the NSK’s view, the hierarchical relationship between marriage and non-marital unions means that the various legal dispositions applying to marriage cannot be applied by analogy to non-marital unions. The NSK held that if the individuals in question had wanted the provisions for married couples to apply, they would have married instead of forming a non-marital union.

The NSK then observed that social security legislation lists legal spouses as family members protected by an insured person’s social security coverage, but makes no reference to unmarried cohabiting partners. Although this law was adopted before the law on non-marital unions, the NSK believed that its application by analogy to non-marital unions was precluded given the hierarchical relationship (mentioned above) between non-marital unions and marriage. Application by analogy is also ruled out by the very nature of the legal dispositions on social security. According to a general principle of social security law, as consistently interpreted in case law, the privileges awarded by social security must be the subject of strict interpretation, without any possibility for liberal interpretation or the application of other texts by analogy.

Furthermore, the NSK considered that these observations were consistent with the constitution, its reasoning being that while the Articles 9 and 21 of the constitution protect the family, they do not actually define the concept, leaving this task to ordinary law (as outlined above) and to the European Convention on

Human Rights (hereafter referred to as “the Convention”). With regard to the latter, the NSK reiterated that while the case law of the European Court of Human Rights would tend to indicate that the concept of “the family” is self-standing and, as such, may include relationships and commitments between individuals living in non-marital unions, the ECHR has refused to recognise itself as having the right to force States that have signed the Convention to treat unmarried cohabiting couples in the same way as married couples (case of *Johnston and others v. Ireland*).

The NSK then referred to European Union law to back up its opinion. Citing the ECJ’s judgments of 16 May 2006 (*Watts*, C-372/04, ECR p. I-4325) and 19 April 2007 (*Stamatelaki*, C-444/05, ECR p. I-3185), it noted that according to the case law of the ECJ, family status and benefits depending on family status fall within the power of the Member States alone. According to the judgments of 28 April 1998 (*Kholl*, C-158/96, ECR p. I-1931), 12 July 2001 (*Smits and Peerbooms*, C-157/99, ECR p. I-5473), 23 October 2003 (*Inizan*, C-56/01, ECR p. I-12403) and 18 March 2004 (*Leichte*, C-8/02, ECR p. I-2641), unless harmonisation takes place at EU level, the same applies to the right of Member States to regulate their social security systems, set the conditions for affiliating to a national social security system and determine the conditions for granting the various social benefits covered by the system. The NSK highlighted that this case law was confirmed by Article 34 of the Charter of Fundamental Rights of the European Union, which became primary legislation following the entry into force of the Treaty of Lisbon. Finally, the court mentioned the judgments of 1 April 2008 (*Maruko*, C-267/06, ECR p. I-1757) and 27 November 2007 (*Roodhuijzen*, F-122/06). According to the first judgment, refusal to award a retirement pension to the surviving same-sex partner of a deceased policyholder is only discriminatory if national law gives same-sex partners the same rights as married couples. According to the NKS, the second judgment did recognise that the concept of “unmarried partner” included situations where individuals living together in a stable relationship were bound by mutual rights and duties, but nevertheless concluded that unmarried couples could not be given rights with respect to third parties (particularly as regards pension rights) unless the bodies responsible for their pensions recognise these

rights.

Nomiko Symvoulia tou Kratous, opinion no. 258/2010 of 22 June 2010, www.lawdb.intrasoftnet.com

IA/32257-A

[RA]

Italy

Public service – Public service contracts – Competition rules – Unenforceability

In its judgment of 10 September 2010, the Consiglio di Stato decided that EU law did not require government organisations granting public service contracts to adopt a specific legal form to jointly exercise their functions, making reference to several judgments of the European Court of Justice (judgments of 13 November 2008, *Coditel Brabant*, C-324/07, ECR, p. I-8457; 9 June 2009, *Commission v. Germany* C-480/06, ECR p. I-4747 and 18 December 2007, *Commission v. Ireland*, ECR p. I-11353). On the contrary, EU law allows them not to apply competition rules and limit the selection of candidates for the public service contracts in question to university institutions, excluding other operators in the same sector.

In the case in point, the Consiglio di Stato ruled that it was admissible for a municipality to award university institutions the contract for technical and scientific study and consultancy in connection with drawing up the governance plan for the municipality, while excluding other operators in the same sector, notably freelancers.

Consiglio di Stato, sez. V, judgment of 10 September 2010, no. 6548, www.lexitalia.it

IA/32831-A

[VBAR]

Right to access documents – Commission refusal – Unenforceability

In application of the principle of equality of arms during proceedings, which assumes that both the company concerned and the Commission have identical knowledge of a file on infringement proceedings, the Consiglio di

Stato, in its judgment of 6 September 2010, ruled that the Commission did not have the sole power to make decisions on access to certain documents.

In the Consiglio di Stato's view, the right of companies to protect their trade secrets must be weighed up against respect of the right to defence.

It found that the need to protect trade secrets did not, in itself, justify the Commission's refusal to give a company that was the subject of infringement proceedings access to documents (about other companies) that could facilitate its defence.

Consiglio di Stato, sez. VI, judgement of 6 September 2010, no. 6481, www.lexitalia.it

IA/32830-A

[VBAR]

Visas, asylum and immigration – Immigration policy – Fight against illegal immigration – Turning back ships in the Mediterranean – Council Regulation (EC) no. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum claim lodged in one of the Member States by a third-country national – Captain of a rescue ship charged with the offence of assisting illegal immigrants – Justification for the offence – Provisions of maritime law and international human rights conventions prohibiting the forced return of refugees – Actions not constituting an offence

The Tribunale d'Agrigento's judgment of 15 February 2010 concerned the *Cap Anamur* case, which provoked great interest throughout the international community in 2004. The case was named after the German rescue ship that provided assistance to immigrants on the open sea and was then turned back by the Italian authorities. The authorities waited several days before giving the ship permission to enter Italian territorial waters, citing Council Regulation (EC) no. 343/2003 and the criteria for determining which Member State is responsible for handling asylum claims. In the case in point, Italy held that either Malta, which was closer to the ship, or Germany, with the rescue ship having to be considered German territory, was responsible. After allowing the ship to dock at Lampedusa and

handling the immigrants' asylum claims in express proceedings, the Italian government refused to give the immigrants asylum. The government also had the captain of the Cap Anamur and the head of the German aid mission arrested, and the Agrigento prosecutor accused them of having aided illegal immigration.

The judgment, which was issued after a five-year trial, acquitted the accused on the grounds that "their actions did not constitute an offence". Their actions, which are mentioned in law no. 286 of 1998 (consolidated legal text on immigration, Articles 12(1) and 12(3)) and constitute an offence within the meaning of the law, were not punishable given that there was justification, namely a legal order. In the case in point, this came from international maritime law and the Geneva Convention, both of which prohibit the forced return of refugees on the open sea and require humanitarian assistance to be provided.

This judgment shows that collective forced return practices in the Mediterranean have been inconsistent for years and provides clear judicial reasoning about the sharp distinction to be made between the evaluation of the conditions for the application of Council Regulation (EC) no. 343/2003 and the application of international maritime law, which takes precedence in situations where humanitarian assistance is required.

The judgment raises important questions as regards the legitimacy of Italian anti-immigration legislation, including new law no. 94 of 2009, which makes illegal immigration a criminal offence.

Tribunale d'Agrigento, judgment of 15 February 2010, I sez. pen., "Cap Anamur",

IA/32826-A

[MSU]

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Fundamental rights – Right to respect of private and family life – Right to marry – National legislation precluding same-sex marriage – Consistency with the constitution

Judgment no. 138/2010 (referred to by judgment no. 276/2010) represents the first

time that the Corte Costituzionale has ruled on the matter of same-sex marriages. The question of constitutionality, which was raised in two orders for reference (one from the Tribunale di Venezia and one from the Corte di Appello di Trento – linked cases), related to the consistency of the provisions of the Italian Civil Code relating to marriage with Articles 2, 3, 29 and 117 of the constitution, to the extent that the provisions of the Civil Code do not allow homosexual people to marry people of the same sex. The two referrals came after actions against the registrar's refusal to publish the bans of marriage.

The Corte Costituzionale found the question to be inadmissible as far as Articles 2 and 117 of the constitution were concerned. Firstly, the court noted that Article 2, which protects the development of the individual in all types of social formations, could also be seen as protecting same-sex unions, since the fundamental right of people in such unions to live freely as a couple is guaranteed and must be recognised by lawmakers "within the terms, conditions and limits set down in law". However, this recognition cannot be viewed as equating same-sex unions with marriage. Secondly, the court held that the question of constitutionality was inadmissible as to the consistency of national legislation with Article 117 of the constitution, which sets out how lawmaking powers are divided between the State and the regions when it comes to compliance with Italy's international obligations, when there is a possible violation of the provisions of the Charter of Nice and the European Convention on Human Rights. Indeed, Article 9 of the Charter of Nice, which recognises the right to marry, refers to national legislation when it comes to the conditions for exercising this right, meaning that the issue falls back within the scope of lawmakers' discretionary power.

The court then ruled that the question relating to the consistency of the aforementioned national legislation with Articles 3 and 29 of the constitution was unfounded. Article 29 protects "the family as a natural social grouping, based on marriage" and, according to the court, was intended by constitutional lawmakers to refer only to unions between a man and a woman (thus excluding same-sex unions, although these did exist at the time).

Even though the constitution should be interpreted in the light of the cultural and social changes that have taken place since its adoption,

the Corte Costituzionale considered that a broad interpretation of Article 29, i.e. one that would include same-sex unions, would be equivalent to a “creative” interpretation and would be a distortion of the core meaning of the provision.

The court did not explicitly restrict the lawmakers’ discretionary power in this regard, but, by ruling that “Article 29 refers to marriage in the traditional sense”, it has implied that any legislation extending marriage to include same-sex couples would go against this provision of the constitution. Nevertheless, the court also highlighted the room for manoeuvre available to lawmakers in connection with the regulation of de facto unions between persons of the same sex (falling within the scope of Article 2 of the constitution).

The Corte Costituzionale added that homosexual couples could not be viewed as legitimate families, which are created through the marriage of a man and a woman, because the main purpose of the latter form of union is procreation (according to some, this view goes against the distinction between the right to marry and the right to form a family and have children, a distinction that has explicitly been made by the Charter of Nice until now. See also: Colaianni N., *Matrimonio omosessuale e Costituzione*, in *Corriere giuridico*, n° 7, 2010, p. 845-854). Consequently, the court held that a ban on same-sex marriages would not infringe on the principle of equality, which is set down in Article 3 of the constitution.

Furthermore, the court declared that the heterosexual nature of marriage was also demonstrated by the fact that transsexuals (individuals who have had an operation to make their physical gender correspond to their mental gender) whose sex change has been recognised and approved by a judge are allowed to marry.

Corte costituzionale, judgments of 15 April 2010, no. 138, and of 22 July 2010, no. 276, www.cortecostituzionale.it

IA/32827-A
IA/32828-A

[MSU]

Netherlands

Visas, asylum, immigration – Immigration policy – Status of third-country nationals

who are long-term residents – Council Directive 2003/106/EC – Administrative charges for a long-term resident’s residence permit – Amount of the administrative charges

On 29 June 2010, the Raad van State issued a judgment ruling that a charge of €201 for a long-term resident’s residence permit did not breach Council Directive 2003/169/EC on the status of third-country nationals who are long-term residents (hereafter referred to as “the directive”).

The case concerned an application by a Moroccan national (hereafter referred to as “the alien”) who had held a fixed-term residence permit since September 1993 and wished to obtain a long-term resident’s residence permit. The alien was asked to pay the sum of €201 for the residence permit and refused to do so.

In first instance, the Gerechtshof ‘s-Gravenhage ruled, in line with the Commission’s reasoned opinion, that while the directive allows administrative charges to be levied for long-term residents’ residence permits, a charge of €201 could not be considered fair, particularly when compared to the €30 charge paid by European Union nationals for their residence cards.

The Dutch Secretary of State for Justice lodged an appeal against the decision with the Raad van State, arguing that the charge of €201 was based on the costs connected with examining the alien’s application and should therefore be considered fair.

In its judgment, the Raad van State referred first to Article 25(2) of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which provides that all documents mentioned in Article 25(1), including residence cards, must be issued free of charge or for a charge not exceeding that imposed on nationals for similar documents. The Raad van State then observed that the €30 charge that EU nationals had to pay for a residence card, by virtue of Article 3.34h of the Aliens Regulation (Voorschrift Vreemdelingen 2000), was based on Article 25(2) of Directive 2004/38/EC of the European Parliament and of the Council and not on a calculation of the costs.

In the view of the Raad van State, there was no basis for finding that the administrative charges linked to the examination of an application for a long-term resident's residence permit had to be comparable to the charges linked to the examination of an application for a document by virtue of Directive 2004/38/EC of the European Parliament and of the Council, given that Council Directive 2003/109/EC, unlike Directive 2004/38/EC, does not contain provisions on setting administrative charges.

Furthermore, the Raad van State did not consider the European Court of Justice's judgment in the Sahin case (judgment of 14 September 2009, C-242/06, ECR p. I-8465) to be decisive in the case in point, since the ECJ judgment relates to the administrative charges imposed on Turkish nationals within the framework of Decision 1/80 and the amount of these charges was established on the basis the administrative charges imposed on European Union nationals for residence cards.

The Raad van State held that by virtue of recital 10 of the directive, administrative charges must be transparent and fair and should not constitute a means of hindering the exercise of the right of residence. In the view of the Raad van State, the €201 charge reflects the costs connected with obtaining a long-term resident's residence permit and could not be viewed as preventing the alien from exercising his right of residence. In this regard, the Raad van State noted that it was reasonable to expect an alien meeting the conditions set in the directive, which include the requirement that a third-country national have stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned, to be able to pay the aforementioned sum. The Raad van State also took into account that the alien had not demonstrated that the €201 charge hindered him in the exercise of his right of residence.

Consequently, the Raad van State ruled that the charge of €201 for a long-term resident's residence permit did not contravene the directive and quashed the judgment of the court of first instance.

Raad van State, 29 June 2010, Appellant v. De Staatssecretaris van Justitie,
www.rechtspraak.nl, LJN BN0203

International agreements – EEC-Turkey Association Agreement – Association Council created by the EEC-Turkey Association Agreement – Decision 1/80 – Integration exam

In a judgment handed down on 12 August 2010, the Rechtbank Rotterdam ruled that the Dutch legislation requiring a Turkish national with a permanent residence permit to pass an integration exam in the Netherlands was contrary to the principle of not discriminating on grounds of nationality, which is integrated into Article 9 of the EEC-Turkey Association Agreement and Article 10(1) of decision 1/80.

The case related to a request by a Turkish national who had lived in the Netherlands since 1983 to be exempted from the requirement to pass an integration exam for medical reasons. Her request was rejected and her complaint against the rejection was dismissed.

The Rechtbank Rotterdam first considered that since the Turkish national had lived in the Netherlands since 1983 and had worked there for nine years, she was entitled to the rights conferred upon her by Decision 1/80. In the view of the court, and with reference to the European Court of Justice's judgment in the Er case (judgment of 25 September 2008, C-453/07, ECR p. I-7299), a Turkish national who has been granted permission to enter the territory of a Member State as a minor for the purpose of family reunification and who has acquired the right of free access to any paid employment of their choice as per Article 7(1)(2) of Decision 1/80 does not lose their right to reside in that State (this right being a consequence of the right to free access to paid employment), even if they have not been in paid employment since finishing school. Furthermore, the court held that the Turkish national could refer to Article 6 of Decision 1/80, to the extent that she had worked in the Netherlands for nine years before becoming incapable of working. Referring to the European Court of Justice's judgment in the Altun case (judgment of 18 December 2008, C-337/07, ECR p. I-10323), the court held that the Turkish national's current incapacity for work did not entail that she would objectively have no

chance of re-entering the labour market in the future. The court then underlined that the European Court of Justice, in its judgment in *Commission v. Netherlands* (handed down on 29 April 2010, C-92/07), found that the aim of the Association Agreement was to bring the situation of Turkish nationals closer to that of EU nationals by gradually implementing free movement of workers and abolishing the restrictions on freedom of establishment and freedom to provide services. The ECJ also found that the general principle of not discriminating on grounds of nationality, which is set down in Article 9 of the Association Agreement, and the application of this principle to workers in particular, as per Article 10 of Decision 1/80, contributed to promoting the gradual integration of Turkish migrant workers and Turkish nationals who move with a view to establishing themselves or offering services in a Member State.

The *Rechtbank Rotterdam* went on to find that since EU nationals are exempted from the requirement to pass an integration exam by virtue of Article 5(2)(a) of the Dutch law on the integration of aliens in the Netherlands (“*Wet Inburgering*”), imposing this requirement on Turkish nationals is contrary to Article 9 of the Association Agreement and Article 10 of Decision 1/80. The court explained that the requirement to pass an integration exam had an impact on the circumstances under which a Turkish worker lives and resides in the Netherlands. For candidates to pass the integration exam, they must spend time and energy studying, to the detriment of other activities. Besides, if they do not pass the exam within the required timeframe, they may be fined. In the court’s view, this situation could influence the circumstances under which the Turkish national lives in the Netherlands and her position on the labour market. Finally, the court considered that since the case in point concerned a restriction that had been established after 1 December 1980 and that the restriction related to conditions of access to employment, the measure should also be considered as breaching Article 13 of Decision 1/80.

Rechtbank Rotterdam, 12 August 2010, Eiseres v. Het College van Burgemeesters en Wethouders, www.rechtspraak.nl, LJN BN3935

IA/32543-A

[SJM] [SGAR]

Poland

Constitutional law – Equal treatment of men and women in matters of social security – Discrimination relating to old-age pensions – Legislation setting a different general retirement age for men and women – Admissibility - Conditions

In a judgment handed down on 15 July 2010, having been asked to rule by the Ombudsman, the *Trybunał Konstytucyjny* (Constitutional Court) gave its verdict on the consistency with Articles 32 and 33 of the constitution of a provision of the law of 17 December 1998 on pensions and annuities from the social insurance fund. The disputed provision sets the general retirement age at 65 for men and 60 for women. Articles 32 and 33 of the constitution declare that all people are equal before the law and emphasise that men and women are equal in family life, politics, society and economic activities, prohibiting all forms of discrimination for whatever reason. In its complaint, the Ombudsman considered that having different retirement ages for men and women was disadvantageous to women as they make contributions over a shorter period but draw pensions for a longer period, meaning that the instalments they are paid are lower.

In the view of the *Trybunał Konstytucyjny*, the principle of gender equality does not require men’s and women’s situations to be regulated in the same way. This difference in treatment does not necessarily give one group a lower status than the other and may be the result of objective differences between them. In line with this reasoning, the *Trybunał Konstytucyjny* ruled that the difference in the retirement ages for men and women did not discriminate against women because it was justified by the need to move away from existing social and biological differences. The court held that the difference constituted a “compensatory privilege” for women and was compatible with the provisions of the constitution. Moreover, neither the contested provision nor the Polish Labour Code provide for forced retirement of women once they reach retirement age. Rather, they give women the right to retire should they choose to do so. In this connection, the *Trybunał Konstytucyjny* referred to the case law of the *Sąd Najwyższy* (Supreme Court), which confirmed that an employer cannot terminate a woman’s employment contract simply because the woman has reached retirement age. Such

actions constitute indirect gender-based discrimination and are prohibited. With regard to the fact that women receive lower pensions than men, the Trybunał Konstytucyjny noted that lawmakers, when deciding to have different retirement ages for men and women, had provided for mechanisms to reduce the gap in the amount of pension paid. These mechanisms include State allowances during maternity or parental leave, the introduction of a minimum pension and the use of the same single life age for both sexes when calculating pensions.

However, the Trybunał Konstytucyjny highlighted that the situation on the labour market is prone to change: calls are being made for the elimination of social differences, and biological differences are becoming less of a justification for drawing distinctions in legislation, since the work involved in many professions no longer has such a great influence on workers' health and the quality of their work.

Although the Trybunał Konstytucyjny believes that this "compensatory privilege" for women is also admissible in the light of European and international law, it is aware that the "privilege" is temporary. Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security does not prevent Member States from excluding from the directive's scope of application the determination of pensionable age for the purposes of granting old-age and retirement pensions. Nevertheless, Member States should periodically examine excluded matters to ascertain whether there is still justification for excluding them in light of social developments. In addition, the Trybunał Konstytucyjny considered that having different retirement ages was not an optimal solution. Consequently, it decided issue an order that same day to inform the parliament of the need to introduce a reform in the aim of gradually bringing the general retirement ages into sync.

Trybunał Konstytucyjny, judgment of 15 July 2010, K 63/07, Orzecznictwo Trybunału Konstytucyjnego, Zbiór Urzędowy, seria A, 2010, Nr 6, poz. 60; Dz.U. Nr 137, poz. 925, www.trybunal.gov.pl

IA/32634-A

[MKAP]

Czech Republic

European Union citizenship- Interpretation consistent with EU law – Concept of a citizen of a municipality – EU citizen living in a municipality - Inclusion

On 19 April 2010, the Ústavní soud (Constitutional Court) ruled on the constitutionality of the provision of the Czech Municipalities Code that states that any part of a municipality wishing to break off from the rest of the municipality must have at least 1,000 citizens. The code defines a "citizen of the municipality" as any individual with Czech nationality who is registered in the municipality as a permanent resident.

The appellant – an area of the city of Hradec Králové called Březhrad – had its right to self-government removed by a decision of the Krajský soud v Hradci Králové (Hradec Králové Regional Court). The regional court approved Hradec Králové municipal council's decision to reject the proposal to hold a referendum on the separation of part of the municipality from the rest of the municipality (such referendums must be held for a new municipality to be created). The municipal council held that the prospective new municipality did not meet the condition of having at least 1,000 citizens. The appellant then challenged the constitutionality of the regional court's decision, adding to its appeal a request for the revocation of the provision of the Municipalities Code that states that a new municipality must have at least 1,000 citizens.

The appellant presented two different arguments. Firstly, it held that the condition was an obstacle to the exercise of the right to self-government. Secondly, it presented the additional argument that the relevant provision should be interpreted in such a way that the concept of citizen also included citizens of other European Union Member States.

Basing its reasoning on a comparative law study, the Ústavní soud found that the first argument was unfounded, declaring that the State had the right to decide the minimum number of citizens in a new municipality with a view to ensuring that it can be managed efficiently. The fact that there are a lot of municipalities with smaller populations cannot be viewed as discriminatory since this is a natural consequence of the development of the

populations of these municipalities over time.

However, with respect to the interpretation of the concept of a citizen for the purposes of meeting the conditions for creating a new municipality, the Ústavní soud rejected the regional court's restrictive reasoning. It reminded those concerned of its established case law, according to which national law, including constitutional order, must be interpreted consistently with EU law (see *Reflets no. 2/2006*, p. 21 [only available in French]). In this regard, the Ústavní soud stressed that the regional court's restrictive interpretation could lead to a situation where an EU citizen who lived in the municipality but did not have Czech nationality could be entitled to vote in the referendum on the separation of a part of the municipality but would not be taken into account when it came to setting out the conditions for creating the new municipality.

Furthermore, the Municipalities Code bestows the rights of a citizen of a municipality upon any citizen from a foreign country who is aged over 18 and is registered as a permanent resident of that municipality, on the condition that there is an international agreement providing for that. Consequently, the Ústavní soud ruled that EU citizens who have registered their residence in a municipality must be considered as citizens of that municipality when determining the number of citizens in a prospective new municipality, since the Treaty on the Functioning of the European Union and the Municipalities Code give such citizens the right to participate in municipal administration. For these reasons, the Ústavní soud overturned the regional court's decision and sent the case back for a new decision to be made.

Ústavní soud, judgment of 19 April 2010, no. IV. ÚS 1403/2009, <http://nalus.usoud.cz>.

IA/32289-A

[PES] [VNK]

European Union citizenship – Directive 2004/38/EC of the European Parliament and of the Council – Right to move and reside freely within the territory of the Member States – Exemptions – Reasons of public law and order – Restrictive interpretation

The Nejvyšší správní soud (Supreme Administrative Court) set aside the decision of the Městský soud v Praze (Prague Municipal Court), which had rejected an action for annulment of a decision of the Alien and Border Police nonsuited the application for a permanent residence permit submitted by the appellant – a third country national – for reasons of public law and order.

In the case in point, the Alien and Border Police presented two arguments to justify the rejection of the aforementioned application. Firstly, the Alien and Border Police found that a false paternity declaration declaring the appellant to be the father of the son of a Czech national (who had received a certain sum of money in exchange for her cooperation) constituted fraudulent evasion of the law. Secondly, the Alien and Border Police pointed out that the appellant had entered Czech territory illegally and without travel documents, which resulted in the appellant being sentenced to leave Czech territory (which he did not do). These events led the Alien and Border Police to the conclusion that there were legitimate fears that the appellant could pose a threat to public law and order in the future.

The Nejvyšší správní soud found that the concept of public law and order had to be interpreted in line with Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and the relevant case law of the European Court of Justice. In this connection, the Nejvyšší správní soud also referred to its own case law, according to which limits on the right of EU citizens and their family members to enter and reside in the EU should be viewed as exceptional measures, which implies that the concept of public law and order should be given a restrictive interpretation and that Member States cannot determine its scope unilaterally.

With regard to the relationship between criminal offences and exemptions from free movement of persons, the Nejvyšší správní soud reiterated that one (or several) criminal conviction(s) was not in itself enough to justify an exemption. The court argued that according to the directive, and especially in

light of consistent interpretations in the case law of the European Court of Justice, the only type of behaviour that could justify a restriction on free movement for reasons of public law and order would be behaviour that is clearly more serious than a petty crime as defined in the relevant Criminal Code. Furthermore, in the court's view, Czech lawmakers have reduced the range of crimes likely to breach public law and order by transposing Directive 2004/38/EC of the European Parliament and of the Council in such a way that only a serious breach of public law and order could result in a rejection of an application for a residence permit. The Nejvyšší správní soud inferred from this that the Czech law applies the definition "breach of public law and order" to more serious offences than provided for in the directive. It follows from this that restrictions on the right of EU citizens and their families to enter and reside in the EU based on public law and order can only be justified if an extremely serious criminal offence has been committed.

In the interests of exhaustiveness, the Nejvyšší správní soud added that in a case relating to a marriage of convenience, it had ruled that an alien's behaviour posed a threat to public law and order. In the court's view, the same conclusion could be drawn in the case in point. Nevertheless, the decision of the Městský soud v Praze was not properly justified as it was based on the sentences imposed on the appellant and did not examine the nature of the appellant's criminal offences with regard to their impact on the threat posed to public law and order.

*Nejvyšší správní soud, judgment of
25 February 2010, no. 2 As 77/2009-63,
www.nssoud.cz*

IA/32254-A

[PES] [VNK]

United Kingdom

***Competition – Community rules –
Infringement by a company – Charges made
to another company given the economic and
legal links between them – Appellant
requesting a preliminary ruling – Refusal by
the national court***

In a judgment handed down on 29 July 2010, the High Court (Chancery Division) ruled that

it was not required to refer a request for a preliminary ruling to the European Court of Justice. The preliminary questions concerned the circumstances in which the English courts could make a declaration of non-liability for a breach of Article 101 TFEU by a company when the company in question is the subject of an ongoing investigation by the European Commission.

Following an investigation into the market for copper and copper alloy fittings, the Commission concluded, in its decision of 20 September 2006, that there was a cartel involving several companies on the market, an arrangement that contravened Article 101 TFEU. It noted that three of the companies, namely Advanced Fluid Connections PLC, IBP Limited and IBP France SA, had participated in the cartel until 1 April 2004. The company IBP France SA was the party found "directly liable" for the infringement, while Advanced Fluid Connections PLC and IBP Ltd were found jointly and severally liable in their capacity as parent companies of IBP France SA.

At the time of the decision of 20 September 2006, Advanced Fluid Connections PLC was in administrative receivership and was unable to pay the fine imposed upon it by the Commission (€18.08 million).

IBP Ltd. (which had been fined €11.26 million) and IBP France SA (€5.63 million) could not pay their fines either. By a decision of the Companies Court, the latter two companies (hereafter referred to as "IBP Group") were placed under the administration of the company Deloitte with a view to restructuring the group by creating a new company, Conex Banninger Ltd. This new company acquired the assets and liabilities of IBP Group, including the fines imposed by the decision of 20 September 2006.

In light of the dissolution of IBP Group, the Commission, an unsecured creditor of the Group, adopted a decision asking Conex to provide all the information it required for identifying means of recourse against the companies that had acquired IBP Group's assets and liabilities. In the meantime, Conex asked the High Court to issue a declaration stating that Conex was not liable to pay the fines imposed by the Commission, arguing that it could not be held responsible for the

infringement mentioned in the Commission's decision of 20 September 2006. It further contended that the dispute concerned the interpretation of Article 101 TFEU and so would sending the European Court of Justice a request for a preliminary ruling on the power of a national court to examine preparatory measures by European institutions and the circumstances under which the liability of an insolvent company can be passed on to the company acquiring it.

The Commission contended that the High Court did not have the power to make a declaration or refer preliminary questions to the European Court of Justice on the grounds that a request for a preliminary ruling would interfere with the Commission's investigation.

The High Court rejected Conex's requests. While underlining that the High Court had the discretionary power to make a declaration and refer preliminary questions to the European Court of Justice, the Hon. Mr Justice Floyd found that the court should not exercise its power in the case in point, for three main reasons. Firstly, with reference to the case law of the European Court of Justice, and particularly the IBM (judgment of 11 November 1981, 60/81, ECR. p. I-2639) and Intel judgments (judgment of 27 January 2009, T-457/08R, ECR. p. II-12), according to which no appeal is possible against preparatory measures by the European institutions, the High Court considered that it would be "unrealistic" to suppose that the ECJ would change its position on investigation of preparatory acts. Secondly, the High Court found that in line with the principle set down by the case law in the Unibet case (judgment of 13 March 2007, C-432/05, ECR p. I-2271), the right to effective judicial protection had not been violated in the case in point. Finally, the High Court found that Conex could have filed an action for annulment against the Commission's decisions to request information and that this being the case, the High Court did not have to provide alternative remedies.

High Court (Chancery Division), judgment of 29 July 2010, Conex Banninger v. European Commission [2010] EWHC 1978 (Ch), www.bailii.org

IA/32628-A

[OKM]

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Social policy – Equal treatment of men and women in matters of social security – Council Directive 79/7/EC – National legislation refusing to grant a retirement pension under the conditions for women to a person who had legally changed sex from male to female - Inadmissibility

The Court of Appeal for England and Wales was asked rule on the appeal by a transsexual woman against the rejection by lower courts (Upper Tribunal and Appeal Tribunal) of her appeal against a decision by the Secretary of State for Work and Pensions that only accorded her pension rights from her 65th birthday (65 being the statutory retirement age for men in the United Kingdom). The court found that Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security was directly applicable given that its provisions are unconditional and sufficiently clear and that the United Kingdom had not taken national transposition measures within the set timeframe.

The appellant, Ms Timbrell, was born on 17 July 1941 and was registered as male on her birth certificate. She was later diagnosed with gender dysphoria and underwent gender reassignment surgery on 3 May 2001. On 6 August 2002, she applied to the Inland Revenue National Insurance Contributions Office to receive her state retirement pension, which she asked to be back-dated to 17 July 2001, the date of her 60th birthday, since under national law, 60 is the pensionable age for women born before 6 April 1950.

On 1 July 2004, the Gender Recognition Act 2004 (hereafter referred to as "the 2004 law") was passed. It came into force on 4 April 2005. This law allows people who have already changed gender or who intend to undergo gender reassignment surgery to request a gender recognition certificate, on the basis of which they can gain almost total recognition of their sex change.

However, the law was not retroactive. Consequently, the legal basis on which the appellant founded her request was that of the previous legislative system. Before the 2004 law came into force, English law did not allow transsexuals to receive a state pension from a date other than that on which they reached the statutory retirement age for their original gender

(65 for men and 60 for women).

In an identical case brought before the European Court of Justice following a request for a preliminary ruling (*Richards v. Secretary of State for Work and Pensions*, C-423/04, ECR p. I-3585), the ECJ ruled that Article 4(1) of the directive should be interpreted as precluding legislation that denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment, entitlement to a retirement pension on the grounds that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

The Court of Appeal followed the European Court of Justice's reasoning in the case in point and ruled that the legislative framework in the United Kingdom prior to the entry into force of the 2004 law discriminated against transsexuals within the meaning of Article 4(1) of Council Directive 79/7/EEC. The decisions of the lower courts were quashed.

Court of Appeal for England and Wales (Civil Division), judgment of 22 June 2010, Timbrell v. Secretary of State for Work and Pensions [2010] EWCA Civ 701, www.bailii.org

IA/32629-A

[OKM]

Slovakia

Approximation of laws – Trademarks – Council Directive 89/104/EEC – No genuine use of the trademark – Concept of proper reasons for non-use – Negotiations on a trademark licence agreement – Exclusion – Existence of a website where the goods cannot be viewed or purchased not viewed as genuine use of the trademark

In its judgement of 18 February 2010, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, hereafter referred to as “the Supreme Court”) dealt with the issue of non-use of an international trademark by its holder on Slovak territory for a continuous period of five years.

In the case in point, the trademark holder (the appellant) asked the krajský súd (regional court, hereafter referred to as “the regional court”) to rule on an application for the

investigation of a decision by the Slovak Intellectual Property Office (the defendant) by which the defendant had revoked the appellant's rights to the trademark on the grounds that there had been no genuine use of the trademark in Slovakia for a continuous period of five years. The regional court, which was the court of first instance, dismissed the application because the appellant had not demonstrated genuine use of the trademark over the aforementioned five-year period, which elapsed before proceedings began before the Intellectual Property Office. The court did not uphold the appellant's argument, namely that the trademark had not had genuine use on Slovak territory because of trademark licensing negotiations between itself and the party requesting that the trademark be made invalid. The company with which the appellant claimed to have been conducting negotiations was headquartered in Poland, meaning that there was no reason for the trademark not to be used in Slovakia.

The appellant appealed against this decision, arguing that to the extent that the trademark is used on the Internet and the wording of the trademark is registered as an Internet domain, there can be no reasonable doubt as to its genuine use or its perception by the Slovak public. The appellant then contested that the law on trademarks did not set out proper reasons for non-use of the trademark. It therefore followed, in the appellant's view, that any reason to the trademark holder's advantage could be cited. Moreover, the appellant's efforts to issue a licence for its trademark could not be viewed as a lack of interest in the trademark's use. Negotiations for the issue of an exclusive licence in Slovakia should, in the appellant's view, be considered a legitimate reason for non-use of the trademark.

However, the Supreme Court upheld the defendant's arguments and confirmed the regional court's judgment. It concluded that licensing negotiations could not be viewed as an obstacle preventing use of the trademark, regardless of the appellant's wishes. On the contrary, licensing negotiations are directly dependent on the trademark holder. Besides this, the existence of a German-language website where the goods for sale cannot be seen or purchased and which does not feature a product catalogue or online shop cannot be viewed as use of the trademark. Genuine use of a trademark must involve goods or services in relation to consumers. Mere information on

a website – and a German-language website at that – is therefore insufficient.

Najvyšší súd, judgment of 18 February 2010, 3 Sžhuv 4/2009,
nssr.blox.sk/blox/cms/main/sk/rozhodnutia/id11/linkState/formDisplay/displayForm/form/displayAttr/pdf/upload/binary/3_Szhuv_4_2009.pdf

IA/32292-A

[VMAG]

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Approximation of laws – Procurement procedures of entities operating in the water, energy, transport and postal services sectors – Directive 2004/17/EC of the European Parliament and of the Council – Principle of not discriminating between tenderers – Requirement for contracting entities to explicitly mention in the contract notice the possibility of recognising professional qualifications obtained by tenderers in their Member State of establishment

In its judgment of 4 May 2010, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, hereafter referred to as “the Supreme Court”) ruled on the issue of discrimination in the context of public procurement.

In this case, the appellant had filed an action against the Slovak Public Contracts Office (the defendant). The aim of the action was to have examined a decision of the Public Contracts Office requiring the appellant, as a contracting entity, to remove the discriminatory conditions that it had included in its contract notice.

In the case in point, the appellant had launched an open award procedure for the construction of a station in Slovakia. A foreign tenderer (with the status of intervener in the dispute) filed grievances against the conditions in the contract notice, under which tenderers had to submit certificates and diplomas issued by the competent Slovak authorities as proof of their technical or professional capacities and their possession of other required knowledge. The tenderer believed these conditions to be discriminatory since they could be met more easily by tenderers established in Slovakia. The Public Contracts Office found in favour of the foreign tenderer and ordered the appellant to remove the aforementioned discriminatory conditions.

In the context of judicial control of administrative decisions, the krajský súd (regional court, hereafter referred to as “the regional court”), which was asked to rule on the dispute as the court of first instance, found in favour of the appellant and overturned the defendant’s decision on the grounds that construction-related activities are so specific that it is vital to focus on the conditions guaranteeing safety during construction. Furthermore, although the appellant did not mention in the contract notice the possibility of recognising foreign professional qualifications, it neither blocked nor ruled out the option of submitting diplomas and certificates issued by the competent authorities in the Member State of establishment.

Upon examination of the regional court’s decision, the Supreme Court came to the conclusion that the appellant’s appeal was unfounded and should have been dismissed. When outlining its reasoning, it underlined that in order to comply with the principle of non-discrimination and equal treatment, it should be mentioned in the contract notice that diplomas and certificates drawn up in line with national legislation in the Member State of establishment and submitted by foreign tenderers could be recognised in Slovakia. Failure to provide this information may discourage non-Slovak tenderers from bidding and, as such, constitutes discrimination. Although the appellant informed the foreign tenderer that the certificates required for the contest could be issued in the Member State of establishment in response to the foreign tenderer’s complaints, this did not remedy the breach of the principle of non-discrimination. Uncertainty among non-domestic tenderers as to the scope of their rights and responsibilities should be dispelled in the call for tenders itself.

Najvyšší súd, judgment of 4 May 2010, 5 Sžf 37/2009,
nssr.blox.sk/blox/cms/main/sk/rozhodnutia/id11/linkState/formDisplay/displayForm/form/displayAttr/pdf/upload/binary/5Szf_37_2009.pdf

IA/32293-A

[VMAG]

Sweden

Freedom to provide services – Restrictions on games of chance and lotteries – National law prohibiting the promotion of all foreign

betting and games of chance

Following the European Court of Justice's judgment in case C-432/05 (judgment of 13 March 2007, Unibet, ECR p. I-2271) on a national law on games of chance and lotteries, the foreign-registered operator of Internet-based games of chance, Unibet International Ltd/Unibet London Ltd. filed an action for damages with the Swedish courts with a view to receiving compensation for the profits it claimed to have lost after being banned from promoting its business activities in Sweden.

Basing its reasoning on Article 56 TFEU (Article 49 EC at the time the writ was issued), the appellant argued that Article 38 of the Swedish law (1994:1000) on lotteries and games of chance, which prohibits the promotion of games or lotteries organised within Sweden or outside Swedish territory by a gaming services operator who has not received prior authorisation, constitutes a restriction creating a monopoly that favours public companies (and, by extension, the Swedish State) and does not pursue an aim of general interest. Consequently, the system has caused the appellant to lose profits as it favours Swedish public or semi-public companies.

In a judgment issued on 2 March 2010, the court of first instance, the Eskilstuna Tingsrätt, ruled that the Swedish law did not breach Community law.

Taking the case law of the European Court of Justice as its basis, (judgment of 24 March 1994, Schindler, C-275/92, ECR p. I-1039; judgment of 21 September 1999, Läära and others, C-124/97, ECR p. I-6067; judgment of 21 October 1999, Zenatti, C-67/98, ECR p. I-7289; judgment of 6 November 2003, Gambelli and others, C-243/01, ECR p. I-13031; judgment of 6 March 2007, Placanica and others, C-338/04, C-359/04 and C-360/04, ECR p. I-1891; judgment of 8 September 2009, Liga Portuguesa de Futebol Profissional and Bwin International, C-42/07, not yet published), the Eskilstuna Tingsrätt noted that the Swedish law did restrict freedom to provide services, but that this restriction was justified as it pursued aims of general interest, most notably fighting fraud and crime and protecting consumers and public health. Despite heavy promotion and advertising (and sometimes

even aggressive advertising) by public companies, the court found that the restriction was a vital, integral part of the Swedish law on games of chance and lotteries, since it made it possible to maintain a high level of protection and combat the damaging social effects of the aforementioned activities through control by State companies. The restriction is therefore proportionate to the aim being pursued. The court considered that it had not been proven that the main aim of the system was to make profits for the State treasury. In view of the market monitoring and control system run by the Lotteries and Games of Chance Inspectorate (Lotteriinspektionen) and the fact that the Swedish government applies certain conditions to the granting of the authorisations mentioned above, the Eskilstuna Tingsrätt ruled that the law was consistent with Article 56 TFEU and dismissed the compensation claim.

Eskilstuna Tingsrätt, judgment of 2 March 2010, nos. T-2417-03 and T-2418-03, www.domstol.se

IA/32619-A

[LTB] [LZE]

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Procedural law – Application for compensation for non-material and purely pecuniary damages caused by the behaviour of the national authorities – Jurisdiction

In three judgments, two of which were issued in December 2009 and one in June 2010, the Högsta Domstolen (Supreme Court) ruled on the jurisdiction of the Swedish courts with regard to an application to incur the Swedish State's fault-based extra-contractual liability for damages caused by the exercise of the authority by the parliament and the government and the excessive length of the judicial proceedings pertaining thereto. The cases raised questions as to the circumstances under which the European Convention on Human Rights (hereafter referred to as "the Convention"), and more specifically, Articles 6 and 13, may be relied upon.

The appellants had filed an application with the Swedish courts in which they claimed compensation for the damages they asserted

that they had sustained as a result of a bilateral agreement concluded between Sweden and the former GDR in 1986. The agreement in question settled the matter of compensation due to Swedish former owners of confiscated immovable property in the GDR. Since the conclusion of the agreement, owners have been unable to exercise their rights relating to the immovable property.

In the first case, which concerned the ownership of the immovable property, the appellants sued the Swedish State for misconduct or negligence committed as a contracting party to the aforementioned agreement. They based their application directly on Article 13 of the Swedish law on compensation, the Skadeståndslagen (hereafter referred to as “the SkL”). The Stockholm court of first instance, which was the first court asked to rule on the matter, ruled on the substance of the case in an interlocutory judgment and declared that it was unable to settle the compensation claim. It referred to the SkL which, in its view, provides that the Swedish State may not be sued in court because if a decision adopted by the parliament. The case then went to the Högsta Domstolen, which determined that a compensation claim connected to a parliamentary or government decision should be lodged with that same body in accordance with the rules of *forum privilegiatum*, under which this provision must be applied *ex officio* by the court first asked to rule on the matter. The argument linked to Article 13 of the Convention does not affect the Högsta Domstolen’s power. It quashed the interlocutory judgment and referred the case back to the court of first instance.

In the second case, which related to compensation, the appellant had claimed compensation for the non-material damage claimed to have been inflicted by the excessive duration of judicial proceedings (thirteen years) and the clear incorrect application of law before the Swedish courts. He filed his claim directly with the Högsta Domstolen, basing this decision on the rule of *forum privilegiatum*. However, a claim brought before this court would have to relate to bodily damage, material damage, purely pecuniary damage or damage sustained as a result of certain crimes. Nevertheless, the Högsta Domstolen stated that there was also an individual right to compensation based on the Convention, existing in parallel to the SkL.

Forum privilegiatum does not apply to compensation claims under this second system. Application by analogy of *forum privilegiatum* is not possible either, for various reasons. Consequently, in the case in point, the court ruling on the case is determined by the desired judicial effect and not the argument used. The court dismissed the application, holding that in the present situation, the issue could not be resolved satisfactorily without involving the lawmakers.

The third judgment, which was handed down in June 2010, also concerned a claim for compensation for both non-material damages and purely pecuniary damages said to have been incurred due to excessively long proceedings. The claim was based on both the SkL and Article 6 of the Convention. Since the appellant was claiming for purely pecuniary damages, the Högsta Domstolen declared that it had jurisdiction to rule in the matter under the *forum privilegiatum* rule. However, compensation claims relating to non-material damage are outside of the Högsta Domstolen’s jurisdiction, with the court of first instance having the jurisdiction over such matters. Despite this, the Högsta Domstolen found that it had jurisdiction since the claim for compensation was based on the slow handling of the appellant’s case and the claim could not be heard by other courts. The Högsta Domstolen also clarified that the infringements of the rights granted by Articles 6 and 13 of the Convention had to be dealt with separately. It then found that taking more than ten years to deal with a case and passing it around six different courts constituted a breach of the obligation to rule on the case within a reasonable timeframe.

Swedish law therefore makes a distinction between claims for compensation for purely pecuniary damages and for non-material damages caused by the national authorities, meaning that the appellant has to file several different applications with several different courts. This issue has led Swedish legal experts to suggest amending domestic law so as not to breach Sweden’s international obligations. Besides this, the third judgment by the Högsta Domstolen showed that it was possible to directly invoke a State’s extra-contractual liability before the supreme court, on the condition that the matter at hand is compensation for non-material damages combined with purely pecuniary damages.

Högsta Domstolen, judgment of

17 December 2009, NJA 2009 s. 873
(no. T-2430-09); Högsta Domstolen, judgment
of 17 December 2009, no. Ö 2765-08; Högsta
Domstolen, judgment of 16 June 2010,
no. T-333-09, www.domstol.se

IA/32631-A
IA/32630-A
IA/32632-A

[LTB] [LZE]

***Transfer of sentenced persons – Proceedings
launched by the administering State – Prior
permission from the sentencing State –
European arrest warrant***

In an order issued on 30 September 2010, the Högsta Domstolen determined that there was no obstacle to the Polish State launching proceedings against a person who had been transferred under the Convention on the Transfer of Sentenced Persons, which was signed at Strasbourg on 21 March 1983. The person in question, a Polish national, had been sentenced to ten years' imprisonment for serious drug smuggling offences. Under a special provision of the judgment, the person was also sentenced to be expelled from Sweden upon serving the custodial sentence, and banned from returning there. The sentenced person was then involuntarily transferred to Poland in line with the aforementioned Convention. Two years later, the Polish Ministry of Justice, referring to Article 3.4(a) of the Additional Protocol to the Convention, asked Sweden for permission to launch proceedings against the sentenced person for actions that had taken place before the transfer. The person was suspected of being involved in a criminal organisation and committing more breaches of drugs laws, among other things. In Sweden, it falls to the government to make decisions on such requests once the Högsta Domstolen has ruled and issued its order.

The principle of speciality (“specialitetsprincipen”) applies to the transfer of sentenced persons. According to this principle, judicial proceedings cannot be launched nor a sentence enforced for previous crimes, except for the crimes covered by the transfer. However, a person who has been expelled from a country for committing a crime can, under certain conditions, be prosecuted in the administering State – for instance, if the sentenced person could have been extradited to the State in question for the

crime. Extradition for a crime committed in Poland would entail application of the Swedish law on the European arrest warrant (lag (2003: 1156) om överlämnande från Sverige enligt en europeisk arresteringsorder). According to Section 2, Article 2 of this law, the principle to be applied is that a person can only be extradited if they have also committed criminal offences in Sweden and if the other State intends to imprison the person for one year or longer. However, if the offence in question is listed in the annex to the law and the other State plans to imprison the person for three years or longer, this principle does not apply. Involvement in a criminal organisation is not recognised as an offence in Swedish criminal law. Yet it is listed in the annex to the aforementioned law and carries a maximum sentence of five years' imprisonment in Poland. The other offences are all breaches of drugs law and the sentenced person has contested them. Nevertheless, the Högsta Domstolen stressed that it was up to the Polish court to rule on the substance of the case. In the end, the Högsta Domstolen ruled on the remaining issues, namely, it determined that the extradition did not violate the European Convention on Human Rights, that the extradition was not linked to offences that had already been ruled on in a binding decision and that the offences had not taken place, in part or in full, on Swedish territory. The Högsta Domstolen concluded that there was nothing to prevent proceedings being launched in Poland for the offences in question.

*Högsta Domstolen, order of
30 September 2010, no. Ö 450-10,
<http://www.domstol.se>*

IA/32633-A

[LTB]

B. Practice of international organisations

[No information was retained for this section]

C. National legislation

Belgium

New law on market practices and consumer protection

The law of 14 July 1991 on trade practices and consumer information and protection (generally known as the Trade Practices Act or LPCC) has been replaced with the new law of 6 April 2010 on market practices and consumer protection. This law, which came into force in May of this year, makes several major amendments to Belgian regulations in the area, in particular under the influence of ECJ case law. These changes include the lifting of the prohibition of linked offers (with some exceptions), as this prohibition had been deemed to be contrary to Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (judgment of 23 June 2009, VTB-VAB, joined cases C-261/07 and C-299/07, ECR p. I-2949). However, the ban remains in force in the case of linked offers when at least one of the components is a financial service (Article 72 of the new law). The ban on selling with a much reduced profit margin has also been dropped. However, selling at a loss remains prohibited, with some exceptions (Article 101 of the new law). In the area of distance contracts which do not cover financial services, the new law no longer prohibits consumers from being charged a deposit or price during the withdrawal period (Article 46 of the new law). This withdrawal period has also been changed to 14 calendar days. The company also has 30 days in which to fulfil the purchase order supplied by the customer. Should this not be done in time, the consumer may cancel the contract by notification, provided the company has not yet shipped the goods ordered or begun to supply the service ordered (Article 48(1) of the new law). Finally, it should be noted that the area of application of the new law does not include members of the liberal professions, dentists and physiotherapists, which may cause problems in terms of Belgium's compliance with its European obligations in the area of consumer protection.

Law of 6 April 2010 on market practices and consumer protection, Moniteur belge/Belgisch Staatsblad, 12 April 2010, p. 20803

[CREM]

France

Law on the opening up to competition and the regulation of the online gambling and gaming sector

The French law of 12 May 2010 put an end to

the gambling and gaming monopoly and opened up the online gambling and gaming sector to French and overseas operators. This concerns three types of online gambling: pari-mutuel betting on horse racing, pari-mutuel betting on sports and "cash games", which emphasise both chance and player skill (this excludes other forms of online gambling such as fruit machines). Until that time, French law reserved the organisation of online gambling and gaming for Française des Jeux (sports betting and other forms of gambling) and Pari Mutuel Urbain (bets on horse racing placed outside racetracks).

As a result, casinos were banned from offering online casino game services. In a case relating to online betting on horse racing, the Cour de Cassation issued a judgment on 10 July 2007 which referred expressly to European Court of Justice case law and overturned the decision by the Paris Cour d'Appel which prohibited the Zeturf Company from organising and taking bets on French territory. Further to this judgment, Zeturf applied to the Conseil d'État, which put two preliminary questions to the European Court of Justice (Conseil d'État judgment of 9 May 2008).

After receiving formal notice on 12 October 2006, France was the subject of a reasoned opinion of 27 June 2007 prior to an infringement action, according to which the restrictions imposed by French legislation on betting on sports and horse racing were not justified under the principle of freedom to provide services specified by Article 49 EC.

France was therefore obliged to yield and prepare to open up the organisation of online gaming and betting to competition.

Although the law of 12 May 2010 opens up online gaming and gambling to competition, it strictly regulates and limits access. Article 1 stipulates that "gaming and gambling are not an ordinary trade or service; under the principle of subsidiarity, they shall be strictly regulated as regards issues of law and order, public safety, health protection and the protection of minors". The law created an independent body which plays a central role in the newly created system: the Autorité de Régulation des Jeux en Ligne (ARJEL). At the operators' request, this body issues a renewable five-year permit which legalises the online gaming and gambling offer. The law includes measures against sites without permits and criminal and financial penalties in case of infringement.

According to a first report by ARJEL, as of 8 October 2010, around 40 activity permits (one per type of game) had been issued to 30 companies, and almost 2 million player accounts opened. ARJEL also reports that approximately 500,000 French citizens are active each week in the area of bets on sports and horse racing, as well as poker.

An “assessment report on the conditions and effects of the law” will be supplied by the government to the parliament within eighteen months of the coming into force of the law.

On 24 November 2010, the Commission stated that it was terminating the proceedings initiated in 2006 against France.

Law no. 2010-476 of 12 May 2010 on the opening up to competition and the regulation of the online gambling and gaming sector, JORF, 13 May 2010, www.legifrance.gouv.fr

[ANBD]

Greece

Decree no. 38 of 25 May 2010 concerning the recognition of professional qualifications

With a view to transposing the provisions of Directive 2005/36/EC of the European Parliament and of the Council, presidential decree no. 38 was adopted and came into force on 28 May 2010 further to the issuance of the requisite opinion by the Symvoulío tis Epikrateias (no. 42/2010).

The decree introduces the new regulatory framework for the recognition of professional qualifications on a national level, and is applicable to any citizen of a Member State desirous of pursuing a profession in Greece (“host Member State”), in a self-employed or employed capacity, in a Member State other than the one in which they have obtained their professional qualifications (“Member State of origin”). The beneficiary of the recognition may access all professions covered by this decree under the same conditions as Greek nationals. All professional activities, access to or pursuance of which is subject to the possession of professional qualifications determined by legal, regulatory or administrative provisions, are designated as “regulated professions” and are included in the area of application of the decree. Liberal professions are included in so far as they are regulated by the host Member State.

Professional qualifications are recognised on a

case-by-case basis, firstly on the basis of a general system for the recognition of formal qualifications, and secondly on the basis of the applicant’s professional experience. Moreover, the decree introduces automatic recognition of professional qualifications on the basis of the coordination of minimum training conditions in the case of architects and certain medical professions.

The decree appoints the relevant authority in charge of receiving and reviewing applications for recognition.

This authority may require that applicants undergo an adaptation traineeship or that they take an aptitude test should it be noted that:

- a) the duration of the training of which they provide evidence is at least one year shorter than that required by Greece, or
- b) the training they have received covers substantially different matters than those covered by the evidence of formal qualifications required in Greece, or
- c) the regulated profession in the host Member State comprises one or more regulated professional activities which do not exist in the corresponding profession in the applicant’s home Member State, and that difference consists in specific training which is required in the host Member State and which covers substantially different matters.

The applicants’ Greek language skills are also reviewed by this authority, in so far as they are required for the pursuance of the profession concerned.

Since the entry into force of Council Directive 89/48/EEC and Council Directive 92/51/EEC, the aim of which was the introduction of a general system for the recognition of professional qualifications, Greece had been condemned many times for failure to transpose. Two recent judgments by the European Court of Justice, of 2 July 2009 (C-465/08, *Commission v Hellenic Republic*, ECR p. I-116) and 4 June 2009 (C-427/08, *Commission v Hellenic Republic*, ECR p. I-98) also condemned Greece for failure to transpose Directive 2005/36/EC of the European Parliament and of the Council and Council Directive 2006/100/EC by the specified

deadlines. The aim of decree no. 38 is to set up a system which facilitates the free circulation of professionals between Greece and the other Member States, and thus to fulfil the aims of the said Directives.

Presidential decree no. 38, Alignment of national legislation on Directive 2005/36 concerning the recognition of professional qualifications.

Official Journal of the Hellenic Republic, ΦΕΚ no. Α'78, 25 May 2010, p. 1537-1652, www.et.gr

[GANI]

Ireland

Money laundering and terrorist financing

The Criminal Justice (Money Laundering & Terrorist Financing) came into force on 15 July 2010. This law completed the transposition into Irish law of Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. It should be remembered that in case C-549/08 (judgment of 1 October 2009, *Commission v Ireland*, ECR p. I-162), the ECJ condemned Ireland for failure to transpose Commission Directive 2006/70/EC as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis by the specified deadline.

Criminal Justice (Money Laundering & Terrorist Financing) Act 2010, www.irishstatutebook.ie

[SEN]

Iceland

Same-sex marriage

On 11 June 2010, Iceland unanimously adopted a law authorising persons of the same sex to marry. The 49 members of the Althing (parliament) voted in favour of a text which extended the area of application of marriage to unions between “a man and a man” and “a woman and a woman”. The new law will replace the “registered partnership” system extant in Iceland since 1996. Iceland is the seventh European country to legalise same-sex

marriage, after the Netherlands, Belgium, Spain, Norway, Sweden and Portugal.

www.althingi.is/alttext/138/s/0836.html

[SEN]

Italy

Legislation concerning State immunity

Law no. 98 of 23 June 2010 was adopted further to the many judgments by the Corte di Cassazione listed in *Reflets no. 3/2008*, p. 23 [available in French only].

In these 14 judgments (14199-14212) of 29 May 2008, the Corte di Cassazione determined in united chamber that the principle of State immunity, according to which the law courts of a State may not have jurisdiction with regard to other States for acts which constitute an immediate and direct manifestation of the exercise of powers conferred by public law and duties (*actes iure imperii*), does not apply when such acts take the form of crimes against humanity.

The court therefore deemed Italian courts competent to judge claims for damages made by Italian citizens against the Republic of Germany for damage incurred between 1944 and 1945 during their captivity and exploitation as forced labourers.

The Federal Republic of Germany subsequently filed an action before the International Court of Justice (hereafter referred to as “the ICJ”), once more requesting the application of the principle of State immunity, to ensure that the acts in question did not fall under the jurisdiction of Italian courts (see p. 5 of this issue of *Reflets*).

Due to the existence of pending proceedings before the ICJ, the relevant Italian regulations established that enforcement orders relating to judgments issued against other countries were to be suspended when the latter had taken action before the ICJ for the purpose of confirmation of the existence of State immunity.

Under the law, the effectiveness of the enforcement orders is suspended until 31 December 2011. This suspension shall end upon the publication of the ICJ ruling.

Prior to issuing enforcement or provisional orders concerning goods belonging to other countries, national courts shall ensure that no

proceedings are pending before the ICJ concerning State immunity.

Law of 23 June 2010, no. 98, di conversion del decreto-legge, 28.04.10, no. 63, recante disposizioni urgenti in tema di immunità di Stati esteri dalla giurisdizione italiana e di elezione degli organismi rappresentativi degli italiani all'estero, G.U. of 26 June 2010, no. 147

[VBAR]

Effectiveness of legal remedies relating to the award of public contracts

Further to the judgment by the Corte di Cassazione, issued in united chamber on 5 May 2010, no. 5291 (see *Reflets no. 2/2010*), the Italian State adopted a regulation to transpose Directive 2007/66/EC of the European Parliament and of the Council with regard to improving the effectiveness of review procedures concerning the award of public contracts, which gives administrative courts exclusive jurisdiction concerning all issues relating to the procedures for the award of public contracts, i.e. requests for the cancellation of contract award documents and requests for the cancellation of contracts signed by the public administration.

Decreto Legislativo of 20 March 2010, no. 53 transposing Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, G.U. of 12 May 2010, no. 84.

[VBAR]

Principle of mutual recognition of judgments in criminal matters

Legislative decree no. 161/2010 was adopted with a view to compliance with Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

This regulation specifies the definitions used in this area and identifies the relevant national

authorities and the conditions for the forwarding abroad of a judgment in a criminal matter, the procedure to be followed for the reception and forwarding of a judgment, and the conditions for the implementation of provisional detention measures.

Decreto Legislativo of 7 September 2010, no. 161, www.lexitalia.it

[VBAR]

Romania

Law on integrity in the performance of public functions and dignities

A new law on integrity in the performance of public functions and dignities has been in force since September 2010. Its adoption had become necessary further to judgment no. 415 of 14 April 2010 by the Curtea Constituțională, which declared the prerogatives of the National Integrity Agency to be unconstitutional.

This authority was established in 2007 at the recommendation of the European Commission during the process of Romania's accession to the European Union, and was in charge of reviewing and investigating statements on patrimony and interests, as well as incompatibilities and conflicts of interest. The Curtea Constituțională judged that the investigative powers of the National Integrity Agency's inspectors gave this administrative body a near-jurisdictional character and that the prerogative of proposing the confiscation of property was contrary to the constitutional presumption of lawful acquisition of patrimony. Moreover, as the statements were available on the Internet, the publication of certain personal data led to a violation of the right to privacy.

The new law (law no. 176/2010) amends the powers and procedure of the National Integrity Agency.

The inspectors review the statements on patrimony and interests. Should significant discrepancies (over €10,000) appear between observed changes to the patrimony during a public mandate or the performance of a public function and the income earned during this period, a first procedure is implemented at the Agency. An explanation is requested of the person under review, who may be assisted or represented by a lawyer and supply proof. Should discrepancies remain further to this

stage, the Agency's inspectors write an evaluation report which is forwarded to the tax authorities and criminal-prosecution bodies, as well as to the commissions of inquiry of the Curți de apel.

A commission of inquiry comprises two judges and a prosecutor. Once requested to rule on the case, this commission reviews the patrimony of the person under investigation and must issue a ruling within three months. Should it rule on the basis of the evidence supplied that the acquisition of the patrimony is not justified, the case is referred to the Curte de apel for a ruling.

The patrimony of an individual who has performed a public function or rank may be investigated within no more than 3 years as of the end of their mandate or cessation of their public function.

In order to comply with the Curtea Constituțională's ruling in the area of the protection of personal data, the new law specifies that certain identifying data concerning the person shall be made anonymous in the published versions of the statements on patrimony and interests.

Lege nr. 176 din 01.09.10 privind integritatea în exercitarea funcțiilor și demnităților publice, pentru modificarea și completarea Legii nr. 144/2007 privind înființarea, organizarea și funcționarea Agenției Naționale de Integritate, precum și pentru modificarea și completarea altor acte normative. Publicată în Monitorul Oficial nr. 621 din 02.09.10, www.integritate.eu/home/legislatie/legislatie-noua.aspx

[RUA]

United Kingdom

Reform of discrimination law

The Equality Act 2010 came into force on 1 October 2010 and comprehensively reforms British discrimination law. Its purpose is to clarify and consolidate existing legislation on discrimination and to ensure a uniform approach to this issue.

The most salient aspects of the reform are the anti-discrimination rights of the disabled and the rights of victims of indirect discrimination, e.g. those caring for dependent relatives.

However, this reform has not gone uncriticised. A number of labour-law specialists have pointed out that the new Act goes too far. Prior to the reform, the various laws protected individuals against discrimination for characteristics specific to them, e.g. disability, age or gender. The new 2010 Act has considerably extended the concept of discrimination. Henceforth, age-related jokes in the workplace might make employers liable to the payment of damages even at the request of staff who are not elderly. Employees would also be able to sue their employers for age-based discrimination if not taken into consideration for a promotion due to the fact that they were taking care of an elderly dependent after work and were therefore assumed to be less focused on their work.

How the courts will resolve disputes relating to the application of the Act remains to be seen.

Equality Act 2010,
www.legislation.gov.uk/ukpga/2010/15/contents

[OKM]

Constitutional Reform and Governance Act

The Constitutional Reform and Governance Act 2010 concerns the democratic and parliamentary procedures which apply to the various parliamentary bodies as well as in other political areas such as the Civil Service (which is given its own legal basis for the very first time).

As part of a trend towards increasing the responsibility and transparency of both the Government and Parliament, the purpose of the new Act is to create a legal basis for Parliament's right to supervise international treaties, the Civil Service and the separation of powers, in so far as the Prime Minister no longer has the power to appoint the members of the Supreme Court.

A number of items in the draft Act were not included in the final version, such as the abolition of the function of hereditary peer in the House of Lords, as well as the ability to expel a peer in the event of a crime or other serious misconduct.

Constitutional Reform and Governance Act 2010,

<http://www.legislation.gov.uk/ukpga/2010/25/contents>

[OKM]

Devolution to Northern Ireland

The Northern Ireland devolution process continues with the coming into force on 12 April 2010 of the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010. This order gives Northern Ireland its own competencies relating to the organisation of its judiciary (Northern Ireland Courts and Tribunals Service). Further to this order, as well as to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, the Northern Ireland Assembly adopted a law on the creation of a decentralised Department of Justice (Department of Justice Act 2010 (Northern Ireland)).

Northern Ireland Act 1998 (Amendment of Schedule 3) Order,
<http://www.legislation.gov.uk/uksi/2010/977/contents/made>

Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010,
<http://www.legislation.gov.uk/uksi/2010/976/contents/made>

Department of Justice Act 2010 (Northern Ireland),
<http://www.legislation.gov.uk/nia/2010/3/contents>

[OKM]

D. Extracts from legal literature

General principle of non-discrimination on the grounds of age and direct horizontal effect of directives

“The body of case law relating to non-discrimination in the workplace on the grounds of age is increasing day by day” (Simon, D., “L’invocabilité des directives dans les litiges horizontaux: confirmation on infléchissement?” Europe, March 2010, p. 4). Indeed, “since the Mangold judgment of 22 November 2005 [C-144/04, ECR p. I-9981; see *Reflets no. 2/2007*, p.28 [available in French only]], which enshrines the principle of

non-discrimination based on age, the ECJ is frequently called upon to issue judgments on complex issues concerning the compatibility of national labour-law provisions with the said principle” (Aubert, M., Broussy, E. and Donnat, F., “Travail – Discrimination en fonction de l’âge” column, AJDA, 15 February 2010, p. 249). In this respect, “the Küçükdeveci judgment [judgment of 19 January 2010, C-555/07, not yet published], the latest [...] in a trilogy of judgments by the European Court of Justice in January 2010 on non-discrimination on the grounds of age [see also the judgments of 12 January 2010, Wolf, C-229/08, and Petersen, C-341/08, not yet published], although only one instance of a wealth of case law relating to Council Directive 2000/78/EC” (Murphy, C., “Politique sociale - Arrêt Küçükdeveci”, RDUE, 2/2010, p. 379), has attracted particular attention. “[Beyond] its implications in the area of social policy, this judgment, which was issued as a Grand Chamber, with observations submitted by six Member States, directly concerns the scope of the directives and the effect of the general principles of Union law, as well as the related mission of the national jurisdictions” (Simon, D., op. cit., p. 4.). This judgment is of great importance in several ways. First of all, it constitutes the expression of “in-depth verification of the existence of discrimination. It also specifies the scope of the Mangold judgment, both in terms of the determination of the reference standard – primary or secondary law –, compatibility with which requires appreciation, and of the disputed issue of the direct effect of the said principle and of Council Directive 2000/78/EC within the scope of a dispute between private individuals” (Aubert, M., Broussy, E. and Donnat, F., op. cit., p. 249-250).

Concerning the issue of whether the disputed national legislation should be considered to be discriminatory, the judgment is characterised by an extremely close review “by the ECJ of the national legislation in an area in which it accepts the existence of a wide margin for appreciation by the Member States in the choice of measures which may be adopted” (ibid., p. 250), a review based on a fairly strict interpretation of the principle of proportionality. “The closeness of this review is based on the concept of strict standard of review established by *Age Concern England* [judgment of 5 March 2009, C-388/07, ECR p. I-1569] and confirmed by the

[abovementioned] Wolf and Petersen judgments, which puts an end to the limited review observed in the Lindorfer [judgment of 11 September 2007, C-227/04 P, ECR p. I-6767] and Palacios de la Villa [judgment of 16 October 2007, C-411/05, ECR p. I-8531] judgments” (Murphy, C., op. cit., p. 384). Should the disputed system’s failure to comply with EU law, as noted by the ECJ further to this proportionality review, “naturally lead to its non-application, [...] the choice of a directive on which to base” a ban on age-related discrimination “might affect such a solution” (Cavallini, J., “Délai de préavis de licenciement et principe général de non-discrimination en fonction de l’âge”, *La semaine juridique - édition sociale*, no. 8, 23 February 2010, p. 31-32). Indeed, it is known that “the ECJ, through consistent case law (see in particular the judgment of 14 July 1994, Faccini Dori, C-91/92, ECR p. I-3325), has consistently set aside the horizontal effect of directives, thereby signifying that they could not be invoked in the case of disputes between private individuals. [Although] there are many exceptions to this principle, [in particular] the obligation of consistent interpretation in the wider sense as expressed in the Pfeiffer case [judgment of 5 October 2004, C-397/01 to C-403/01, ECR p. I-8835] and the obligation of Member States to remedy damage caused by poor transposition [see in particular the judgment on which this case law is based, the judgment of 19 November 1991, Francovich, C-6/90 et C-9/90, ECR p. I-5357]”, the fact remains that “such palliatives to [...] the lack of a direct horizontal effect” in directives sometimes do not suffice to adequately protect the rights of private individuals under Community law (Murphy, C., op. cit., p. 384). The obligation of national courts to interpret “their national legislation in the light of the directives in order to comply with the latter [for instance] does not enable them [...] to give a contra legem interpretation of national texts”. As to the ability of private individuals to take action on the basis of State liability, “the strict conditions imposed, such as the existence of a sufficiently obvious violation of an EU standard, make its chances of success remote” (Marciali, S., “Invocabilité des directives et des droits fondamentaux dans les litiges entre particuliers devant les juridictions nationales”, *Petites affiches*, no. 51, 12 March 2010, p. 3-5).

Although, despite the stringent criticism it has

sometimes attracted [see in particular Emmert, F. and Pereira de Azevedo, M., “L’effet horizontal des directives - La case law de la CJCE: un bateau ivre?”, *RTDE*, 1993, p. 503, or more recently Craig, P., “The legal effect of directives: policy, rules and exceptions”, *ELRev.*, 2009, p. 349], the ECJ’s position on direct horizontal effect appeared to be deeply rooted, that fact that it was able “to rule in the Mangold case [abovementioned] that national legislation contrary to Council Directive 2000/78/EC might be set aside by a national judge in the case of a dispute between private individuals concerning the basis of the principle of non-discrimination on the grounds of age made it possible to question the preservation of this traditional case law” (Aubert, M., Broussy, E. and Donnat, F., op. cit., 250). However, this was only “one of the potential interpretations of a highly ambiguous judgment. The Küçükdeveci judgment has the merit of clarifying this point, as the European Court of Justice explicitly [reaffirms] the directives’ lack of direct horizontal effect” (Marciali, S., op. cit., p. 5). Although, in his Opinions concerning the case, the Advocate General, in accordance with a distinction long enshrined by the doctrine [see in particular Simon, D., *Le système juridique communautaire*, 3rd ed., Paris, PUF, 2001, p. 437], “requested that the ECJ adopt a solution which far exceeded the facts of the case by disconnecting [...] direct effect from [...] the right to plead the exclusion of national legislation, these proposals were not followed by the Court, which is hardly surprising. Although the Court has developed a case law which requires that national courts interpret national law in accordance with the Directive in horizontal cases, without imposing contra legem interpretations of national law, it must be deduced that it set aside the right to plead the exclusion of national legislation in such disputes” (Marciali, S., op. cit., p. 5).

While confirming that “the directives have no direct horizontal effect [...], the ECJ does provide a solution for circumventing this lack when the Directive affirms a basic right [...]. By merging into a single proposition what the Mangold judgment separated into two distinct propositions” (ibid., p. 6), it “sets aside the [disputed] national provision by using the principle of non-discrimination on the grounds of age as a basis, as specified by the Directive” (Murphy, C., op. cit., p. 385). A reasonably logical decision when one considers that in its case law the Court has already “acknowledged

a horizontal application of the general principles [...] set out in a Treaty provision in certain cases [see in particular the judgments of 12 September 1974, Walrave, 36/74, ECR p. 1405 and of 6 June 2000, Angonese, C-281/98, ECR p. I-4139; see *Reflets n° 1/2001*, p. 23 [available in French only]], and has even gone so far as to admit “the ability to invoke the fundamental right to take class action, which forms an integral part of the general principles of law, in a dispute between private individuals [see judgments of 11 December 2007, Viking, C-438/05, ECR p. I-10779 and of 18 December 2007, Laval, C-341/05, ECR p. I-11767)” (ibid.).

Although it is “easy to measure the interest of approximating a general principle of EU law and a directive containing the same precepts” - the principle which extends “the values of the Directive to situations which it does not cover, in this case relations between private individuals” (Cavallini, J., op. cit., p. 33), “the fact of circumventing the directives’ lack of direct horizontal effect by acknowledging the horizontal effect of the rights they express [...] is open to a variety of criticisms [...]. The first of these relates to the origin of the principle [...]. [Whereas] in the Mangold judgment the general principle of non-discrimination on the grounds of age rested only on shaky bases: an evasive reference to the international instruments and constitutional traditions common to the Member States [...], the Küçükdeveci judgment is more specific, as it adds a reference to Article 21 of the Charter of Fundamental Rights [...], which enshrines this interpretation of the principle of non-discrimination” (Marciali, S., op. cit, p. 6). Indisputably, “by invoking the Charter, the Court strengthens the legitimacy of the principle and moderates the criticisms made in the wake of the Mangold judgment, which disputed the existence of such a principle in the constitutional traditions of the Member States and in the [international] instruments, as the latter do not clearly establish the existence of such a principle (see in particular Muir, E., “Enhancing the Effects of Community Law on National Employment Policies: the Mangold case”, *ELRev.*, 2006, p. 879-889) [...]. However, the laconic reference to the Charter in Paragraph 22 refers to its legal value, without reference to its application *rationae temporis* [...], thus leaving open the question of its exact scope” (Murphy, C, op. cit., p. 383). In such a context, “the reference to Article 6(1) TEU, which stipulates that the

Charter [...] has the same legal value as the Treaty, comes as a surprise. Although this value has been acquired since the coming into force of the Lisbon Treaty, it did not exist at the time the case was filed before the national court, and this reminder was therefore totally irrelevant to the answer to the [preliminary] question. It would have been preferable for the Court to content itself with making a reference to the proclaimed Charter by merely acknowledging its confirmative value” (Marciali, S., op. cit, p. 6-7).

A “second criticism relates to the link between this case law and the right to invoke directives. The distinction between the right to invoke a directive and the right to invoke the basic legislation on which it is based is highly artificial” (ibid., p. 7). In particular, difficulties arise as to the conditions in which discrimination is covered by EU law. “It is undisputed that the equality principle, with respect to its effects on national law, is only applicable if the subject matter falls within the scope of Community law - but the question is, when is this the case? So far this has been acknowledged [...] when the case falls into one of three categories: the national law must either implement EC law [see in particular the judgment of 13 July 1989, Wachauf, 5/8, ECR p. 2689], or invoke some permitted derogation under EC law [see judgment of 18 June 1991, ERT, C-260/89, ECR p. I-2925], or it must otherwise fall within the scope of Community law because some specific substantive rule of EC law is applicable to the situation [see in particular the judgment of 11 July 2002, Carpenter, C-60/00, ECR p. I-6279; *Reflets no. 3/2003*, p. 30 [available in French only]] [...]. The ECJ now considers European law applicable if a national rule merely concerns a matter that falls within the scope of a directive [...]. The development [...] may seem cautious but its effects are radical. Taking the Court at its word, it will suffice for a subject matter [...] to be regulated by a directive in one way or another; at that moment the equality principle of primary law will apply. It is not the infringement of the directive that will bring about the applicability, but merely the fact that a particular provision falls within the scope of a directive. If this really is the Court’s opinion, it presents a significant extension far beyond the previous cases [...]. The ECJ may have stated in the present case that directives still have no horizontal direct effect, but, in practice, the results are the same when it rules that the equality principle of

primary law can be relied upon by individuals in private disputes as soon as a subject matter falls within the scope of a directive: national law is disapplied because it is contrary to European law. This is precisely the disapplication of national rules which cannot be distinguished from a horizontal direct effect. This causes the architectural structure of regulation and directive to crumble. The structure weighs strongly against these results which are solely based on teleological considerations" (Thüsing, G. and Horler, S., Annotation on Case C-555/07, Seda Küçükdeveci, CMLRev., 2010, p. 1161, p. 1168-1170).

A "third criticism relates to the effects attributed to the principle. The right to invoke a general principle of law which enshrines a basic right in a dispute between private individuals before a national court [...] inevitably raises the issue of the horizontal effect of fundamental rights [...] [with which] other judges have been faced [...]. [Although] the European Court of Human Rights has acknowledged the indirect horizontal effect of fundamental rights in cases in which the State has enabled or encouraged a violation, and in one hypothesis at least in connection with the principle of non-discrimination [see judgment of 13 July 2004, Pla and Puncernau v Andorra, ECR 2004-VIII], the U.S. Supreme Court considers that to sanction the principle of equality implies an act by the State [see in particular the judgment of 23 December 1974, Jackson v. Metropolitan Edison Co., 419 (US) 345; see also Chemerinsky, E., "Rethinking State Action", Northwestern University Law Review, 1985, p. 503]. The principle of the horizontal effect of fundamental rights is therefore not a given. Of course, [...] EU courts have already acknowledged the effect of the principle of equality between men and women [see judgment of 8 April 1976, Defrenne, 43/75, ECR p. 455] [...] and of the former Articles 43 and 49 of the EC Treaty on freedom of establishment and the freedom to provide services [see Viking and Laval judgments, abovementioned]. However, the judgments invoked enshrined the horizontal effect of a Treaty provision deemed to be clear, precise and unconditional, rather than of a general legal principle" (Marciali, S., op. cit., p. 7).

Besides these criticisms, the judgment also raises issues relating to the scope of the Court's reasoning. Although at first sight it appears to be "transferrable to each of the

criteria prohibited by the 2000 directives, since they constitute a specific expression of the general principle of equality" (Cavallini, J., op. cit., p. 33), one may legitimately question "the developments of this case law outside the area of equal treatment, especially in the case of some of the new rights mentioned in the Charter of Fundamental Rights of the European Union, [for instance] the right to a high level of consumer protection guaranteed by Article 38 of the Charter" (Marciali, S., op. cit., p. 7).

Ultimately, the solution chosen by the Court in the Küçükdeveci judgment, despite remaining problematic in some respects, is unquestionably original and pragmatic. "By simply deeming that the prevalence of EU law required that a national provision be set aside under the principle of primacy [...], [the Court] avoided the sometimes arbitrary distinction between disputes involving private individuals and those between a private party and the State – in accordance with the hierarchy of standards, EU law shall prevail should it conflict with a national standard, even in the case of a dispute between private individuals" (Murphy, C., op. cit., p. 386). Of course, "the substance of the issue is the admission that the right to invoke EU legislation with a view to requesting of a national court that it set aside a national provision to the contrary is less an issue of direct effect than of primacy. It is the primacy of EU law, as raised in the Costa/ENEL [judgment of 15 July 1964, 6/64, ECR p. 1141] and Simmenthal [judgment of 9 March 1978, 106/77, ECR p. 629] case law, which necessarily implies that national jurisdictions must disapply national provisions to the contrary" (Simon, D., "L'invocabilité des directives...", cit. supra, p. 7). However, this has led in some cases to a conviction that the judgment may have an adverse effect on legal certainty. "The national courts may see themselves forced to disapply any legislation on any subject matter that is somehow covered by a directive [...] if it is in conflict with the equality principle of primary law. And this, without reference to a constitutional or supreme court for judicial review, notwithstanding the national court not having the authority to disapply legislation under domestic law - the ECJ was quite clear about that. This raises the question as to the effectiveness of other pieces of current national legislation [...] which are quite possibly contrary to the equality principle of

primary law. Thus the decision has created great legal uncertainty [and] [i]t remains to be seen whether the ECJ will find a doctrinal basis for [this] development. Moreover, from a political point of view, this [...] is highly problematic and certainly not desirable. There are limits as to how far employment law can be used as an engine for the ECJ's quest to extend the scope of EU law. As with any engine, continual abuse can have detrimental effects. One must be mindful not to let it overheat for fear of breaking it down altogether" (Thüsing, G. and Horler, S., op. cit., p. 1171-1172). Beyond these issues, "the Court's sometimes jejune reasoning leaves a number of constitutional issues unanswered. Should the Court reaffirm an extensive approach to the general principles of law, it remains to be seen how the judgment will be interpreted in future case law [...]. What is known for sure is that "in view of the ever-increasing interference of EU law in relations between private individuals, we do not have long to wait before the Court is once more required to rule on these major issues" (Murphy, C., op. cit., p. 386-387).

[PC]

E. Brief summaries

* *European Court of Human Rights*: Further to the ratification by Russia in February 2010 of the 14th Protocol to the Convention of Human Rights amending the review system established by the Convention (hereafter referred to as "the 14th Protocol"), this provision came into force on 1 June 2010. The 14th Protocol was opened for signature on 13 May 2004. With a view to maintaining the functionality of the European Court of Human Rights, a group of adherent countries had agreed to the provisional application of a number of the provisions of the 14th Protocol in the Madrid Agreement of 12 May 2009. As the preliminary reform of the Convention's review system effected by the 11th Protocol has not adequately reduced the ECHR's excessive workload, the new amendment makes three main procedural changes. First, to increase the ECHR's filtering capacity, decisions concerning obvious inadmissibility will be made by a single judge. Second, repetitive cases will be judged by a committee of three judges (instead of a bench of seven judges) under a simplified procedure. Finally, a new condition of admissibility has been introduced, which enables the Court to declare cases to be inadmissible when the applicant

has not suffered a significant disadvantage and when an examination of the application on the merits in relation to compliance with human rights is not considered necessary. The 14th Protocol forms a part of a general programme to lighten the excessive workload of the ECHR, and also aims to prevent violations of the Convention at the national level, and if necessary to improve and speed up the enforcement of the ECHR's judgments.

A ministerial conference on the future of the ECHR took place in February 2010 in Interlaken (Switzerland). The representatives of the 47 Member States published a joint statement which includes an action plan with short- and medium-term measures as well as an implementation schedule. Between 2012 and 2015, the Committee of Ministers should assess the extent to which the implementation of the 14th Protocol and of the action plan has improved the situation of the ECHR. The Committee should decide by the end of 2019 whether more fundamental changes are required.

<http://www.echr.coe.int/NR/rdonlyres/57211B-CC-C88A-43C6-B540-AF0642E81D2C/0/CP/Protocole14EN.pdf>

[JUU]

On 7 January 2010, the ECHR issued a Chamber judgment in the *Rantsev v Cyprus and Russia* case, in which it unanimously concluded that there had been a violation of Articles 2, 4 and 5 of the Convention. The Cypriot and Russian authorities had failed to protect a Russian citizen who had fallen into the hands of human traffickers and died in Cyprus in unexplained circumstances.

Although the Cypriot authorities had supplied a unilateral statement to the effect that they had violated the Convention and offering to pay the plaintiff – the victim's father – compensation for all damages, the ECHR concluded that as its judgments serve not only as judgments on cases laid before it, but also to clarify, preserve and develop the standards of the Convention, compliance with human rights in general required that it continue to judge the case. An application for referral to the Grand Chamber was made and rejected on 10 May 2010.

European Court of Human Rights, judgment of

7 January 2010, *Rantsev v Cyprus and Russia*,
www.echr.coe.int/echr

IA/32788-A

[J.U.]

On 1 September 2010, in his first-ever oral intervention as a third party before the European Court of Human Rights at the hearing of the *M.S.S. v Belgium and Greece* case, Council of Europe Commissioner for Human Rights Thomas Hammarberg provided his observations on major issues concerning refugee protection in Greece, including asylum procedures and human rights safeguards, as well as asylum seekers' reception and detention conditions. In this context, it should be noted that over 1,000 cases concerning the application of the "Dublin regulation" to asylum seekers are pending before the ECHR, and that in many of these cases requests for interim measures (Article 39 of the Rules of Court) have been made to the ECHR by the applicants.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=51&portal=hbkm&action=html&highlight=&sessionid=60140614&skin=hudoc-pr-fr>

[J.U.]

* *Germany*: The Bundesfinanzhof (Federal Finance Court, hereafter referred to as "the BFH") has ruled that importers of South American bananas may not plead the inconsistency of the (former) customs tariffs specified by Council Regulation no. 404/93/EEC on the common organisation of the market in bananas with the General Agreement on Tariffs and Trade (GATT).

The case concerned imports by the claimant of bananas from Ecuador in 1995, outside certain tariff quotas, on which the European Union had imposed high customs duties in order to protect the banana production of the ACP countries and of the EU itself.

The World Trade Organisation's Dispute Settlement Body declared these regulations to be incompatible with the GATT. However, according to the Court of Justice case law, an economic operator may not plead before a jurisdiction of a Member State that an EU provision is incompatible with certain WTO regulations. In principle, the WTO agreements

are not included in the standards used by the European Court of Justice to check the legality of the acts of EU institutions (judgment of 1 March 2005, *Van Parys*, C-377/02, ECR p. I-1465).

According to the BFH, neither this European Court of Justice case law nor Council Regulation no. 404/93/EEC are legal acts which exceed the powers of the European Union (ausbrechender Rechtsakt) within the meaning of the case law of the German Federal Constitutional Court.

The EU is not competent to determine whether this Regulation is compatible with the GATT. The fact that a legal act does not comply with obligations under international public law does not mean that it exceeds the powers laid down by the treaties.

Although the ECJ case law to the effect that the incompatibility of an EU legal provision with the GATT cannot be pleaded has aroused some criticism, it leaves no doubt that the European Court of Justice provides legal protection which fulfils the requirements of the principles of the rule of law. There is therefore no need to review the compatibility of the relevant provisions of EU law with German constitutional law. The purpose of the doctrine of the exceedance of the EU's powers by legal acts is not to enable national jurisdictions to review the substance of the ECJ's case law.

The claimant was therefore sentenced to pay the customs dues specified by Council Regulation no. 404/93/EEC.

*Bundesfinanzhof, judgment of
23 February 2010, VII R 8/08,
www.bundesfinanzhof.de*

IA/32780-A

[TLA]

* *France*: In its judgment of 9 July 2010, the Conseil d'État ruled on its ability to assess the condition of reciprocity stipulated by Article 55 of the Constitution. According to this provision, international treaties and agreements take precedence over laws, in so far as they are applied reciprocally by the parties.

In the course of an action for annulment for

misuse of powers against a decision by the Conseil National de l'Ordre des Médecins that denied the claimant registration with the Ordre des Médecins in Haute-Garonne, the Conseil d'État agreed to perform its own assessment of the condition of reciprocity in Article 55 of the Constitution. In this case, the Conseil d'État considered that the administration had committed an error of law in interpreting the fact that the university curriculum in Algeria had ceased to be identical to the French curriculum in the late 1960s as a failure by Algeria to apply Article 5 of the Government Declaration of 19 March on cultural cooperation between France and Algeria (Evian Agreement) concerning the conditions for the *de jure* recognition of diplomas issued by these countries.

In this judgment, the Conseil d'État changed its position concerning the assessment of the condition of reciprocity in Article 55 of the Constitution. Previously, administrative courts systematically refused to review the condition of reciprocity themselves and referred the issue to the Ministry of Foreign Affairs. Henceforth, the Conseil d'État deems itself competent to appreciate the condition of reciprocity, as in 1990, in the GISTI judgment (CE ass. 29 June 1990, req. no. 78519), it deemed itself competent to interpret treaties. This change of position also enables the Conseil d'État to render its case law consistent with that of the ECHR, which issued a 2003 judgment to the effect that preliminary referral of the appreciation of the condition of reciprocity to the executive arm was contrary to Article 6(1) of the European Convention on Human Rights concerning the right to a fair trial (ECHR, 13 February 2002, *Chevrol v France*, no. 4936-99).

Conseil d'État, 9 July 2010, no. 317747

IA/32090-A

[MNAD]

In an order of 16 June 2010, for the very first time, the Conseil d'État affirmed the competence of administrative courts hearing interim applications to issue judgments on the compatibility of national law with EU law.

In a slight departure from its "Carminati" case law (CE, 30 December 2002, no. 240430), and one month after judgment no. 2010-605 DC by the Conseil Constitutionnel and its own

Rujovic judgment (CE, 14 May 2010, no. 312305) (see p. 13 of this issue of *Reflets*), the *juge des référés* (judge hearing interim applications) of the Conseil d'État ruled that "a means derived from the incompatibility of legislative provisions with the provisions of EU law may only be admitted by the *juge des référés* concerned (within the scope of a *référé-liberté* (application for interim measures relating to basic freedoms)) in cases of obvious ignorance of the requirements attendant on EU law". Obvious incompatibility with the Convention is therefore required to invalidate a legislative provision. It remains to be seen whether this solution, which was determined within the scope of applications for interim measures relating to basic freedoms, can be transposed to other forms of application for interim measures.

This judgment by the Conseil d'État also enshrined the effectiveness of priority questions on constitutionality (QPC) in applications for interim measures relating to basic freedoms, and defined the role of courts hearing interim applications in such cases.

Conseil d'État, order of 16 June 2010, no. 340250, www.legifrance.gouv.fr

IA-32091-A

[NRY] [HJR]

* *Italy*: According to the Italian Corte di Cassazione, reference should be made to the main service in a contract, e.g. the rental of real estate at Palma de Majorca, which is subject to Spanish law, to identify the court of the location rather than the court of the consumer's place of residence as the lawful court.

In substance, the Italian court ruled that under Article 22(1) of Council Regulation (EC) no. 44/2001 Spanish courts were competent to rule on an application for repudiation of a contract for non-fulfilment and a claim for damages for a ruined holiday (to have been spent on premises at Palma de Majorca) filed by a private individual against several overseas companies based in Spain or Ireland.

Corte di Cassazione, S.U., judgment of 18 June 2010, no. 14702, www.lexitalia.it

IA/32833-A

[VBAR]

Further to the judgment of 17 November 2009 by the European Court of Justice (Presidente del Consiglio di Ministri, C-169/08, ECR p. I-10821) that “Article 49 EC must be interpreted as precluding tax legislation, adopted by a regional authority, which establishes a regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, to be imposed only on natural and legal persons whose tax domicile is outside the territory of the region, because the application of that tax legislation makes the services concerned more costly for the persons liable for that tax, who have their tax domicile outside the territory of the region and who are established in other Member States, than they are for operators established in that territory”, the Corte Costituzionale ruled further to this judgment that the legislation of the region of Sardinia adopted in this area was unconstitutional.

Corte Costituzionale, judgment of 9 June 2010, no. 216, www.lexitalia.it

QP/06091-P1

[VBAR]

In an order of 15 April 2010, the Corte di Cassazione recognised the competence of Italian courts in the case of a claim for compensation filed by an Italian company against the Portuguese Ministry of Public Works.

According to this order, the Supreme Administrative Court of Portugal (Supremo Tribunal Administrativo) has already ruled that the procedure for the award of the public contract applied by this Ministry was contrary to both EU and Portuguese law.

Further to the Portuguese decision, the Italian company filed a claim for compensation in an Italian administrative court, the competence of which was not disputed by the Portuguese Ministry of Public Works.

In order to determine once and for all which court is competent to rule in this case, a judgment was requested from the Corte di Cassazione by the company itself.

The competence of the Italian courts was therefore acknowledged by the judge of legitimacy due to the fact that it had never been disputed by the defendant. The Court also added that, to determine the competent court, it was not important to check whether the Ministry had taken part in the proceedings as a person governed by public or private law.

Corte di Cassazione, S.U., order of 15 April 2010, no. 8988, www.dejure.giuffre.it

IA/32829-A

[GLA]

* *The Netherlands:* In a judgment of 22 June 2010, the Gerechtshof ‘s-Gravenhage (Court of Appeal of The Hague) ruled that the Dutch gas and electricity legislation which obliged companies in the gas and electricity sector to unbundle their operations into a network company on the one hand and a generation, trade and distribution company on the other by 1 January 2011 at the latest was contrary to the principle of the free circulation of capital. According to Gerechtshof, this barrier to the free circulation of capital could not be justified by overriding requirements relating to general interest, as part of the problems, i.e. problems relating to grid quality and security of energy supply, pleaded by the State to justify unbundling, had already been resolved by a number of current legal provisions. Moreover, the Gerechtshof asserted that the other reasons pleaded by the State were economic reasons and could not be considered to be overriding requirements relating to the general interest which might justify non-compliance with the principle of the free circulation of capital.

The State, which was convinced of the importance of this unbundling process in preventing energy companies operating the grid equally from competing unfairly with companies which did not operate the grid, instituted cassation proceedings before the Hoge Raad der Nederlanden. Moreover, further to the judgment by the Gerechtshof and in order to avoid waiting for the judgment by the Hoge Raad, the State proposed changing the relevant Dutch law. By banning the privatisation of the stakes of the grid companies and of the grid ownership stakes by law, the State intends to prevent the legislation on unbundling from being reviewed in the light of the free circulation of capital (the

Gerechthof ruled that as the ban on privatisation was partially regulated by secondary law, there was no absolute ban on privatisation, which enabled the legislation on unbundling to be reviewed in the light of the principle of the free circulation of capital).

Gerechthof 's-Gravenhage, 22 June 2010, Delta N.V. v. de Staat der Nederlanden, www.rechtspraak.nl, LJN BM8494

IA/32544-A

[SJN] [SGAR]

* *Romania*: In its judgment no. 872 of 25 June 2010, the Curtea Constituțională a României (Romanian Constitutional Court) issued a verdict on the constitutionality of the wage- and pension-cutting measures in the public sector. These measures had been determined by the law on the rebalancing of the budget intended to offset the effects of the economic crisis.

Concerning the 25% wage cut, the Curtea Constituțională ruled that this cut was both legitimate and proportionate in view of its purpose, which was to defend national security. The government was entitled to take appropriate measures to guarantee the country's economic stability in the face of the repercussions of the global economic crisis on the Romanian economy.

The court rejected the argument that such cuts, in particular to the pay of judges, would have infringed the principle of the latter's independence. In this respect, by emphasising that pay was only one way of guaranteeing the independence of judges and that this could not be jeopardised by a temporary pay cut, the court introduced a measure of flexibility into the trend towards considering the rights of a professional category such as judges to be absolute, in that it advertised the fact that in the context of the economic crisis the principle of solidarity had to be applied and that as a direct consequence all citizens were bound to take responsibility in proportion to their ability to do so.

However, the court invalidated the 15% pension cut, using as a premise in its reasoning the high level of protection guaranteed by the Romanian constitution. Under the constitution, pension rights are not only characterised by the patrimonial rights of individuals, but elevated to the status of a basic right of

individuals, and generate a number of constitutional obligations on the part of the State.

The Curtea Constituțională based its argumentation on the requirements derived from this constitutional commitment, and on the essentially contributive character of pensions.

The pension rights previously accumulated during an individual's working life generate a corresponding obligation on the part of the State to ensure the payment of pensions and avoid all behaviours which may limit access to social benefits. Pension cuts, which contravene acquired rights, are not acceptable, even as a temporary measure. Such an exception would affect the very substance of law.

Curtea Constituțională a României, judgment no. 872 of 25 June 2010, published in Monitorul Oficial al României no. 433, 28 June 2010, www.ccr.ro

* *Sweden*: The Arbetsdomstolen (Labour Court) finally issued a judgment in the wake of the judgment by the European Court of Justice in case C-341/05 (judgment of 18 December 2007, Laval un Partneri, ECR p. I-11767) concerning a national regulation which restricted the free supply of services and infringed Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers. In particular, the Arbetsdomstolen judgment, which has just been forwarded to the European Court of Justice, includes the damages claimed by Latvian company Laval un Partneri Ltd. further to economic and non-material damage incurred. An in-depth analysis of this judgment will be supplied in the next issue of *Reflets*.

www.arbetsdomstolen.se

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[LTB]

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 internal databases. The files relating to these decisions can be consulted at the Research and Documentation Service.

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

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