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R E F L E T S

Brief information on legal developments of Community interest

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European Court of Human Rights

European Convention on Human Rights – Right to respect for private and family life - National legislation prohibiting the use of sperm and ova from donors for in vitro fertilisation – No breach of Article 8 of the Convention

On 3 November 2011, the ECHR handed down its judgment in the case of S.H. and others v. Austria, which related to the prohibition, by an Austrian law, on *in vitro* fertilisation using sperm from a donor or ova from a donor. The Grand Chamber of the ECHR ruled by 13 votes to 4 that this prohibition did not constitute a breach of Article 8 of the European Convention on Human Rights (hereafter referred to as "the Convention").

The appellants in the case were two married couples with Austrian nationality, resident in Austria. Both couples were affected by infertility and wanted to use assisted procreation techniques that were not allowed under Austrian law. In the appellants' view, *in vitro* fertilisation using sperm from a donor (first couple) or ova from a donor (second couple) was the only way for them to have a child of which at least one of the appellants would be the genetic parent. However, both of these techniques are ruled out by the Austrian Artificial Procreation Act (Fortpflanzungsmedizingesetz), which bans the use of sperm from a donor for *in vitro* fertilisation and prohibits ovum donation in general. However, the law does allow *in vitro* fertilisation of ova and sperm (homologous procreation techniques) and, in exceptional circumstances, sperm donation for *in utero* fertilisation.

Following a complaint questioning the constitutionality of the relevant provisions of the Artificial Procreation Act, the Austrian Verfassungsgerichtshof found that the law interfered with the appellants' right to respect for their family life, but also that it was justified because it aimed to prevent the forming of unusual personal relations, such as a child having more than one biological mother (a genetic mother and one carrying the child), and to avoid the risk of exploitation of socially disadvantaged women who may be put under pressure to donate their ova.

The appellants held that the prohibition on the use of sperm and ova from donors for *in vitro* fertilisation violated their right to respect for family life, which is guaranteed by Article 8 of the Convention. Furthermore, they argued that they had been discriminated against, within the meaning of Article 14 of the Convention, in that they had been treated differently from couples who do not need to use donor sperm or ova for *in vitro* fertilisation. It was common ground between the parties that the contested prohibition constituted State interference in the appellants' exercise of their right to respect for family life, and also that the interference was set down in law and pursued the legitimate aim of protecting health or morals and protecting the rights and freedoms of others.

Consequently, it fell to the ECHR to decide whether the measure at issue was necessary in a democratic society at the time (in 1999) and whether it exceeded Austria's margin of appreciation. The ECHR noted that there is now a clear trend in the legislation of the Member States of the Council of Europe towards allowing gamete donation for the purpose of *in vitro* fertilisation. However, the European consensus that seems to be emerging reflects a stage of development within a particularly dynamic field of law. For this reason, the ECHR considered that it would be appropriate to give Austria a wide margin of appreciation, given that the use of *in vitro* fertilisation gave rise (when the domestic courts ruled on the case) and still gives rise to sensitive ethical issues against a background of fast-moving scientific developments.

With regard to the ban on ovum donation, the ECHR observed that the Austrian legislature had not completely ruled out artificial procreation since it allowed the use of homologous techniques. It noted the valid aims pursued by the Austrian legislature, namely to prevent the exploitation of women in vulnerable situations and avoid the formation of unusual family relations. The ECHR considered that the Austrian legislature could have created another legal framework for artificial procreation that would have allowed ovum donation, and that it could have set up guarantees to reduce the risk attached to ovum donation, particularly that of the exploitation of women from disadvantaged backgrounds. The ECHR observed that unusual family relations were not unknown in the legal orders of the Member States of the Council of Europe and that the institution of adoption provided a satisfactory legal framework for such relations.

Nonetheless, the ECHR highlighted that the central issue in terms of Article 8 was not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, but whether, in opting for the contested solution, the Austrian legislature exceeded the margin of appreciation afforded to it under that Article. Moreover, the ECHR noted that the relevant European legal instruments do not deal with ovum donation or – following the example of Directive 2004/23/EC of the European

Parliament and of the Council setting standards of safety for the donation of human cells – explicitly leave the Member States free to decide whether or not to authorise the use of stem cells.

The ECHR therefore concluded that the ban on ovum donation for the purpose of artificial procreation did not exceed the margin of appreciation afforded to Austria at the relevant time. Furthermore, the ECHR held that these considerations were also relevant to the ban on sperm donation for the purposes of *in vitro* fertilisation, given the need to take account of the general context in which the ban was enacted. Consequently, the ECHR ruled that Article 8 of the Convention had not been breached in the case in point (and, by extension, neither had Article 14 read in conjunction with Article 8).

Nonetheless, it is important to note that the ECHR only confirmed the validity of such a ban being in place in 1999, as it reflected the state of medical science and the consensus existing in society at the time. While it did conclude that Article 8 had not been breached in the case in point, the ECHR also called for continuous examination of the issue by the Member States and criticised the fact that the Austrian parliament had not, so far, conducted an in-depth review of the rules governing artificial procreation, given the evolution of medical science and societal attitudes in regard to the issue. The future case law of the ECHR in this domain therefore remains open to developments.

European Court of Human Rights, judgment of 3 November 2011, S.H. and others v. Austria (appeal no. 57813/00), www.echr.coe.int/echr

IA-32858-A

[WINDIJO]

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European Convention on Human Rights – Right to respect for family life – Return of a child – Decisions contrary to the interests of a child – Breach of Article 8 of the Convention

On 12 July 2011, the European Court of Human Rights (Second Section) handed down its judgment (which became final on 12 October 2011) in the case of Šneersone and Kampanella v. Italy. The ECHR found, by a majority, that an Italian court order concluding that a boy should be returned to his father in Italy when he lived with his mother in Latvia constituted a breach of Article 8 of the Convention (right to respect of private and family life).

The appellants – Ms Šneersone and her son, Marko Kampanella – are Latvian nationals. They contested Italian court decisions ordering Marko's return to Italy. Moreover, Ms Šneersone complained that she had not been heard by the Tribunale per i minorenni di Roma (Rome Youth Court).

In 2003, one year after Marko's birth in Italy, his parents, who had never married, separated and the mother moved away with Marko. In September 2004, the Tribunale per i minorenni di Roma awarded custody of Marko to his mother. It appears that Marko's father had not paid the alimony that he was ordered to pay by the court. Due to a lack of resources, the appellants left Italy for Latvia in April 2006.

On an unspecified date, Marko's father requested that the Tribunale per i minorenni di Roma award him sole custody of Marko. The court did so and decided that Marko should live with his father.

In accordance with the Hague Convention on the Civil Aspects of International Child Abduction, the Italian Ministry of Justice asked the Latvian authorities to return Marko to Italy. On the basis of a psychological examination, the Latvian courts concluded that returning to Italy could have negative effects on Marko.

In April 2008, at the request of Marko's father, the Tribunale per i minorenni di Roma ordered that Marko be returned to Italy, basing its jurisdiction on Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. In August 2008, the Italian authorities asked Latvia to enforce this decision and return Marko to Italy. (It

should be noted that in October 2008, Latvia brought an action against Italy before the European Commission using the procedure mentioned in Article 227 EC. Latvia alleged, in particular, that the aforementioned proceedings did not respect Community law and disregarded the decisions of the Latvian courts. On 15 January 2009, the Commission issued a reasoned opinion concluding that Italy had violated neither Council Regulation (EC) No. 2201/2003 nor the general principles of Community law.)

The ECHR observed that the reasoning behind the Italian courts' decisions was rather scant and that the proposed solution did not constitute an appropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between mother and child. Despite the findings of the Latvian courts and the psychologists' reports about Marko, the Italian courts did not take account of the risk that separating Marko from his mother might cause him neurotic problems. The Italian courts also failed to consider that Marko's father had not tried to see his son since 2006. In addition, they made no effort to establish whether Marko's father's accommodation was adapted to the child's needs and also set down conditions, initially requested by Marko's father, stipulating that the mother could only see her son for one month every two years. Finally, the Italian courts did not consider any alternative solutions for ensuring contact between Marko and his father. For these reasons, the ECHR found that the order to return Marko to Italy breached Article 8 of the Convention.

Conversely, the ECHR ruled that adopting a decision following a written procedure, without having heard the parties, was perfectly fair and that there had been no breach of Article 8 on account of Ms Šneersone's absence from the hearing of the Tribunale per i minorenni di Roma.

European Court of Human Rights, judgment of 12 July 2011, Šneersone and Kampanella v. Italy, www.echr.coe.int/echr

IA/32856-A

[AZN]

EFTA Court

European Economic Area – Right to move and reside freely within the territory of the Member States – Directive 2004/38/EC of the European Parliament and of the Council – Right of citizens of the Union to permanent residence – Retired beneficiary receiving social welfare benefits in the host Member State – Family reunification – Possibility of making the right to residence of this person's family members conditional upon having sufficient financial resources – Exclusion

The EFTA Court was asked to rule on a question about the interpretation of Article 16(1) 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 (hereafter referred to as "the directive"). The question related to whether it was possible for a citizen of a State in the European Economic Area who has permanent right of residence in the host Member State and is retired and drawing social welfare benefits there to demand to exercise his right to family reunification if the family member in question would also be claiming social welfare benefits. The EFTA Court ruled that:

"Article 16(1) of the Directive (...) is to be interpreted such that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits."

In this respect, it observed that: (...) in contrast to Article 1 of Directive 90/364/EEC and Article 1 of Directive 90/365/EEC, Directive 2004/38 does not contain a general requirement of sufficient resources. Such a requirement exists neither with regard to workers and self-employed persons nor with regard to persons who have acquired a permanent right of residence pursuant to the Directive (...). The rights conferred on the family members of a beneficiary under the Directive are not

autonomous rights, but derived rights, acquired through their status as members of the beneficiary's family (...)." (points 38-39)

" (...) although not explicitly stated in the wording of the provision, the right to permanent residence under Article 16(1) of the Directive must confer a derived right of residence in the host State on the holder's family members. It follows from the scheme and purpose of the Directive that the right to permanent residence, which represents the highest level of integration under the Directive, cannot be read as not including the right to live with one's family, or be limited such as to confer on family members a right of residence derived from a different, lower status. In that regard, it must be noted that the right to permanent residence under Article 16 does not confer an autonomous right of permanent residence on family members, but a right to reside with the beneficiary of a right of permanent residence as a member of his or her family. Hence, only on satisfying the condition of legal residence in the host State for a continuous period of five years may a family member acquire an autonomous right to permanent residence, either pursuant to Article 16(1) in the case of EEA nationals or Article 16(2) in the case of non-EEA nationals. (...) Article 16 of the Directive explicitly states that, once acquired, the right of permanent residence is not subject to the conditions laid down in Chapter III of the Directive, in which Article 7 on the right to residence for more than three months, including the condition to have sufficient resources, is set out." (points 43-44)

"Since the retention of a right to permanent residence under Article 16 of the Directive is not subject to the conditions in Chapter III and it is apparent that the right must be understood to confer a derived right on the beneficiary's family members, it must be presumed prima facie that also the derived right is not subject to a condition to have sufficient resources. This interpretation is underpinned by the discontinuation of a general requirement to have sufficient resources in the Directive (...). Thus, in the Court's view, whereas under the previous directives to have sufficient resources was a general condition for residence rights under Directive 2004/38 it is only a legitimate condition for residence rights in the cases specifically mentioned in the Directive. (...) where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (...). Finally, it should be recalled that all the EEA States are parties to the ECHR, which enshrines in Article 8(1) the right to respect for private and family life. According to established case-law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (...). The Court notes that in the European Union, the same right is protected by Article 7 of the Charter of Fundamental Rights." (points 47-49)

EFTA Court, judgment of 26 July 2011 in case E-4/11, Arnulf Clauder, www.eftacourt.int

IA/32677-A

[LSA]

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European Economic Area – Free movement of goods – Quantitative restrictions – Measures having equivalent effect – Article 11 of the EEA Agreement – Ban on displaying tobacco products – Justification – Protection of public health

The EFTA Court was asked to rule on two questions. The first concerned whether to interpret Article 11 of the EEA Agreement in the sense that a ban on displaying tobacco products would constitute a measure having equivalent effect to a quantitative restriction in terms of free movement of goods. The other question related to the decisive criterion for determining whether such a ban would be desirable and necessary on public health grounds.

With regard to the first question, the EFTA Court found that:
"A visual display ban on tobacco products, imposed by national legislation of an EEA State (...) constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 11 EEA if, in fact, the ban affects the marketing of products imported from other EEA States to a greater degree than that of imported products which were, until recently, produced in the host EEA State."

In this connection, it observed that:

" (...) national measures adopted by an EEA State which have the object or effect of treating products coming from other EEA States less favourably than domestic products are to be regarded as measures having an effect equivalent to quantitative restrictions and thereby caught by Article 11 EEA. The same applies to rules that lay down requirements to be met by imported goods, even if those rules apply to all products alike. Any other measure which hinders access of products originating in one EEA State to the market of another also qualifies as having an equivalent effect for the purposes of Article 11 EEA (...).

The Court notes that the visual display ban at issue in the case at hand is not designed to regulate trade in goods between EEA States. However, the ban is by its nature capable of having a restrictive effect on the marketing of tobacco products on the market in question, especially with regard to market penetration of new products.

(...) national provisions which apply to products from other EEA States and restrict or prohibit certain selling arrangements must be viewed as generally hindering directly or indirectly, actually or potentially, trade between EEA States.

However, provisions concerning selling arrangements do not constitute a restriction if they apply to all relevant traders operating within the national territory and affect the marketing of domestic products and of those from other EEA States in the same manner, both in law and in fact (...).
National provisions (...) which provide that products cannot be displayed or only displayed in a certain manner relate to the selling arrangements for those goods in that they lay down the manner in which these products may be presented at venues legally permitted to sell them (...)." (points 41-45)

" (...) the question whether there is domestic production is not decisive when it comes to determining the effects of a restrictive measure. It cannot be excluded that production in the host EEA State will resume at a later time (...).

(...) In order to assess (...) [whether the national provisions at issue prohibiting the display of tobacco products affect the marketing of products from other EEA States to a greater degree than that of imported products that were, until recently, manufactured in the host EEA State], an analysis of the characteristics of the relevant market and of other facts is necessary. The national court must, in particular, take account of the effects of the display ban on products which are new on the market compared to products bearing an established trademark. In that regard (...) depending on the level of brand fidelity of tobacco consumers, the penetration of the market may be more difficult for new products due to the display ban which applies in addition to a total advertising ban.

It is for the national court to determine whether the application of national law is such as to entail that the national rules on the display of tobacco products affect the marketing of products previously produced in the host EEA State differently than the marketing of products from other EEA States or whether such an effect cannot be clearly verified and, therefore, is too uncertain or indirect to constitute a hindrance of trade (...)." (points 48-50)

With regard to the second question, the EFTA Court found that:

"It is for the national court to identify the aims which the legislation at issue is actually intended to pursue and to decide whether the public health objective of reducing tobacco use by the public in general can be achieved by measures less restrictive than a visual display ban on tobacco products."

In this respect, it stated that:

" (...) the health and life of humans rank foremost among the assets or interests protected by Article 13 EEA. It is for the EEA States, within the limits imposed by the EEA Agreement, to decide what degree of protection they wish to assure (...)." (point 77)

" (...) an assessment of whether the principle of proportionality has been observed in the field of public health must take account of the fact that an EEA State has the power to determine the

degree of protection that it wishes to afford to public health and the way in which that protection is to be achieved. As EEA States are allowed a certain margin of discretion in this regard, protection may vary from one EEA State to another. Consequently, the fact that one EEA State imposes less strict rules than another does not mean that the latter's rules are disproportionate (...).

Nevertheless, national rules or practices which restrict a fundamental freedom under the EEA Agreement, such as the free movement of goods, or are capable of doing so, can be properly justified only if they are appropriate for securing the attainment of the objective in question and do not go beyond what is necessary in order to attain it (...).

However, where there is uncertainty as to the existence or extent of risks to human health, an EEA State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. Furthermore, an EEA State may take the measures that reduce, as far as possible, a public health risk (...).

It follows that, where the EEA State concerned legitimately aims for a very high level of protection, it must be sufficient for the authorities to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the disputed measure, it was reasonable to assume that the measure would be able to contribute to the protection of human health.

In this regard, (...) a measure banning the visual display of tobacco products (...), by its nature seems likely to limit, at least in the long run, the consumption of tobacco in the EEA State concerned. Accordingly, in the absence of convincing proof to the contrary, a measure of this kind may be considered suitable for the protection of public health." (points 80-84) "As regards the further assessment of whether measures less restrictive than the visual display ban could ensure a similar result, it is appropriate to leave this to the national court to decide on the basis of all the matters of law and fact before it. Review of proportionality and of the effectiveness of the measures taken relies on findings of fact which the referring court is in a better position than the Court to make (...). " (point 86)

EFTA Court, judgment of 12 September 2011, Philip Morris Norway AS / Staten v/Helse- og omsorgsdepartementet, www.eftacourt.int

IA/32676-A

[LSA]

II. National courts

Germany

European Union – Monetary union – Euro rescue measures – Loan to Greece – Germany's involvement in the European Financial Stability Facility – Constitutional review by the Bundesverfassungsgericht

The Bundesverfassungsgericht ruled that measures relating to aid for Greece and the euro rescue plan, adopted in 2010, were consistent with the Basic Law. This judgment confirms the case law set down in the judgments on the Treaties of Maastricht and Lisbon.

The constitutional review concerned the law authorising a loan of €22.4 billion to Greece and the law providing that Germany would provide a guarantee of €123 billion within the framework of the European Financial Stability Facility (EFSF). Germany's highest court found that these measures infringed upon neither the budgetary power of the Bundestag nor the budgetary autonomy of the public authorities. However, the court attached to its approval the requirement that in future, with regard to Germany's involvement in the European stabilisation mechanism, the German government obtain the consent of the budget committee before issuing a guarantee.

The appeals had been lodged by several economists and a member of parliament, all of whom held that the aforementioned measures infringed on their fundamental rights.

The Bundesverfassungsgericht referred to the right to vote, protected by Article 38 of the Basic Law (hereafter referred to as "BL"), to determine the admissibility of the appeals and

examine the constitutionality of the contested measures. According to the case law of the Bundesverfassungsgericht, the right to vote is not limited to the act of voting, but rather is an expression of the fundamental idea behind democracy, namely the sovereignty of the people. Thus, for a citizen to be able to influence how public affairs are run, a State body elected by the citizen must have powers in that respect. Article 38 BL therefore protects citizens against the transfer of the Bundestag's powers to supranational bodies. The right to vote would have no meaning if the Bundestag's powers were reduced to the extent that it was impossible for it to do as the people wish.

In principle, every citizen has the subjective right to refer to Germany's highest court with a view to preserving the effectiveness of his or her right to vote, should the Bundestag give up essential areas of power and thus deprive the citizen of influence. Consequently, appeals against the measures to assist Greece and the measures relating to the euro rescue plan are admissible to the extent that they are based on the idea of an infringement on budgetary autonomy, since the laws aiming to rescue the euro may restrict the Bundestag's scope of action in an unconstitutional manner.

Ruling on the merits of the case, the Bundesverfassungsgericht found that the appeals were unfounded because there had been no clear overstepping of the constitutional limits. The reasoning behind the judgment of 7 September 2011 was based on the concept of State sovereignty. Firstly, the Bundesverfassungsgericht stressed the importance of budgetary decisions. After all, power over the budget is a key element of democratic awareness. The scope and structure of the budget reflect the political design of a State as a whole. The court then inferred from this that the Bundestag did not have the right to relinquish its budgetary responsibilities. The right to vote would be violated if the current Bundestag (or a future Bundestag) was no longer responsible for exercising power over its own budget. The Bundestag must therefore retain its power to have control over major budgetary decisions ("Herr seiner Entschlüsse"). This implies that it may not authorise permanent mechanisms of which the financial impact is difficult to predict. Each aid measure involving significant public expenditure must be approved by the Bundestag, on a case by case basis. In addition, the Bundesverfassungsgericht held that it would constitute an infringement on the very principle democracy if Germany had to contribute to paying back other countries' debts.

Finally, as regards the assessment of the actual measures, the Bundesverfassungsgericht found that the loan and the guarantee were consistent with the Basic Law. The mechanisms are limited in time and monetary value, so the German government retains its decision-making power. However, as far as Germany's involvement in the European Financial Stability Facility is concerned, the German government must, as a general rule, obtain the consent of the budget committee before issuing a guarantee. An exception may be made if urgent reasons require guarantees to be available immediately.

We should also mention the Bundesverfassungsgericht's order of 27 October 2011. The Bundestag's participation rights had been altered in connection with the law providing for Germany to issue a guarantee within the European Financial Stability Facility. This law provided that, in urgent cases, the Bundestag's participation rights could be transferred to a committee of nine people. Several members of the Bundestag challenged thus amendment before the Bundesverfassungsgericht. By its order of 27 October 2011, which was issued following interim proceedings, the Bundesverfassungsgericht prohibited exercise of the Bundestag's rights by this committee until a final judgment was made on the matter.

Bundesverfassungsgericht, judgment of 7 September 2011, , 2 BvR 987/10, 2 BvR 1485/10 and2 BvR 1099/10
Bundesverfassungsgericht, order of 27 October 2011, 2 BvE 8/11,
www.bundesverfassungsgericht.de

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[AGT]

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European Union – European Parliament – Elections – German law setting a minimum

threshold of 5% of the vote for seats to be granted – Violation of the principle of equality of votes and equal opportunities for political parties

In a judgment handed down on 9 November 2011, the Bundesverfassungsgericht ruled that the clause setting a threshold of 5% of the vote for the allocation of seats, which was applied in the 2009 elections for the European Parliament, conflicts with the principle of equality of votes and equal opportunities for political parties. Consequently, the 5% clause in the German law on the election of representatives to the European Parliament was declared null and void. However, this judgment does not affect the validity of the 2009 European elections.

The judgment was much debated among the judges of the Bundesverfassungsgericht, and passed by five votes to three, with two judges issuing a minority opinion.

The 5% clause has been subject to constitutional review before, in 1979. At that time, the Bundesverfassungsgericht held that the clause was consistent with the Basic Law because it was necessary and appropriate to prevent the European Parliament from being fragmented into a large number of political parties.

In its judgment of 9 November 2011, the Bundesverfassungsgericht first highlighted the increased powers and importance of the Parliament in the European institutional framework.

In the court's view, equal treatment of citizens requires that each citizen's vote carries the same weight. Each vote should have the same influence on the outcome of elections. Moreover, with regard to equal opportunities for political parties, each party should have the same opportunities in the electoral procedure. The court argued that the application of the 5% clause meant that votes cast by voters for parties that did not achieve the minimum threshold would have no influence on the outcome of the elections.

In the opinion of the Bundesverfassungsgericht, this infringement on the equality of votes and equal opportunities for political parties cannot be justified by the general, abstract argument that having a large number of small parties would prevent the European Parliament from forming its political will. According to the court, the increased number of political parties represented in the European Parliament (currently over 160) does not undermine the smooth running of the institution. In this connection, the court referred to specific characteristics of the Parliament and referred to the way it works, placing particular emphasis on the role of the political groups. The Parliament's political groups have already shown that they are capable of integrating a large number of small parties. Besides, the court argued that the greater number of parties has not made it impossible for the various political groups to reach agreements. Even if another rise in the number of political parties in the European Parliament were to make it more difficult to reach a majority, this would not, in the court's view, justify infringing upon equality of votes and equal opportunities for political parties.

Furthermore, the Bundesverfassungsgericht held that there was a significant difference between the application of a 5% minimum threshold at national level (such a threshold exists in Germany) and the application of such a threshold to the European elections. Unlike a national parliament, the European Parliament does not need to elect a government that will then require its ongoing support and a stable majority.

According to judges Di Fabio and Mellinghoff, who issued a minority opinion, most of the judges in the Second Chamber of the Bundesverfassungsgericht did not weigh up the infringement on the principle of equality of votes and the possible justification for the infringement. They feared that the smooth running of the European Parliament would be undermined. They viewed the 5% clause as complementary to the proportional representation voting system. They also argued that the Basic Law did not prescribe the use of a specific voting system, so it would even be possible to introduce a majority voting system, which would infringe even further on the principle of equality of votes.

Bundesverfassungsgericht, judgment of 9 November 2011, 2 BvC 4/10, 2 BvC 6/10, 2 BvC 8/10, www.bundesverfassungsgericht.de

IA/33214-A

[AGT]

Belgium

Equal treatment – Citizenship of the European Union – Discrimination on grounds of nationality – Access to higher education – Restriction of the number of non-resident students – Justification – Existence of a health risk as regards courses in physiotherapy and veterinary medicine

After the European Court of Justice's judgment of 13 April 2010 (case of Bressol and others, C-73/08, not yet published in the European Court Reports), the Cour Constitutionnelle/Grondwettelijk Hof only partly upheld an action for the annulment of the French Community decree of 16 June 2006 regulating the number of non-resident students in certain medical and paramedical higher education programmes offered by the French Community. The restriction on the number of non-resident students enrolling for certain courses was thus maintained.

In its judgment in the case of Bressol and others, the ECJ found that the unequal treatment put in place by the decree constituted indirect discrimination on grounds of nationality, unless it could be justified by the aim of maintaining a high level of protection of public health. The ECJ determined that it fell to the national court to decide whether this was the case. Applying the various criteria raised by the ECJ in the aforementioned judgment, the Cour Constitutionnelle/Grondwettelijk Hof used data provided by the government of the French Community to determine, for each study programme in question, whether the contested restriction was appropriate and proportionate.

With regard to courses in physiotherapy and veterinary medicine, the Cour Constitutionnelle/Grondwettelijk Hof drew on several studies and lists of professions for which there is a lack of practitioners. In light of this data, the court first observed that there was a shortage of physiotherapists in the French Community and an excessive number of students of veterinary medicine, which demonstrates that there is indeed a risk to public health. The court then checked whether the restriction on the number of non-resident students had made it possible – and would make it possible in the future – to raise the number of physiotherapists and improve the quality of training offered to veterinary surgeons willing to provide the relevant health services. Finally, with regard to the proportionality of the contested restriction, the Cour Constitutionnelle/Grondwettelijk Hof found that the measure had not prevented broad access to the relevant study programmes (since non-resident students account for an average of 10% of the student body) and that the lot-drawing system used to select non-resident students was the least controversial method possible (compared to a system with selection based on application files or where students are registered on a first-come first-served basis).

Conversely, the Cour Constitutionnelle/Grondwettelijk Hof repealed the contested decree with regard to the other training courses concerned (including midwifery and occupational therapy) due to a lack of specific data demonstrating a decline in the quality of teaching for these programmes.

For more on the consequences of the Bressol case, see the Dutch contribution.

Cour Constitutionnelle/Grondwettelijk Hof, judgment of 31 May 2011, no. 89/2011, www.const-court.be

IA/33147-A

[CREM]

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Freedom to provide services – Restrictions – National legislation requiring operators running games of chance on the Internet to have a permanent establishment and a server on the territory of the relevant Member State – Justification – Protection of public policy and public health

In a judgment handed down on 14 July 2011, the Cour Constitutionnelle/Grondwettelijk Hof ruled that the law of 10 January 2010 amending the legislation on games of chance was consistent with Articles 49 and 56 TFEU. Under the terms of the law, operators may only obtain a licence to run games of chance on the Internet if they have a permanent gambling venue or organise bets on Belgian territory and if the servers on which the data and structure of their sites are managed are located in a permanent establishment on Belgian territory.

In light of the case law of the European Court of Justice (particularly the judgment in the Liga Portuguesa de Futebol case, handed down on 8 September 2009, C-42/07, ECR 2009 p. I 7633), the Cour Constitutionnelle/ Grondwettelijk Hof ruled that while the new law restricted freedom of establishment and freedom to provide services, these measures could be justified since games of chance are an economic activity that could have very harmful effects on both society, given the risk that gamblers who gamble excessively may become impoverished, and public policy in general, given the significant revenue they generate. In the view of the Cour Constitutionnelle/ Grondwettelijk Hof, the contested legislation pursued a legitimate aim: it limited the number of operators running games of chance and channelled games of chance into authorised, monitored establishments with a view to protecting gamblers and limiting the social hazard posed by these games of chance. As regards the proportionality review, the Cour Constitutionnelle/Grondwettelijk Hof observed that the contested legislation no longer completely prohibited the operation of games of chance via 'information society' tools, as had previously been the case. Moreover, the presence on Belgian territory of servers belonging to operators – with Belgian licences – offering games of chance through information society tools, on which website data and structure are managed, enables the competent authorities to directly monitor the data and structure of the website managed on the servers. In this connection, the Cour Constitutionnelle/Grondwettelijk Hof pointed out that at present, there was no Community cooperation instrument through which the Member State in which a provider of online games of chance was established would be required to provide the competent authorities in the destination Member State with all the technical assistance they may need to monitor compliance with their own legislation. Besides, a remote inspection performed within the operating system could not guarantee that the observations made were accurate and complete. Consequently, the Cour Constitutionnelle/Grondwettelijk Hof found the contested legislation to be reasonably justified.

Cour Constitutionnelle/Grondwettelijk Hof, judgment of 14 July 2011, no. 128/2011,
www.const-court.be

IA/33148-A

[CREM]

Spain

Fundamental rights – Right to an effective judicial remedy – Criminal court – European arrest warrant

In a judgment handed down on 18 July 2011, the Tribunal Constitucional ruled on whether judicial decisions according to which "it is not necessary to rule on the actions brought by the appellant" to the extent that the appellant is not available to the court are consistent with the right to an effective judicial remedy.

The court had been asked to rule on an action for the protection of fundamental rights (recurso de amparo). The action contested the inadmissibility of an action against an order issued by the First Section of the Criminal Chamber of the Audencia Nacional (issued on 4 March 2008), which confirmed an order issued by the same chamber on 22 February 2008, within the framework of the enforcement of a European arrest warrant.

The dispute in the main proceedings arose from a European arrest warrant issued for the appellant by the British authorities. Following numerous procedural problems regarding the enforcement of the warrant, the appellant eventually lodged an appeal on the basis of Articles 502(3) and 539 of the Spanish Criminal Code (LECrim) and Article 20(4) of law 3/2003 on the European arrest warrant, claiming that the deadline for his transfer to the British

authorities had passed. However, this appeal was ruled inadmissible and on 22 February 2008, the Audencia Nacional ordered the enforcement of the arrest warrant and the provisional detention of the appellant on the grounds that he was not available to the court, despite having appeared before the court before. The appellant then lodged another appeal based on failure to apply Article 20(3) of law 3/2003 and the violation of his right to an effective judicial remedy. The Audencia Nacional ruled that this appeal was also inadmissible, thus confirming its order of 22 February 2008.

Against this backdrop, the appellant brought an action for the protection of fundamental rights (recurso de amparo) before the Tribunal Constitucional, arguing that his right to an effective judicial remedy had been violated (Article 24(1) of the Spanish constitution).

The Tribunal Constitucional considered that the appellant's two appeals before the Audencia Nacional related to the issue of knowing whether the maximum deadlines for the enforcement of the arrest warrant had passed. In its reasoning, the court held that "making exercise to the right of access to a judicial remedy conditional on imprisonment, to the extent that compliance with the condition of being available to the judicial body would involve the appellant being deprived of his freedom of movement while the appeal was being investigated, cannot be considered lawful".

The Tribunal Constitucional therefore upheld the appeal, finding that there had been a violation of the right to an effective judicial remedy (tutela judicial efectiva) and annulling the orders of 4 March and 22 February 2008 of the First Section of the Criminal Chamber of the Audencia Nacional.

Tribunal Constitucional, Sala Segunda, judgment of 18 July 2011, no. 132/2011, *http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Buscador.aspx.*

[MEBL]

Estonia

Freedom to provide services – Public-service concession – Equal treatment – Requirement of transparency – Substantial changes to a concession contract that was still valid – Right of appeal - Conditions

In its judgment of 12 October 2011, the Administrative Chamber of the Riigikohus applied the principles of compulsory transparency and equal treatment under EU law to the domain of service concession contracts.

The Riigikohus defined the possibilities for modifying some of the conditions for awarding a contract after the winning tenderer has been selected, applying the case law of the European Court of Justice to the matter. The Riigikohus found that it was admissible for the tenderers who had taken part in the contested tendering procedure to challenge the decisions by which the contracting authority substantially changed key provisions of a valid concession contract. Referring to the Succhi di Frutta case (judgment of 29 April 2004, C-496/99, ECR p. I-3801), the Riigikohus observed that in order to ensure that tenderers receive equal treatment and procedures are transparent, any public authorities concluding such contracts are required to respect and comply with the conditions set during the initial tendering procedure until the end of the contract's execution.

Moreover, the Riigikohus added that the right of appeal was not restricted to the tenderers who had initially bid. The right of appeal was also available to anyone else who had not taken part in the tendering procedure but would have done so had they known that the conditions in the call for tenders were likely to change during the contract's period of validity (ECJ judgment of 13 April 2010, Wall AG, C-91/08, ECR p. I-2815; ECJ judgment of 19 June 2008, Pressetext Nachrichtenagentur, C-454/06, ECR p. I-4401; and ECJ judgment of 3 June 2010, Sporting Exchange, C-203/08, not yet published in the European Court Records). Anyone wishing to bring an action before the court on that basis would have to demonstrate the existence of a real interest in participating in the tendering procedure.

In the case in point, a tenderer that was not selected, AS Veolia Keskkonnateenused, brought an action for the annulment of the awarding authority's decision to increase the price of a waste transport service after having concluded a concession contract and initially set the prices. The public authorities justified this decision by arguing that the fees for tipping waste and the level of duty payable on diesel had both risen.

The Riigikohus confirmed the judgment of the lower court, which found that the conditions for price increase, as set down in a municipal council rule, had not been respected and that the contested decision was therefore illegal. In accordance with the European Court of Justice's case law in the Succhi di Frutta case (mentioned above), the Riigikohus added that if the awarding authority may wish to make changes to various conditions of the contract after selecting a tenderer, this possibility and the arrangements for its application must be explicitly mentioned in the call for tenders.

Riigikohus, Administrative Chamber, judgment of 12 October 2011, administrative case no. 3-3-1-3111,
www.riigikohus.ee/?id=11&tekst=RK/3-3-1-31-11

IA-32673-A

[PIIRRAG]

France

EU law – Directly applicable provisions – Conflict between EU law and a national regulatory act – Duties and powers of the national court asked to rule on the matter – National principle of separation of administrative and judicial authorities – Administrative court's jurisdiction, in principle, to review the lawfulness of regulatory acts and exclusion of the jurisdiction of the judicial court – Exception in the specific case of EU law – Non-application of the national regulatory standard by the judicial court

On 17 October 2011, the Tribunal des Conflits passed two judgments placing an important restriction on the principle of the separation of administrative and judicial authorities "in the specific case of European Union law".

In the case in point, the Tribunal des Conflits was asked whether the judicial court had jurisdiction to rule, as an exceptional remedy, on whether two ministerial decrees making payment of voluntary inter-branch contributions compulsory in the agricultural sector were consistent with EU law. The appellants in the main proceedings claimed that these decrees constituted a system of State aid that was illegal under EU law, since European Commission had not been notified about the decrees in advance. In its arguments to retain jurisdiction and dismiss any challenges to jurisdiction, the judicial court referred to both Article 55 of the constitution, which gives treaties more authority than laws, and the principle of primacy of Community law. This line of argument was in accordance with the case law of the Cour de Cassation, which has recognised, on these two bases, the jurisdiction of judicial civil courts to evaluate the consistency of administrative acts with EU law since a judgment handed down in 1996 (Cass. com., 6 May 1996, no. 9413347; see also Cass. soc., 18 December 2007, no; 0645132).

Having been asked to rule on this matter of jurisdiction, the Tribunal des Conflits first pointed out the principle of separation of administrative and judicial authorities, as set out by Article 13 of the law of 16-24 August 1790 and the decree of 16 Fructidor year III, according to which the administrative courts have sole jurisdiction for evaluating the lawfulness of decisions made by the administrative authorities in the exercise of their public powers, except for matters reserved to the judicial courts because of their nature and certain legal exemptions. The Tribunal des Conflits then referred to the principle derived from its judgment in the Septfonds case (TC, 16 June 1923, no. 00732), according to which the judicial court did not have jurisdiction to rule on the lawfulness of an administrative act, even as an exceptional remedy, and therefore had to stay proceedings and refer a preliminary question to the relevant administrative court. The court had previously made similar rulings in cases to review the consistency of an administrative act with Community law (TC, 19 January 1998, Union française de l'Express

and others v. Poste and others, no. 03084) or with the European Convention on Human Rights (TC, 23 October 2000, Boussadar, no. 3227). Having made these references, the court then set aside the argument based on Article 55 of the constitution, considering that this provision had no influence on the division of jurisdiction between the courts. However, the court did allow an attenuation of and an exception to the principle of separation of authorities, based on other grounds.

First of all, the attenuation of the principle was general and consisted in allowing – given the need for a reasonable timeframe – the judicial judge jurisdiction to hear, as an exceptional remedy, a challenge to the lawfulness of an administrative act, since there is established case law permitting this. As for the exception, this concerned the "specific case of European Union law". The Tribunal des Conflits held that the principle of effectiveness of Community law, as derived from the case law of the European Court of Justice, according to which "a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation" (ECJ judgment of 9 March 1978, Simmenthal case, 106/77), necessarily results in recognition of the jurisdiction of judicial court which was validly asked to rule on the main proceedings to review the validity of a regulatory act in view of EU law, referring a question to the European Court of Justice if necessary.

Tribunal des Conflits, 17 October 2011, no. 3828, www.tribunal-conflits.fr,

IA/32944-A

[MNAD]

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Approximation of legislation – Copyright and related rights – Directive 2001/29/EC of the European Parliament and of the Council - Harmonisation of certain aspects of copyright and related rights in the information society – Right of reproduction – Private copying exception – Fair compensation – Evaluation criteria – Funding of this compensation by people who have digital reproduction equipment, devices and media and make them available to private users

The Conseil d'Etat dealt with the matter of private copying in its judgment of 17 June 2011 (Canal + Distribution and others). It had been asked to rule, by several professional associations and societies representing producers and sellers of material, on actions for the annulment of decisions through which the competent committee had expanded remuneration for private copying to certain media and set the remuneration levels for these media.

With regard to use of private copying, authors of music or producers of images are remunerated through the payment of a lump sum which is then distributed to the authors by the societies they formed. The amount of this remuneration is set by a decision of the aforementioned committee, which brings together representatives of authors, manufacturers or sellers of material, and consumers.

In the case in point, one particular issue of contention was the inclusion of products acquired by professionals for purposes other than private copying in the scope of remuneration. The remuneration is paid by the manufacturer, importer or intra-Community acquirer of recording media that can be used for copying works for private use when these media are put into circulation in France, inasmuch as these people can pass the burden resulting from this funding on to private users. The committee's successive decisions also excluded certain media which, due to their special technical characteristics, are clearly for professional use only. However, some media that the committee included in the scope of remuneration do not have special technical characteristics and could thus be used for both private copying and professional purposes.

Firstly, the Conseil d'Etat reiterated the principles governing remuneration for private copying. Remuneration must be set at such a level as to produce revenue – to be distributed amongst those entitled to it – at a level generally

equivalent to the total of payments for one right per author for each private copy, were it possible to set and claim such payments. The committee must also assess the type of use to be made of equipment by various users, based on the technical capabilities of the equipment and the evolution thereof, by referring to studies and surveys that it must regularly update on the basis of an objective study of technology and behaviour.

Secondly, the Conseil d'Etat pointed out that in its judgment of 21 October 2010 in the Padawan SL case (C-467-08, not yet published in the European Court Reports), the European Court of Justice answered a preliminary question on the interpretation of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, stating that a link is necessary between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media and the deemed use of them for the purposes of private copying. Consequently, according to the European Court of Justice, the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with the directive.

On this basis, the Conseil d'Etat ruled that by deciding that all of the media affected by the remuneration for private copying would be subject to this remuneration, without providing for an exemption for media acquired for professional purposes in particular, of which the conditions for use make use for private copying highly unlikely, the committee had disregarded the principles set out above. However, given the seriousness of this violation and the difficulties with enforcement that would be encountered were the contested decision to be annulled immediately, due to the impact, inherent to the annulment decision, on the very existence of a system for remuneration for the right to private copying, the Conseil d'Etat annulled the decision and deferred the entry into force of the annulment for a six-month period, due to begin on the date that the Minister for Culture and Communications received notice of the annulment decision.

Conseil d'Etat, judgment of 17 June 2011, Canal+Distribution,
www.arianeinternet.conseil-etat.fr

IA/ 32946-A

[CHIONEL]

Italy

Fundamental rights – Freedom to marry – Marriage between a national of a Member State and a third-country national – National law making this right conditional upon possession of a valid residence permit – Contrary to the principle of equality, fundamental rights and freedom to marry - Unconstitutionality

The Corte Costituzionale ruled on the constitutionality of Article 116 of the Civil Code, which relates to the formal and substantial conditions for marriage, as amended by law no. 94 of 15 July 2009 setting out provisions with regard to public security. The amended article stipulates that a valid residence permit is one of the documents that must be presented for marriage with a third-country national. According to a circular issued on 7 August 2009 by the Italian Ministry of the Interior (no. 19) on the application of the amending law, the third-country national must have a residence permit both when making the necessary publications before the marriage and at the time the marriage is performed. In the case in point, an Italian national and a Moroccan citizen had already made the relevant pre-marriage publications at a time when the legislative amendment had not yet come into force and the condition of possession of a valid residence permit did not yet exist. However, the provision was in force by the time the marriage was to be performed and the registrar refused to marry the couple.

The couple appealed against the registrar's refusal and the Tribunale di Catania referred the case to the Corte Costituzionale, holding that the contested legislation might be contrary to Articles 2 (fundamental rights), 3 (principle of equality), 29 (freedom to marry), 31 (duty of the

legislature to remove any obstacles to freedom to marry) and 117 (need to respect international obligations arising from the European Convention on Human Rights) of the Italian constitution. The Corte Costituzionale upheld the challenge concerning the constitutionality of the legislation. In accordance with its past case law, the court found that it was justifiable to treat foreign nationals differently with regard to the exercise of certain rights where this different treatment served general interests such as public security, public policy or public health. However, it highlighted that fundamental rights, which are accorded to individuals as human beings and not on the basis of their membership of a community based on the rule of law, should not be reduced in a manner that is disproportionate to the aim pursued. With regard to the fundamental nature of the right to marry, which may only be restricted to protect interests of greater constitutional value, the Corte Costituzionale found that the amended provision of the Civil Code breached these fundamental rights to the extent that it disproportionately restricted the individual freedoms of both third-country nationals and Italian nationals. In connection with the reconciliation of fundamental rights and individual freedoms with the State's interest in protecting its borders and controlling migratory flows, the court held that a total prohibition on performing marriages where one of the people to be married is a third-country national residing illegally on Italian territory was not an appropriate measure for ensuring that the different interests at stake were weighed up in a proportionate manner, bearing in mind the other means available to the legislature for preventing marriages of convenience. In any case, legislation should at least provide for a prohibition measure that could be applied on a case-by-case basis after examination of a marriage's authenticity.

Corte Costituzionale, judgment of 25 July 2011, no. 245, www.cortecostituzionale.it

IA/32847-A

[MSU]

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Checks at borders, asylum and immigration – Immigration policy – Returning illegally staying third-country nationals – National residing illegally on the territory of a Member State – National legislation providing for immediate expulsion as an alternative penalty to a fine – Consistency with the Return Directive

Over the course of 2011, Italy saw a massive increase in the amount of case law on the transposal and application of the Return Directive. The matter of penalties to be applied in cases of violation of the police chief's expulsion order was the subject of a number of court decisions and attracted the attention of the media and various European, national and international bodies, even going so far as to incite the legislature to intervene.

Even before the El Dridi judgment (C-61/11), some national courts had noticed that national legislation conflicted with Directive 2008/115/EC of the European Parliament and of the Council, which had not yet been transposed into national law. In a judgment that acted as a forerunner to national and international case law in this respect, the Tribunale di Torino decided not to apply the national legislation that was inconsistent with the directive (see the Tribunale di Torino's judgment of 4 January 2011, sez. V penale). Similarly, the Corte di Appello di Ancona (judgment of 7 February 2011), the Tribunale di Verona (judgment of 18 January 2011) and the Tribunale di Santa Maria Capua Vetere (judgment of 2 March 2011) decided that since the directive had not been transposed within the given timeframe, it should be deemed to be a self-executing directive and the national legislation conflicting with it should not be applied. The El Dridi judgment later helped to eliminate remaining discrepancies in case law (i.e. judgment no. 84 of the Tribunale di La Spezia, handed down on 21 February 2011, which held that Directive 2008/115/EC of the European Parliament and of the Council was not self-executing). After the European Court of Justice's judgment, national case law conformed entirely to European case law, deeming that European case law and the directive led to abolition of the offence of violating the police chief's expulsion order and, as such, this offence could no longer be subject to the penalties outlined in Article 14 of legislative decree no. 286/98 (see Corte Costituzionale judgment

no. 216 of 18 July 2011; Corte di Cassazione judgments no. 22105 of 28 April 2008, no. 18586, 20130 and 24009 of 29 April 2011, no. 22831 of 3 May 2011 and no. 32326 of 11 August 2011; Consiglio di Stato judgments no. 7 and 8 of 10 May 2011; and a large number of decisions by lower courts). The national legislature finally brought national provisions into line with EU law by adopting decree-law no. 89 of 23 June 2011, converted into law no. 129 of 2 August 2011.

While Italian legislation is now consistent with EU law in terms of the penalties applied in cases of violation of the police chief's expulsion order, the national courts believe that it is still not fully consistent with the Return Directive. In the orders for reference by the Tribunale di Rovigo (4 August 2011) and the Giudice di Pace di Lecce (22 September 2011), the courts asked the European Court of Justice to rule on whether the option of immediately expelling third-country nationals residing in Italy illegally, as an alternative penalty to a fine, was admissible in view of Article 2(b) of Directive 2008/115/EC of the European Parliament and of the Council. Besides, other courts are still handing down rulings on the new legislation. Most notably, the Corte di Cassazione found that the new offence of failure to comply with the police chief's expulsion order, defined in Article 3 of decree-law no.89 of 23 June 2011, as amended by the conversion law, was only applicable to cases arising after the new law came into force.

Corte di Cassazione, judgment of 23 September 2011, nos. 36446 and 36451; Tribunale di Torino, judgment of 4 January 2011; Tribunale di Rovigo, order of 4 August 2011; Giudice di pace di Lecce, order of 22 September 2011, www.dejure.it

IA/32849-A
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QP/07293-A9
QP/07250-A9

[MSU]

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Administrative actions – Action for damages – Administrative act affecting a legitimate interest – No action for annulment brought against the illegal administrative act – Admissibility of the action – Consequences of not contesting the act

With its judgment of 23 March 2011, the Plenary Assembly of the Consiglio di Stato performed an important reversal of case law by allowing a person whose legitimate interests had been harmed by an act of the public authorities to bring an action for damages before the administrative court. In so doing, the Consiglio di Stato discarded the requirement according to which appellants must first bring an action for the annulment of the contested administrative act and may only claim for damages if the act is ruled to be illegal.

The judgment in question was handed down following a civil action for damages, brought by a company that claimed to have suffered harm due to a decision by a public authority to exclude it from public contracts in a certain district for a nine-month period. The civil court decided that the case should be heard by an administrative court as an administrative act was involved. While it did not declare the action for damages to be inadmissible, despite the fact that there had not been an action for annulment, the administrative court dismissed the action based on the substance. It found that the appellant company was partly responsible and could have avoided the harm it suffered by promptly bringing an action for the annulment of the public authority's decision, within the relevant timeframe.

The company appealed to the Consiglio di Stato, arguing that while its own responsibility for what happened could lead to a reduction in the amount of compensation, it could not be used as a reason to entirely rule out the payment of compensation.

The Consiglio di Stato passed the question on to the Plenary Assembly because of the discrepancy between the case law of the administrative courts and the case law of the civil courts. Whereas the Consiglio di Stato was traditionally in favour of retaining a prior action for annulment as a condition for admitting an action for damages, the Corte di Cassazione

tended towards admitting such actions for damages, even if an action for annulment had not been brought.

The Plenary Assembly's reasoning referred to the system of legal remedies set out in the new Code of Administrative Procedure, which came into force in 2010. Although the Code did not apply to this particular case (*ratione temporis*), it provided a credible solution – which could also be derived from the principles of the previous normative framework – to the differences in interpretation mentioned above.

The Plenary Assembly stated that from now on, proceedings before the administrative court would no longer relate solely to the annulment of the contested administrative act, but would instead cover the entire relationship between the public authorities and the person affected by the acts. In the view of the Plenary Assembly, "legitimate interest" no longer refers solely to the appellant's procedural position or the legitimation of bringing an action to have the act's lawfulness verified. Rather, the term refers to the holder's material interest or position with regard to a good, which ought to be protected by a broader range of actions to enable the holder to act on the interest.

As further grounds for allowing an action for damages relating to harm caused by an illegal administrative act to be filed without a prior action for annulment, the Consiglio di Stato emphasised that there was a need for consistency with the European Court of Justice's case law as regards the liability of the European institutions and compliance with EU law in general (reiterated in Article 1 of the Code of Administrative Procedure) with a view to ensuring that litigants have full, real judicial protection.

Finally, the Plenary Assembly declared that if the administrative courts are faced with a claim for damages, they must evaluate, according to what normally happens (*id quod plerumque accidit*), whether an action for annulment would have prevented the harm from being caused. If this is the case, the administrative courts may decide not to award damages, or to only award damages to the extent that an action for annulment would not have prevented the harm from being caused.

Consiglio di Stato Ad. Plen. judgment no. 3 of 23 March 2011, www.lexitalia.it.

IA/32855-A

[VBAR]

Latvia

Free movement of persons – Workers – Equal treatment – Provision of national law on granting parental benefits – Calculation of amount – Inclusion of period of employment with the European Communities

In a judgment handed down on 29 April 2011, the Augstākās tiesas Senāts (Court of Cassation) ruled on the interpretation of Regulation (EEC) No. 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EEC) No. 574/72 of the Council fixing the procedure for implementing that regulation.

The dispute related to the granting of parental benefits to a father who had been a European official. After working for one of the European institutions, he had returned to Latvia and continued working as a State official. The Latvian social security fund had granted him parental benefits without taking account of the salary he had received while working for the EU institutions.

The national legislation in force at the time of his application for benefits accorded the right to parental benefits to people who were working while they had custody of their child, were actually working on the date they submitted their application, and were not on parental leave. Calculation of the amount took account of average social contributions for the 12-month period ending three months before the child's birth, with the amount being set at 70% of the salary. Lower and upper limits were established for the period ending 1 January 2008. In the case in point, the court of first instance had ordered the social security fund to recalculate the amount so as to take account of the income earned by the appellant when he worked as a European official. The Administratīvā apgabaltiesa (administrative court of appeal) confirmed the court of first instance's judgment

when it was asked to rule on an appeal lodged by the social security fund.

However, when asked to rule on the appeal in cassation lodged by the social security fund, the Augstākās tiesas Senāts overturned the contested decision and referred the case back to the Administratīvā apgabaltiesa. First of all, the Augstākās tiesas Senāts pointed out that a European Community official is a migrant worker, referring to Regulation (EEC) No. 1408/71 of the Council and the case law of the European Court of Justice, particularly the judgments of 16 February 2006 (Ulf Öberg, C-185/04, ECR p. I-1453) and 9 November 2006 (Fabien Nemec, C-205/05, ECR p. I-10745). It then held – contrary to the opinion of the lower courts – that the regulation in question referred only to periods of employment and not the income earned.

The Augstākās tiesas Senāts based its reasoning on the fact that Article 72 of Regulation (EEC) No. 1408/71 of the Council expressly makes acquisition of the right to benefits conditional upon the completion of periods of employment. For the purposes of determining whether a person is entitled to benefits, periods of employment completed in the territory of any other Member State must be taken into account, rather than the income earned during the periods in question.

In the aim of eliminating this indirect discrimination, the Augstākās tiesas Senāts considered that periods of employment with one of the European institutions had to be taken into account for the purposes of calculating the amount of parental benefit, and that consequently, such periods of employment had to be excluded from the minimum period of 12 months of social contributions required by the social system of parental benefits.

In its judgment of 24 October 2011, the Administratīvā apgabaltiesa followed the interpretation provided by the Augstākās tiesas Senāts.

Augstākās tiesas Senāts, judgment of 29 April 2011, no. SKA-65/2011,
Administratīvā apgabaltiesa, judgment of 24 October 2011, no. A42436608,

www.tiesas.lv
IA/3267-A
IA/32672-B

[AZN]

Netherlands

Taxation – Tax deductibility of fines imposed by the Commission for breaching competition rules

In this case, the Hoge Raad found that fines imposed by the Commission for breaching competition rules were not tax-deductible.

The case related to a company established in Germany that passed on part of a fine imposed on it within the group of which it is the parent company, primarily to one of its Dutch subsidiaries, X BV. The Dutch tax authorities issued a tax notice to notice to X BV for company tax for the 2002 financial year, and the complaint against this tax notice was dismissed.

Ruling in the first instance, the Rechtbank te Haarlem admitted partial deductibility of the fine imposed by the Commission. It reasoned that the fines imposed by the Commission differed from the fines imposed by the national competition authority in that the fines imposed by the Commission partially aimed to "remove an advantage" and partially aimed to punish actions, whereas the fines imposed by the national competition authority aimed solely to punish actions. The Rechtbank te Haarlem derived the idea that the Commission fines aimed to "remove an advantage" from the fact that there was no absolute upper limit for the fine, the negation of the "criminal law nature" in Article 15(4) of Regulation No. 17, the fact that the guidelines stipulate that fines must have a deterrent effect, and finally, the fact that the company's turnover is taken into account when calculating the amount of the fine. Consequently, the Rechtbank te Haarlem found that the part of the fine aiming to "remove an advantage" was tax-deductible.

Ruling on the appeal, the Gerechtshof te Amsterdam found that the fines imposed by the Commission were not tax-deductible, after referring the case to the European Court of Justice for a preliminary ruling with a view to determining whether, in the case in point, the

Commission was authorised to submit written observations within the meaning of Article 15 of Council Regulation (EC) No. 1/2003 (judgment of 11 June 2009, C-429/07, ECR p. I-4833).

In its judgment of 12 August 2011, the Hoge Raad followed the reasoning of the Gerechtshof te Amsterdam and ruled that the company in question could not deduct the fine imposed by the Commission. The Hoge Raad found that fines imposed by the Commission for breaching competition rules aim to punish those who disregard these rules. In the Hoge Raad's view, the fact that the company's turnover was taken into account when calculating the amount of the fine does not affect this observation.

Hoge Raad, judgment of 12 August 2011, X BV v . the Minister and the State Secretary of Finance, www.rechtspraak.nl, LJNBO6770

IA/33143-A

[SJN] [WILDENA]

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Citizenship of the European Union – Right to move and reside freely within the territory of the Member States – Access to higher education – Access to medical school - Lot-drawing system – Equal treatment

In its judgment of 7 September 2011, the Raad van State dealt with the Dutch system of lot-drawing for entrance to medical school and, more specifically, the fact that holders of foreign certificates of secondary education are automatically placed in merit group C, regardless of their results.

The case concerned a Dutch national who had gone to secondary school in Belgium and had successfully completed her studies with a mark of 88%. She wanted to study medicine in the Netherlands.

The Netherlands operates a lot-drawing system to manage entrance to medical school. The system is based on several merit groups. All students who successfully complete their secondary school studies in the Netherlands with a mark of at least 80% are placed in merit group A, while other students are placed in different merit groups according to their results. Only students in merit group A are automatically admitted to medical school; all other students must take part in a lot-drawing system.

In the case in point, the party concerned was placed in merit group C, despite having completed secondary school with a mark of 88%. In the Dutch education system, anyone who goes to secondary school abroad is placed in merit group C, regardless of their results. The party concerned's lot was not drawn and she was not admitted to medical school.

With a judgment handed down on 3 September 2010, the judge hearing the interim application overturned the minister's decision not to admit the party concerned to medical school. In the judge's view, the minister's decision violated Article 18 TFEU, read in conjunction with Articles 165 and 166 TFEU. Ruling on the appeal, the Raad van State referred to the European Court of Justice's judgment in the Bressol case (judgment of 13 April 2010, C-73/08, ECR p. I-2735), finding that Member States are, in principle, free to organise their own education systems, on the condition that they comply with EU law, and more specifically, the principle of not discriminating on grounds of nationality. In the opinion of the Raad van State, treating holders of foreign certificates of secondary education differently to holders of Dutch certificates of secondary education constitutes indirect discrimination on grounds of nationality, given that most holders of Dutch certificates of secondary education are Dutch nationals.

As regards objective justifications, the Raad van State referred to the European Court of Justice's judgment in Commission v. Austria (judgment of 7 July 2005, C-147/03, ECR p. I-5969), in which the ECJ found that any justifications that may be mentioned by a Member State had to be supported with an analysis of the appropriateness and proportionality of the restrictive measure adopted by the State, along with other specific elements shoring up its argument. The Raad van State held that the minister should have evaluated the specific situation of the party concerned or compared Belgian and Dutch certificates of secondary education, in cooperation with the relevant Belgian bodies.

For more on the consequences of the Bressol case, see the Belgian contribution.

Raad van State, 7 September 2011, Party v. the Minister, www.rechtspraak.nl, LJNBR6920

IA/33144-A

[SJN] [WILDENA]

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Competition – Cartels – Prohibition – Exemption by category – Vertical agreements – Commission Regulation (EC) No. 2790/1999 – Operating agreement – Exclusive purchasing clause – Article 5(a) of the regulation – Concept of "ownership" – Concept in national law – Distinction between legal ownership and economic ownership

In a judgment handed down on 8 July 2011, the Hoge Raad found that the concept of "ownership" in Article 5(a) of Commission Regulation (EC) No. 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (hereafter referred to as "the regulation") is not a concept in EU law, but rather a concept in national law.

The case concerned an exclusive purchasing clause concluded within the framework of a service station operating agreement drawn up between a fuel supplier and a purchaser. The duration of the exclusive purchasing clause exceeded five years. The issue at hand in this case was whether the clause fell within the scope of application of the exemption provided for in Article 2 of the regulation, in view of Article 5(a) of the regulation. Under Article 5(a) of the regulation, the exemption provided for in Article 2 does not apply to a non-compete obligation of which the duration exceeds five years. However, the time limitation of five years does not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer.

In the case in point, the Hoge Raad observed that the supplier owned the service stations, but not the land on which they were located. In fact, the land belonged to the province of Utrecht and was sub-let to the supplier by a third party connected with the buyer.

With a view to proving that the contested exclusive purchasing clause fell within the scope of application of the exemption provided for in Article 2 of the regulation, the supplier argued that the concept of "ownership" in Article 5(a) of the regulation is not limited to legal ownership and also refers to economic ownership.

Referring to the footnote 27 of Advocate-General Mengozzi's opinion in the Pedro IV Servicios case (opinion of 4 September 2008, C-260/07, ECR p. I-02437) and point 66 of the European Court of Justice's judgment in the same case, the Hoge Raad found that the concept of "ownership" in Article 5(a) should be interpreted in line with national law and not in line with EU law. In Dutch law, economic ownership (in the case in point, the right to use land) does not constitute ownership. In the Hoge Raad's view, only legal ownership may be viewed as "ownership" within the meaning of the regulation under Dutch law.

Consequently, the Hoge Raad found that in the case in point, the exclusive purchasing clause did not fall within the scope of application of the exemption provided for in Article 2 of the regulation.

Hoge Raad, 8 July 2011, BP Europa SE v. Verweersters, LJNBQ2809, www.rechtspraak.nl

IA/33145-A

[SJN] [WILDENA]

Poland

Constitutional law – Jurisdiction of the Trybunał Konstytucyjny – Constitutionality review of instruments of secondary European Union law – Council Regulation (EC) No. 44/2001 – Admissibility – Limits on constitutional review

In a judgment handed down on 16 November 2011 (case SK 45/09), the

Trybunał Konstytucyjny found that it had jurisdiction to assess the consistency of instruments of secondary European Union law with the Polish constitution. It thus ruled that the procedural safeguards enshrined in Article 45(1) and Article 32(1) of the Polish constitution are not violated by Article 41(2) of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, according to which a party against whom enforcement of another Member State's judgment is sought is not entitled to make any submissions on the application before the judgment is declared enforceable.

The constitutional complaint at the root of the case was brought by a person who, following a criminal trial, had been sentenced by the Brussels Court of Appeal to pay damages for harm resulting from an offence committed against a Belgian citizen. At the Belgian citizen's request, Warsaw Regional Court declared the judgment enforceable on the basis of Council Regulation (EC) No. 44/2001, which was confirmed in appeal. In the constitutional complaint, the party against whom enforcement was sought asked the Trybunał Konstytucyjny to review the constitutionality of Article 41(2) of Council Regulation (EC) No. 44/2001, given that it did not allow the party against whom enforcement was sought to make submissions during proceedings. The appellant raised arguments based on the violation of the right to equal treatment by the public authorities, the right to a fair and public hearing by the courts, and the right to two tiers of judicial authority.

The Trybunał Konstytucyjny has already assessed the constitutionality of primary European Union law (judgments K 18/04, *Reflets no. 3/2005* [only available in French] and K 32/09, *Reflets no. 1/2011*) and national laws transposing secondary European Union law (judgments P 1/05, *Reflets no. 2/2005* and SK 26/08, *Reflets no. 1/2001* [both only available in French]). This case was the first time that the Trybunał Konstytucyjny ruled on whether instruments of secondary European Union law fell within its jurisdiction. Under Article 79(1) of the Polish constitution, anyone whose freedoms or rights have been violated is entitled to bring an appeal before the Trybunał Konstytucyjny with regard to the constitutionality of the law or other legislative act according to which the relevant judicial or administrative authority made a final judgment on the freedoms, rights, or obligations of that person as defined in the constitution. Consequently, the Trybunał Konstytucyjny had to decide whether a European regulation constituted was a "legislative act" within the meaning of the aforementioned provision.

Firstly, the Trybunał Konstytucyjny held that Article 79(1) of the constitution (which features in Chapter II, "The freedoms, rights, and obligations of persons and citizens", in the sub-section on measures to protect freedoms and rights) independently establishes its jurisdiction, regardless of what is set out in Article 188(1) to 188(3) (in Chapter VIII, "Courts and tribunals"). Article 188 limits the Trybunał Konstytucyjny's jurisdiction by stipulating that it may rule on the consistency of laws and treaties with the constitution, the consistency of laws with treaties for which the ratification requires a law to be approved beforehand, and the consistency of regulatory acts issued by State central authorities with the constitution, ratified treaties, and laws. The article adds that the Trybunał Konstytucyjny may also rule on constitutional complaints on the basis of Article 79(1). However, the Trybunał Konstytucyjny believes that Article 188 does not limit the scope of constitutional complaints, as defined in Article 79(1), to national laws or legislative provisions issued by the State's central authorities.

Secondly, the Trybunał Konstytucyjny found that the concept of "other legislative acts" in Article 79(1) of the constitution is not restricted to acts adopted by Polish bodies, but rather also applies to acts adopted by the bodies of an international organisation to which Poland belongs. This applies to acts adopted by the institutions of the European Union: such acts enter national judicial orders and determine citizens' judicial situation.

Thirdly, Article 288 TFEU, read in the light of the interpretation provided by the European Court of Justice, shows that EU regulations do indeed have all the characteristics required for them to be viewed as legislative acts within the meaning of Article 79(1) of the constitution.

Moreover, EU regulations may contain provisions that could be used as a basis for judicial or administrative authorities to make final judgments.

In view of the considerations outlined above, the Trybunał Konstytucyjny found that European Union regulations are legislative acts within the meaning of Article 79(1) of the constitution.

Furthermore, the Trybunał Konstytucyjny pointed out that the position of European regulations in the hierarchy of norms of Polish judicial order is defined by Article 91(3) of the constitution, which provides that European legislation takes precedence in the event of a conflict of law. Nevertheless, the Trybunał Konstytucyjny deduced from Article 8 of the constitution, which provides that the constitution is the supreme law of the Republic of Poland, that the constitution takes precedence over all acts emanating from Polish judicial order, including instruments of secondary EU law. The constitution thus makes the Trybunał Konstytucyjny the court of last instance for cases relating to constitutional and structural issues. The Trybunał Konstytucyjny already confirmed this position with judgment K 18/04 on the Treaty concerning the accession of Poland to the European Union and judgment K 32/09 on the Treaty of Lisbon.

With this in mind, the Trybunał Konstytucyjny underlined the importance of drawing a distinction between jurisdiction enabling the assessment of the consistency of instruments of secondary EU law with the treaties, which is the exclusive preserve of the European Court of Justice, and jurisdiction enabling the assessment of the consistency of these instruments with the constitution, which falls to the Trybunał Konstytucyjny. The European Court of Justice and the Trybunał Konstytucyjny cannot be viewed as competing courts since their roles and areas of jurisdiction are different. The Trybunał Konstytucyjny's review of the consistency of European regulations must therefore be viewed as separate from (though subsidiary to) the review performed by the European Court of Justice.

Moreover, the Trybunał Konstytucyjny emphasised the need to act cautiously and with moderation. It reiterated that it was required to comply with EU law and act according to the principles of positive interpretation, promotion of integration, and loyal cooperation. As a result, the Trybunał Konstytucyjny must check the scope of application of an act, using methods such as requesting an interpretation from the European Court of Justice, before ruling that an instrument of secondary EU law is contrary to the constitution. Such a judgment may only be made once all of the means of resolving the conflict between constitutional provisions and provisions of EU law have been explored, since a judgment declaring a European regulation unconstitutional is an *ultima ratio.*

The Trybunał Konstytucyjny also considered the potential effects of ruling that an instrument of secondary EU law was not consistent with the constitution. National acts that are ruled unconstitutional lose their binding nature. Since this cannot happen to instruments of secondary EU law, their application by the national authorities would have to be precluded. However, given that it would be difficult to combine such an action with the obligations of a Member State, the date on which the instrument in question would lose its binding nature would have to be postponed and measures would have to be taken to amend either the constitution or the instrument.

The Trybunał Konstytucyjny found that there was no evidence showing that the appellant's constitutional rights had been violated by Article 41(2) of Council Regulation (EC) No. 44/2001, which states that the party against whom enforcement is sought may not, at this stage of the proceedings, make any submissions on the application.

The court reviewed the contested provision in light of Articles 45(1) (right to a fair hearing) and 32(1) (principle of equality within the framework of the right to a fair hearing) of the constitution.

The Trybunał Konstytucyjny first highlighted that the procedures established by Council Regulation (EC) No. 44/2001 aimed to strike a balance between the conflicting rights and interests of the party requesting enforcement and the party against whom enforcement is

sought. To achieve this aim, the European legislature set up a two-step procedure aiming to reconcile the effect of surprising the party against whom enforcement is sought with the need to respect that party's right to be heard, thus reflecting the general principle underpinning the proceedings for obtaining a declaration recognising a foreign judgment as enforceable. These proceedings are secondary to the judicial proceedings that led to the judgment being handed down in the State of origin. It is assumed that the two parties' procedural rights, in relation to the concept of a free trial, were safeguarded during the proceedings before the court in the State of origin. This assumption is based on mutual trust between the Member States of the European Union with regard to administration of justice.

The Trybunał Konstytucyjny also observed that the Polish Code of Civil Procedure recognises various forms of ex parte proceedings that are similar to that mentioned in Article 41(2) of Council Regulation (EC) No. 44/2001.

The Trybunał Konstytucyjny therefore ruled that since proceedings to recognise the enforceability of a foreign court's judgment aim to achieve the vital aims set out above, the lack of opportunity to make submissions at that stage in the proceedings is not arbitrary and does not violate the right to a fair hearing.

As to the claimed violation of Article 32(1), read in conjunction with Article 45(1), of the constitution, the Trybunał Konstytucyjny found that given the specific nature of proceedings to recognise the enforceability of a foreign court's judgment, differences between the procedural rights of the parties in the first instance are admissible. In the court's view, the provision in Article 41(2) of Council Regulation (EC) No. 44/2001 does not give the creditor an excessive or unjustified advantage over the party against which enforcement is sought.

Trybunał Konstytucyjny, judgment of 16 November 2011, SK 45/09; Dz. U. Nr 254, poz. 1530 www.trybunal.gov.pl

IA/32680-A

[MKAP]

Czech Republic

EU law – Liability of the Member State for non-compliance with EU law – Insufficient interpretation of national provisions on government liability as regards alleged infringement of EU law – Violation of the right to a fair hearing

The Ústavní soud (Constitutional Court) handed down its first-ever judgment on the principle of Member State liability for harm caused to individuals by infringement of EU law on 9 February 2011, placing the issue within the context of Czech judicial order.

The Ústavní soud had been asked to rule on a constitutional complaint lodged by an individual against the judgments handed down by the lower courts and the Nejvyšší soud (Supreme Court) with regard to government liability for harm caused by a wrongful act or omission on the part of the government in the performance of its functions. In the case in point, the appellant, a midwife, claimed to have suffered harm (reduction in income) because the Ministry of Health approved and published, in the form of a ministerial order, the results of a negotiation procedure between representatives of health insurance funds and representatives of healthcare providers. In the approved and published results, the profession of midwifery was not taken into account (at least, not directly) with regard to the unit value and amount of payments for healthcare services. In the appellant's view, this brought about the exclusion of establishments where midwives exercise their profession from the public health insurance system, which she believed was discriminatory and contrary to the law and to public interest. Consequently, she invoked the liability of the State, as governed by the provisions of law no. 82/1998 Sb. on government liability for unlawful decisions or wrongful acts or omissions on the part of the government in the performance of its functions. Only as a secondary argument did she raise a point from EU law, asking the court whether the State's obligation to include midwives' activities in the public health insurance system was based on Council Directive 80/155/EEC.

Ruling in the final instance, the Nejvyšší soud dismissed the appeal in cassation, thus confirming the opinion of the lower courts that negotiation results approved and published by the Ministry of Health constituted general legislative acts of which the application could not be deemed a wrongful act or omission on the part of the government in the performance of its functions. Consequently, the Nejvyšší soud ruled that the government's liability could not be invoked in the case in point. As a result of this observation, the Nejvyšší soud considered that it was no longer necessary to examine the other arguments mentioned by the appellant.

While the Ústavní soud agreed that the Nejvyšší soud's reasoning, namely that the adoption of general legislative acts by the executive branch did not constitute a wrongful act or omission on the part of the government in the performance of its functions, was consistent with constitutional order, it did not have the same opinion of the reasoning behind the court's judgment as regards the argument based on EU law.

According to the Ústavní soud, a Member State is unquestionably liable for harm caused by infringements on EU law, even if there is no provision of national law that expressly sets out how this liability is incurred (not even law no. 82/1998 Sb., which was mentioned by the appellant), because the Czech Republic must respect the obligations that are incumbent upon it by virtue of international law (and also EU law). In this respect, the Ústavní soud confirmed the past case law of the Nejvyšší soud, according to which there are two separate, independent systems of liability with different legal bases. However, it should not have been harmful to the appellant to have mentioned both forms of liability in her complaint and to have claimed that there had been a violation of EU law in support of her argument to establish that the government had committed a wrongful act or omission in the performance of its functions. On the contrary, it was the duty of the Nejvyšší soud to examine all of the arguments raised by the appellant and to both interpret law no. 82/1998 Sb. and link it with the system of Member States' liability towards individuals in cases of non-compliance with EU law. Finally, referring to its case law in the Pfizer case (see *Reflets no. 1/2009* [only available in French], p. 27, IA/31357-A), the Ústavní soud added that the law should not be interpreted arbitrarily, which risked happening if there were no relevant grounds showing that the chosen solution matched the purpose of a rule of EU law.

In view of the above, the Ústavní soud found that the Nejvyšší soud's judgment had violated the appellant's right to a fair hearing. On this basis, it overturned the judgment and referred the case back to the Nejvyšší soud.

Ústavní soud, judgment of 9 February 2011, no. IV. US 1521/10, http://nalus.usoud.cz

IA/33027-A

[KUSTEDI]

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Border controls, asylum and immigration – Asylum policy – Minimum standards for determining who qualifies for refugee status or subsidiary protection status – Council Directive 2004/83/EC – Exclusion – Acts contrary to the purposes and principles of the United Nations

With its judgment of 29 March 2011, the Nejvyšší správní soud (Supreme Administrative Court) shed some light on the concept of "acts contrary to the purposes and principles of the United Nations", which, by virtue of law no. 325/1999 Sb. on asylum, transposing Council Directive 2004/83/EC, exclude a person from being eligible for international protection. The judgment is particularly interesting in view of the court's reasoning, which readily drew on the case law of foreign and international courts and the European Court of Justice with a view to interpreting the contested national provision (the exclusion clause), which originated in EU and international law.

In the case in point, the authority responsible for handling applications for international protection did not follow up on the application of the appellant in the main proceedings, a Cuban citizen, on the grounds that he collaborated with the Cuban authorities by giving them information about his Cuban

colleagues (specifically, their contact with people from "the West" and their intentions of going there) while he was in the Czech Republic in the 1980s.

In this context, the Nejvyšší správní soud, which was ruling in the final instance, interpreted the exclusion clause in the light of the case law of the European Court of Justice and the Convention Relating to the Status of Refugees of 28 July 1951. Based on various United Nations texts and the case law of the International Court of Justice and the courts of various State parties to the aforementioned convention, the court found that (a) acts held by a consensus in international law to be violations of a person's fundamental rights sufficiently severe and sustained as to constitute persecution, or (b) acts expressly recognised as such by United Nations bodies should be considered acts contrary to the purposes and principles of the United Nations. The le Nejvyšší správní soud found that, in the case in point, passing on information about colleagues did not fall into either of these categories.

According to the le Nejvyšší správní soud, it was irrelevant that the information provided may have helped the Cuban authorities to persecute others and that the appellant may have known about the acts in question.

In this respect, the Nejvyšší správní soud made reference to the European Court of Justice's judgment of 9 November 2010 (B and D, C-57/09 and C-101/09, not yet published) and pointed out that the appellant's individual responsibility had to be assessed on the basis of both objective and subjective criteria. This means that the consequences of the appellant's activities must be examined, as must his knowledge of the purpose of the information he provided and his intention to act contrary to the purposes and principles of the United Nations. However, neither the responsible authority nor the court of first instance had determined the facts behind the case to an extent enabling them to assess the actual repercussions of the appellant's activities on the lives of the people he denounced (e.g. were they tortured or treated inhumanely as a result of the information he provided?).

Consequently, the Nejvyšší správní soud found that the burden of proof was on the responsible authority and that it had to determine the facts behind the case, especially since the facts may not be favourable to the appellant. The Nejvyšší správní soud thus quashed the judgment of the court of first instance and referred the case back to it.

Nejvyšší správní soud, judgment of 29 March 2011, no. 6 Azs 40/2010-70, www.nssoud.cz

IA/33038

[KUSTEDI]

United Kingdom

Border control, asylum and immigration – Immigration policy – Procedure of the Special Immigration Appeals Commission – Right to a fair hearing - Significance

Within the framework of current case law on the consistency of the procedure used by the Special Immigration Appeals Commission (hereafter referred to as "the SIAC') with the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the ECHR"), the Court of Appeal limited the scope of the right to a fair hearing in immigration matters with its judgment of 21 June 2011. It ruled that, with regard to the SIAC's procedure, litigants' right to a fair hearing does not give them additional protection beyond that afforded by national law in general and the rules governing the SIAC's procedure in particular.

The two appellants in the case in the main proceedings, one of whom was Sri Lankan (IR) and the other of whom was Libyan (GT), legally entered the United Kingdom in 2001 and 2005 respectively. Their leave to remain was cancelled by the Secretary of State of the Home Department on the grounds that their presence was not conducive to the public good. The appellants appealed lodged appeals against the decisions with the SIAC, which confirmed the Secretary of State's decision and dismissed the appeals.

The European Court of Human Rights had already examined the consistency of the SIAC's procedure with Articles 5(5) and 6 of the ECHR in a judgment handed down on 19 February 2009, A and ors. v. the United Kingdom (no. 3455/05). The appellants were therefore unable to use this line of argument before the Court of Appeal, so they put forward an argument based on violation of Article 8 of the ECHR. In line with the case law of the European Court of Human Rights, the Court of Appeal acknowledged that Article 8 of the ECHR could give rise to procedural obligations, particularly when a decision by a national authority could infringe on the right to respect for family life.

As the European Court of Human Rights mentioned in its judgment in A and ors v. the United Kingdom, the SIAC, which was set up in response to the European Court of Human Rights' judgment in Chahal v. the United Kingdom (no. 22414/93), is a tribunal composed of independent judges, with a right of appeal against its decisions on a point of law to the Court of Appeal and the House of Lords. The SIAC uses a special procedure enabling it to examine elements that may be made public (classed as "non-confidential") and documents that, for reasons of national security, may not be made public (classed as "confidential") and that neither the litigants nor their lawyers may access, which is why the procedure provides for the involvement at the ministry of one or more Special Advocates, who have security clearance and are appointed by the Solicitor General to act on behalf of people who bring appeals before the SIAC.

According to the Court of Appeal, the constant practice of the European Court of Human Rights as regards Articles 5(4) and 6 of the ECHR in national security matters also applied to the interpretation of Article 8 of the ECHR. However, the Court of Appeal highlighted that the procedural protection afforded by this article was more limited compared to that afforded by Articles 5(4) and 6 and that the procedural obligations ensuing from Article 8 of the ECHR were not equivalent to those ensuing from Articles 5(4) and 6. In any case, the Court of Appeal found that the SIAC's procedure was consistent with the requirements set out in these articles.

The Court of Appeal found that the only channel open to the appellants was that of demonstrating that the SIAC had committed an error of law, an argument not raised in the case in point.

This Court of Appeal judgment is interesting beyond the framework of the case in point, particularly in view of pending case C-300/11, ZZ v. Secretary of State for the Home Department, which relates to the scope of the principle of effective judicial protection enshrined in Article 30(2) of Directive 2004/38/EC of the European Parliament and of the Council and its application to the SIAC's procedure.

Court of Appeal for England and Wales (Civil Division), judgment of 21 June 2011, IR (Sri Lanka) v. Secretary of State of the Home Department [2011] EWCA Civ 704, www.bailii.org

IA/32669-A

[OKM] [HUBERNA]

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Social policy – Rights of persons with disabilities – Duty of the public authorities to take into account the individual situation of a disabled person when performing its functions – Significance

In a judgment handed down on 21 July 2011, the Court of Appeal ruled that all public authorities are required, when making any decision, to take account of the individual situation of a disabled person, even if this will result in more favourable treatment of the person in question. Furthermore, the Court of Appeal found that public authorities are bound by this requirement not only when making decisions that directly affect disabled persons but also in the general performance of their functions.

Mr Norton, the main appellant in the case in point, lived with his wife and daughter (born with cerebral palsy in 1991) in the caretaker's house at the primary school where he worked from 1992 to 2009. The caretaker's house had been adapted to meet the needs of the appellant's disabled daughter.

Following the termination of the appellant's employment contract on grounds of misconduct, the local authority obtained an order for possession of the house from Barnsley County Court. The appellant brought an action for the annulment of this decision and raised two grounds of appeal before the Court of Appeal. These were the violation of Article 49A of the Disability Discrimination Act 1995 (now Article 149 of the Equality Act 2010), which provides that the public authorities must take all steps necessary in the performance of its functions where performance of its functions may affect disabled persons, and the violation of Article 8 of the European Convention on Human Rights. The appellant claimed that the public authority should have taken his daughter's situation into account before making the decision to seek possession. For its part, the public authority contested the application of Article 49A of the Disability Discrimination Act 1995 to the case in point.

While the Court of Appeal upheld the first argument, finding that the local authority had not taken the daughter's individual situation into account before adopting its decision to seek possession of the caretaker's house, it nonetheless ruled that, in the case in point, possession of the house was necessary for the school to perform its functions and that annulment of the contested decision in the aim of forcing the local authority to do its duty under Article 49A of the Disability Discrimination Act 1995 would not have changed the result of the dispute. However, the Court of Appeal did stress that the duty to into take account the individual situation of a disabled person not only applied when expressly stipulated by law, but also when performing any public function.

Court of Appeal (Civil Division), judgment of 21 July 2011, Barnsley Metropolitan Borough Council v. Norton and ors [2011] EWCA Civ 834,
www.bailii.org

IA/32668-A

[OKM]

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Free movement of goods – Quantitative restrictions – Manufacture, presentation and sale of tobacco products – Prohibition on selling tobacco products from vending machines – Justification – Protection of public health – Proportionality

On 17 June 2011, the Court of Appeal dismissed the appeal brought against Articles 22 and 23 of the Health Act 2009 (hereafter referred to as "the 2009 Act") and the Protection from Tobacco (Sales from Vending Machines) Regulations 2010 made under it (hereafter referred to as "the 2010 Regulations"). The 2009 Act and the 2010 Regulations provide for a prohibition on the sale of tobacco products from vending machines.

The appellants, a cigarette manufacturer, supported by the National Association of Cigarette Machine Operators, raised several arguments in defence of their appeal, including violation of the principle of proportionality. The appellants challenged the idea that the measures taken were proportional to the aim pursued by the law, namely the protection of public health in general and the protection of children and young people from tobacco in particular.

The appellants argued that although the legislature had the power to adopt measures to protect children and young people from tobacco, it could have taken other, less restrictive measures to achieve the same end. In their view, the prohibition set out in the 2009 Act and 2010 Regulations would prevent the import of cigarette vending machines to the United Kingdom and jeopardise various companies active in the sale of tobacco products from vending machines.

Drawing on Articles 34 and 36 TFEU and the European Court of Justice's case law on their application, the Court of Appeal acknowledged that the legislature could introduce prohibitions on and restrictions to the free movement of goods, such as that in the case in point, on the proviso that the measure was justified for health reasons and was proportional to the aim pursued.

With regard to the proportionality of the measures, the Court of Appeal found that the legislature, for the 2009 Act, and the executive

branch, for the 2010 Regulations, had a considerable margin of appreciation that had to be evaluated in the light of national and European policy on protection from tobacco. It stressed that a flexible approach was needed to determine the proportionality of the measures taken.

However, the Court of Appeal decision was not unanimous. Judge Laws held that the measures were too restrictive in view of the aim pursued by the British government. Judges Arden and Neuberger believed the prohibition to be proportional on the grounds that the measure adopted by the Secretary of State for Health specifically aimed to protect children and you g people – the most vulnerable members of society.
The Court of Appeal thus dismissed the appellants' appeal and aligned itself more closely with the case law of the European Court of Justice.

Court of Appeal for England and Wales (Civil Division), judgment of 17 June 2011, R (on the application of Sinclair Collis Ltd.) v. Secretary of State for Health, www.bailii.org

IA/32671-A

[OKM] [HUBERNA]

Slovakia

State aid – European Commission decision ruling an aid incompatible with the common market and ordering its return – Obligations of the Member States – Possibility for national court to re-examine the Commission's conclusion – Inadmissibility

In its judgment of 6 April 2011, the Constitutional Court of the Slovak Republic (Ústavný súd Slovenskej republiky, hereafter referred to as "the Ústavný súd") ruled on the enforcement of a Commission decision requiring the recovery of an illegal State aid.

The case in point concerned the decision by which the European Commission found that the measures taken by the Slovak Republic to assist a limited company (called Frucona Košice, a.s.) constituted a State aid that was incompatible with the common market.

The Supreme Court of the Slovak Republic (Najvyšší súd Slovenskej republiky, hereafter referred to as "the Najvyšší súd") had dismissed an action brought by a tax authority against the limited company in the aim of recovering the illegal aid. In the view of the Najvyšší súd, the Commission's decision was simply a piece of evidence in the judicial proceedings before the national court and the national court could only base its conclusions on facts that it itself had established, which may differ from those observed by the Commission. Indeed, unlike in the proceedings launched by the Commission, the limited company was a party to the judicial proceedings, meaning it was entitled to submit evidence.

However, this judgment was subsequently overturned by the Ústavný súd on the grounds that the conclusion reached in the Commission's final decision, which relates to the existence of the State aid and its lawfulness, may not be re-examined in proceedings before a national court and that a national court may not reach a different conclusion. With regard to the Najvyšší súd's incorrect assessment of the binding nature of the Commission's decision, the Ústavný súd came to the conclusion that the tax authority's right to judicial protection had been violated.

In this connection, it is worth mentioning that in judgment C-507/08 (European Commission v. Slovak Republic), the European Court of Justice found that by having failed to take measures to recover from the recipient an illegal aid referred to in a Commission decision about a State aid paid by Slovakia to Frucona Košice, a.s., Slovakia had failed to fulfil the obligations imposed on it by the European Commission and the decision in question.

Following the case described above, the national law on State aid was amended so that a Commission decision declaring a State aid illegal is now directly enforceable against the recipient of the aid.

Ústavný súd, judgment of 6 April 2011, II.US 501/2010-94, www.concourt.sk/

IA/33035-A

[VMAG]

Slovenia

Visas, asylum and immigration – Asylum policy – Lack of an official identity document – Decision to temporarily detain the person concerned with a view to establishing identity – Conditions – Obligation to justify the need for temporary detention – Principle of proportionality – Absence

On a judgment on asylum matters on 15 September 2011, the Vrhovno sodišče (Supreme Court) ruled on the conditions for an asylum seeker to be held in custody on the basis of Article 51(1)(1) of the Slovenian International Protection Act (hereafter referred to as "the International Protection Act") in particular, according to which asylum seekers may be detained temporarily if necessary with a view to establishing their identity. This provision corresponds to Article 7(3) of Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.

The case in point concerned a Somalia-born asylum seeker who did not have any official identity documents. After entering Slovenian territory, he voluntarily went to an asylum centre, where police officers temporarily detained him with a view to establishing his identity. Having appealed to the Administrative Court against the decision to detain him, the party concerned argued during the hearing that Somalia's government was dissolved in 1991 and no government had been formed since. Given that the party concerned was born in 1993, he had been unable to obtain any official identity documents. The Administrative Court overturned the temporary detention decision and the Ministry of Interior Affairs brought an appeal against the judgment before the Vrhovno sodišče.

When making its judgment, the Vrhovno sodišče first considered that as the detention decision was made on the basis of the International Protection Act, the expression "when it proves necessary" implies that detention is optional and is at the police officers' discretion. This means that the temporary detention decision must be based on the reasons mentioned in the aforementioned provision, i.e. obtaining digital fingerprints in the Eurodac system or establishing the identity of the asylum seeker, and other circumstances justifying the measure.

The Vrhovno sodišče then pointed out that a temporary detention decision should be linked directly to establishing the applicant's identity and guaranteeing the applicant's appearance in court if there is a risk that the applicant will flee or a risk of hindering the proceedings brought against the applicant on the basis of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereafter referred to as "the Dublin II Regulation"). The court also held that such decisions should be based on the acknowledgement that the purposes of the detention could not be achieved by less restrictive measures. In this connection, the Vrhovno sodišče confirmed the Administrative Court's reasoning that criteria relating to the principle of proportionality had to be applied if an individual was to be detained on the basis of the International Protection Act, the Dublin II Regulation or Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

In this respect, the Vrhovno sodišče drew on the reasoning put forward by the European Court of Justice in the El Dridi (C-61/11 PPU) and Kadzoev (C-357/09 PPU) cases and on Articles 6(1) and 51(1) of the Charter of Fundamental Rights of the European Union.

Finally, the Vrhovno sodišče observed that in the context of the procedure for establishing the asylum seeker's identity, the body detaining the asylum seeker is required to present and justify its doubts about the asylum seeker's claims not to have any official identity documents.

Consequently, the Vrhovno sodišče confirmed the Administrative Court judgment overturning the decision to temporarily detain the asylum seeker as it did not provide any justification of the need to detain the asylum seeker to establish his identity or transfer him to the competent

Member State under the procedure set out in the Dublin II Regulation.

Vrhovno sodišče, Administrative Chamber, 15 September 2011, I Up 423/2011, www.sodisce.si/znanje/sodnapraksa/vrhovnosodiscers/

IA/32675-A

[SAS]

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European Union – Euro rescue package – Constitutional review of the law on assisting Greece – Principle of clarity and principle of the Welfare State – Inclusion

In a judgment handed down on the European Stability Mechanism on 3 February 2011, the Ustavno sodišče ruled on the constitutionality of the law on the Republic of Slovenia's guarantee to contribute to financial stability in the Eurozone (hereafter referred to as "the guarantee law").

In the case in point, a group of members of the Slovene parliament lodged a constitutional complaint in which they argued, in particular, that the guarantee law breached the principle set out in Article 149 of the Slovene constitution, according to which all State guarantees must be based on a law. Since the guarantee law contains several guarantees, the group held that it encroached on the parliament's powers in that the parliament should have adopted a separate law for each State guarantee.

First of all, the Ustavno sodišče observed that this provision formed the legal basis with regard to State debt, so the issue was that of knowing what limits it sets in this respect. Since the concept of a "guarantee" in the provision is an independent constitutional concept, it should be interpreted broadly and should thus be deemed to cover all types of guarantee through which the State takes on a risk relating to meeting a third party's obligation. This obligation is dependent on the third party not meeting its own obligations. The guarantee therefore does not necessarily have consequences on future State budgets and thus is not a component of public debt.

The Ustavno sodišče then went on to say that the provision in question stipulates that a State guarantee must be based on a "law". Indeed, each law concerning the guarantee must be adopted by the parliament, meaning that the parliament cannot give the government carte blanche to adopt all future guarantees. Moreover, in accordance with the principle of a State governed by the rule of law, enshrined in Article 2, and the principle of lawfulness of acts of the administration, set out in Article 120 of the constitution, any future obligation arising from the State guarantee must be defined by or clearly derived from the law. Incidentally, in accordance with the principle of the Welfare State set out in Article 2 of the constitution, a State guarantee may not jeopardise the population's minimum social benefits.
Finally, the Ustavno sodišče stated that the guarantee law imposed a well-defined obligation on the Slovene State, the aim of which is to provide a State guarantee for financial instruments to fund Member States experiencing financial difficulties. Besides, this obligation is limited to €2.073 billion and only covers contracts concluded by 30 June 2013. The law mentions the debtor – the company EFSF – and lists all the types of instrument for which the guarantee was issued. The law thus conforms with the principle of clarity, which is one of the principles for a State governed by the rule of law within the meaning of Article 2 of the constitution. Moreover, the Ustavno sodišče held that the guarantee was limited to the aforementioned amount, which would be paid in several instalments as needed. However, should the guarantee amount be exceeded, the parliament will have to adopt a new law, as per Article 149 of the constitution.

Consequently, the Ustavno sodišče ruled that the guarantee law was consistent with the constitution.

Ustavno sodišče, 3 February 2011, U-I-178/10-18, www.us-rs.si/odlocitve/

IA/32674-A

[SAS]

Non-EU countries

[No information was retained for this section.]

B. Practice of international organisations

World Trade Organisation

WTO – Common commercial policy – SCM Agreement – Measures affecting trade in large civil aircraft – Subsidies awarded to Airbus by the European Communities and certain Member States

The WTO Appellate Body Report on measures affecting trade in large civil aircraft was adopted by the Dispute Settlement Body (hereafter referred to as "the DSB") on 1 June 2011.

The consultation procedure was launched in 2004 following a complaint by the United States concerning allegations that subsidies were paid by Germany, France, the United Kingdom, Spain, and the European Communities to Airbus. At the request of the United States, the DSB created a panel on 20 July 2005. The panel's report of 30 June 2010 grouped the measures that were the subject of the US complaint into five general categories: 1) launch aid or Member State financing (hereafter referred to as "LA/MSF"); 2) loans from the European Investment Bank (EIB); 3) infrastructure and infrastructure-related grants; 4) corporate restructuring measures; and 5) research and technological development funding. The European Union lodged an appeal against the panel's decision with the Appellate Body in July 2010.

The Appellate Body's report confirmed some of the panel's findings. It found that some of the measures mentioned constituted specific subsidies that were incompatible with Article 5(c) of the SCM Agreement, which prohibits subsidies that cause serious prejudice to the interests of another member (the United States in the case in point).

The main subsidies covered by the Appellate Body's judgment were financing arrangements (known as LA/MSF) provided by Germany, France, Spain, and the United Kingdom for the development of large civil aircraft projects. The judgment also covers certain equity infusions provided by the French and German governments to companies forming part of the Airbus consortium and certain infrastructure measures provided to Airbus. The Appellate Body found that the effect of these subsidies was to displace exports of Boeing large civil aircraft from the EU, Korean, Australian, and Chinese markets. However, the Appellate Body found that certain other measures did not cause serious prejudice to the interests of the United States.

On 17 June 2011, the European Union informed the DSB that it intended to implement the DSB's recommendations and judgments in a manner that respected its WTO obligations, and within the time-limit set out in the SCM Agreement.

Incidentally, the Appellate Body is currently examining a different case within the framework of proceedings brought by the European Union against the United States in connection with subsidies allegedly paid to Boeing.

WTO Appellate Body Report of 1 June 2011 (case DS 316),
www.wto.org

IA/32857-A

[NICOLLO]

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Appellate Body Decision – Measures against dumping practices – Definitive anti-dumping measures on certain iron or steel fasteners from China – Article 9(5) of Council Regulation (EC) No. 384/96 on dumping practices – Inconsistency with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

The WTO Appellate Body adopted the report of 28 July 2011 in which it upheld the panel's findings that Article 9(5) of Council Regulation (EC) No. 384/96 (the Basic Anti-Dumping Regulation) was inconsistent, "as such", and "as applied" by Council Regulation (EC) No. 91/2009 imposing definitive anti-dumping duties on imports of certain iron or steel

fasteners from the People's Republic of China, with Articles 6.10 and 9.2 of the Anti-Dumping Agreement since it conditions the determination of individual dumping margins, and the imposition of individual dumping duties (for imports from non-market economy countries) on the fulfilment of an "Individual Treatment Test". In substance, a producer or exporter from a non-market economy country should demonstrate that its export activities are sufficiently independent from the State if it wishes to receive individual treatment. The Basic Anti-Dumping Regulation applies this condition to individual treatment whereas individual treatment is the rule under the Anti-Dumping Agreement. Among the panel's other findings, the Appellate Body highlighted the finding that the EU institutions acted inconsistently with the EU's WTO obligations because the domestic industry defined by the contested definitive regulation did not constitute producers whose production represented a "major proportion" of the total domestic production within the meaning of Article 4.1. Moreover, the Appellate Body found that the institutions had failed to ensure that their method of calculation would not introduce a distortion to the injury analysis. The Appellate Body also found that the European Union had failed to disclose in a timely manner information regarding product categorisations that was necessary for determining whether there was dumping and for defending the Chinese producers' interests, this failure being contrary to Article 2.4 of the Anti-Dumping Agreement. Furthermore, with regard to the confidential handling of documents during the anti-dumping investigation, the Appellate Body found that the EU had breached Articles 6.1.1 and 6.5.1 of the Anti-Dumping Agreement by allowing the parties less than 30 days to reply to a request for confidential treatment of information and by failing to verify the reasons why confidential information could not be included in a non-confidential summary. In addition, the Appellate Body did not uphold the panel's findings on some other points on which the EU was accused of having breached its obligations under the Anti-Dumping Agreement.

WTO Appellate Body Report of 28 July 2011 (case DS 397), www.wto.org

IA/32859-A

[MSU]

C. National legislation

Belgium

Amendments to the law on family reunification

The law of 8 July 2011, which amended the law of 15 December 1980 on access to the territory, residence, settlement and expulsion of foreign nationals with regard to the conditions for family reunification, came into force on 22 September 2011. This law amends the basic conditions (specifically, by introducing a condition linked to sufficient resources) and various procedural aspects for family reunification with third-country nationals and EU nationals.

The new law removes the option of Belgian citizens being joined in Belgium by relatives in the ascending line, unless the Belgian sponsor is a minor. This exception is derived from the European Court of Justice's judgment of 8 March 2011 (Ruiz Zambrano, C-34/09), according to which "a minor child's status as an EU citizen confers upon his or her parents, who are third-country nationals, a right of residence in a Member State".

The sponsor's spouse (or cohabiting partner) must be aged 21 or over (age increased with a view to combating family pressure to enter into a sham marriage).

With the exception of disabled persons or persons receiving a state pension, the sponsor must have "sufficient and stable means of subsistence" equivalent to 120% of the national minimum wage, i.e. €1,232 per month. However, this income requirement does not apply to sponsors who are only bringing their minor children to Belgium.

The period during which these conditions may be checked and the residence permit (if any is granted) withdrawn has been extended from two to three years. However, any spouse who is

mistreated by his or her spouse may remain in Belgium.

Any application for family reunification from the person joining the sponsor must be filed abroad. At present, illegally staying foreign nationals who have married Belgian citizens may apply for family reunification while in Belgium.

Moreover, proof must be provided that the family has "sufficient accommodation". This condition already exists, and the municipal authorities are satisfied if the rental contract is formally registered.

Finally, anyone wishing to apply for family reunification as a sponsor must prove that they were allowed or authorised, at least twelve months ago, to reside in Belgium for an unlimited period, or that they were authorised, at least twelve months ago, to settle in Belgium.

Law of 8 July 2011 amending the law of 15 December 1980 on access to the territory, residence, settlement and expulsion of foreign nationals with regard to the conditions for family reunification, MB, 12 September 2011, www.moniteur.be

[NICOLLO]

Bulgaria

Amendments to the law on the protection of personal data in the light of Bulgarian and European law

On 6 October 2011, the Bulgarian parliament adopted a law amending the law on the protection of personal data. The adoption of this new law guarantees that Bulgaria will fulfil its obligation to transpose into national law the provisions of Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and that there will be uniform rules regarding the processing of personal data exchanged between EU Member States and between the responsible authorities and information systems, created on the basis of the treaties (TEU and TFEU).

The main amendments to the law on the protection of personal data (hereafter referred to as "the LPPD") relate to:

• the opportunity for the responsible authorities to process personal data received from other Member States where these are necessary for an ongoing investigation, prosecution of criminal offences, or the enforcement of sentences for additional purposes. To be able to process data, the legislature must ensure that all three of the following conditions are met: a) compatibility with the initial purpose for which the data were collected; b) existence of a legal basis for processing; and c) compliance with the principles set out in the LPPD.

This legislative amendment is significant in that it is part of the continuous improvement of the process for police and judicial cooperation within the European Union.

• the enhancement of the Personal Data Protection Committee's institutional independence as the national supervisory authority responsible for such matters. The new law expands the Committee's powers: it now has the power to issue legislative acts in connection with protection of personal data.

• the introduction of additional legal reasons to justify denial or limitation of access to information or data by the party responsible for processing when this limitation aims to prevent interference with investigations, the prosecution of criminal offences or the enforcement of criminal sentences, or when refusal of access is necessary for the protection of public security, the safety of the State or the person concerned, or the rights and freedoms of others (Articles 34(4) and 34(5) of the LPPD).

• the definition of specific rules on:

- transferring personal data to the responsible authority in another Member State when: a) this is necessary for preventing and detecting criminal offences, or investigating or prosecuting criminal offences, or for enforcing criminal sentences; b) the responsible authority in the Member State where the data were

collected has agreed to transfer them, in compliance with its national legislation; and c) the third State or international body receiving the data provides for an appropriate level of protection for the planned processing of the personal data;

- transferring personal data to private individuals in Member States when the following conditions are met: a) the responsible authority in the Member State where the data were collected has agreed to the transfer; b) no specific legitimate interest of the person concerned prevents the transfer; and c) in these specific cases, the transfer us essential for the responsible authority, which is transferring the data to a private individual so that this individual may: i) perform a task legally assigned to him or her; ii) prevent and detect criminal offences, investigate or prosecute criminal offences, or enforce criminal sentences; iii) prevent an imminent and serious public security risk; or iv) prevent a serious violation of people's rights.

• expressly regulating obligations relating to compliance with specific restrictions applying by virtue of the law of the Member State transferring data to a recipient in Bulgaria. The authority transmitting the data must inform the recipient of any such restrictions, and the recipient must guarantee compliance with any restrictions on processing.

In conclusion, it could be said that the LPPD and its recent amendments highlight the progress and interaction of the legislative process at national and European level.

Law on the protection of personal data (published in DV (Bulgarian Official Gazette) no. 1 of 4 January 2002, amended in DV no. 81 of 18 October 2011), http://dv.parliament.bg/

[NTOD]

Spain

Revision of Article 135 of the constitution

The revised version of Article 135 of the Spanish constitution came into force on 27 September 2011. The text of the article is preceded by a statement of reasons explaining the reasoning that led to the amendment. The revision was made in the context of the financial crisis and stems from the repercussions of economic and financial globalisation. Against this backdrop, "budgetary stability has taken on a real structural value and influences the State's capacity for reform, the maintenance and development of the Welfare State (…), and thus the current and future prosperity of citizens (…). In this sense, the Stability and Growth Pact aims to prevent an excessive budgetary deficit in the Eurozone (…)". The revision of Article 135 of the constitution aims to "safeguard the principle of budgetary stability by requiring all public authorities to ensure compliance with this principle" with a view to "guaranteeing Spain's economic and social stability" and "strengthening Spain's commitment to the European Union".

The revised version of Article 135 stipulates that all public authorities must act in line with the principle of budgetary stability and that the State and the Autonomous Communities may not run up structural deficits that exceed the limits set by the European Union for each of its Member States. An organic law shall set the maximum structural deficit threshold for the State and the Autonomous Communities, in relation to their gross domestic product. Local authorities must have balanced budgets (sections 1 and 2).

Moreover, the State and the Autonomous Communities shall have to be authorised by law to go into debt and take out loans. Loans to pay the interest on and capital of authorities' public debts have absolute priority. The total volume of the public debt incurred by all public authorities in relation to the State's GDP may not exceed the reference value set down in the Treaty on the Functioning of the European Union (section 3).

Under the revised version of the article, the structural deficit and public debt limits may only be exceeded in the event of natural disasters, economic recession, or an extraordinary emergency situation beyond the State's control that significantly affects the financial situation or economic or social stability of the State. Nevertheless, the option to

exceed the limits for this reason may only be exercised if the majority of members of the Congress of Deputies votes in favour (section 4).

Furthermore, it is provided that an organic law shall be adopted to implement the principles set out in the revised article of the constitution, and that mechanisms shall be set up to enable compliance with the debt limit fixed by the article (section 5). The Autonomous Communities shall adopt the provisions required for effective application of the principle of stability in their standards and budgetary decisions, in keeping with their respective levels of autonomy and within the limits mentioned in the article (section 6).

The additional provision to the revised article stipulates that the aforementioned organic law must be adopted by 30 June 2012 and must provide for mechanisms enabling compliance with the debt limit fixed in section 3 of the article.

Finally, the structural deficit limits set in Article 135(2) shall only apply from 2020.

Spanish constitution (BOE no. 233 of 27 September 2011), *http://www.boe.es/boe/dias/2011/09/27/pdfs/BOE-A-2011-15210.pdf*

[MEBL] [MALDOVI]

France

Law on immigration

According to the statement of reasons preceding law no. 2011-672 of 16 June 2011 on immigration, integration and nationality, the law's adoption aims to achieve three things. Firstly, it aims to "strengthen the policy for the integration of immigrants entering and residing in France". Secondly, it transposes three European directives relating to immigration, namely Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, known as the Return Directive; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, known as the European Blue Card; and Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, known as the Sanctions Directive. Thirdly, it aims to "improve the efficiency of the fight against irregular immigration by reforming the procedures and court proceedings relating to the expulsion of illegally staying foreign nationals". The reform in relation to this last point is far-reaching and is directly connected with the transposal of the aforementioned Return Directive, although the French legislature went beyond what was required by European Union law.

Notable changes – which also affect the Code governing Entry and Residence of Foreigners and the Right of Asylum (CESEDA) – made by this text include: -the creation of "itinerant" waiting areas when a group of people arrive in France away from a border crossing; -the transformation of the "obligation to leave French territory" (OQTF) into the main instrument for expelling illegally staying foreign nationals from France, thus replacing the conventional procedure of escort to the border; -the widespread use of house arrest as an alternative measure to detention for foreign nationals subject to an OQTF but temporarily unable to act on it; -chronological reversal of involvement of the administrative and judicial courts: under the new law, an appeal can be made to the administrative courts to annul the expulsion measure before being made to the (judicial) liberty and custody courts with jurisdiction to rule on the extension of detention and its lawfulness.

Law no. 2011-672, which was essentially approved by the Conseil constitutionnel (CC, 9 June 2001, no. 2011-631 DC), has provoked numerous reactions in legal literature, particularly in connection with the European Court of Justice's judgment of 28 April 2011 (El Dridi, C-61/11 PPU), which was followed by a reference for a preliminary ruling by the Cour d'Appel de Paris in the Achughbabian case (pending case C-329/11). The fact that the new

law does not reform provisions penalising illegal stays (Art. L621-1 CESEDA) or failure by illegally staying third-country nationals to act on expulsion measures (Art. L624-1 CESEDA) has raised doubts as to whether the law is consistent with the Return Directive, as interpreted by the European Court of Justice in its judgment in the aforementioned El Dridi case. However, on 12 May 2011, the Ministry of Justice adopted a circular to support the implementation of the aforementioned CESEDA provisions with a view to ensuring consistency with EU law. For now, all that remains is to await the European Court of Justice's response to the French court's request for a preliminary ruling in the Achughbabian case, which asked whether the Return Directive precluded provisions such as Article L621-1 of CESEDA, which penalises illegal stays.

[MHD]

Hungary

Fundamental Law of Hungary

The new Hungarian constitution, which was adopted on 18 April 2011 by the National Assembly of the Republic of Hungary and signed by the country's president on 25 April 2011, will come into force on 1 January 2012.

The new Fundamental Law has given rise to animated debates at national and international level (see opinions no. CDL(2011)016 and CDL(2011)001 of the European Commission for Democracy through Law, resolution no. 12490 submitted to the Parliamentary Assembly of the Council of Europe on 25 January 2011, the European Council and European Commission's declarations on the revised Hungarian constitution, and the European Parliament's resolution of 5 July 2011 on the revised Hungarian constitution).

The provisions of most interest to the European Union are the following:

From now on, the country's name shall be "Hungary" and not "the Republic of Hungary", although the country remains a republic (Article A).

Article E contains clear references to the European Union and Hungary as a Member State of the European Union, stating that "(1) Hungary shall contribute to the creation of European units, in pursuit of the greatest freedom, well-being and security for the peoples of Europe. (2) In its role as a Member State of the European Union, and on the basis of an international treaty, Hungary may – as far as its rights and obligations set out in the founding treaties allow and demand – exercise certain powers deriving from the Fundamental Law, together with the other Member States, through the institutions of the European Union. (3) Within the framework of point (2), European Union law may set binding general rules. (4) For the authorisation to recognise the binding force of an international treaty, such as that referred to in point (2), the votes of two-thirds of all members of the National Assembly shall be required.

With regard to the application of international agreements and international law, Article Q(2) of the new constitution provides that "Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law", while Article Q(3) provides that "Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation".

The Fundamental Law is divided into chapters.

The chapter of the new constitution titled "National avowal of faith" makes various national, historical, and cultural references and emphasises the key role of Christianity in the history of Hungary as well as elements of national identity.

In the chapter titled "Foundation", in reference to Hungarians living outside Hungary's borders, the constitution provides that "Hungary shall bear responsibility for [their] fate" and "shall support their efforts to preserve their Hungarian identity, and the assertion of their individual and collective rights" (Article D). The new constitution also contains a constitutional guarantee to defend the institution of marriage, defined as "the union of a man and a woman

established by voluntary decision", and the family as "the basis of the nation's survival" (Article L).

The chapter titled "Freedom and responsibility" covers fundamental rights and partly uses the structure of the Charter of Fundamental Rights of the European Union. Article II declares that human dignity is inviolable. It affirms the right of every human being to life and human dignity and provides that "foetal life shall be subject to protection from the moment of conception", but complete abolition of the death penalty is not expressly mentioned in Article II or in any other article of the constitution.

The chapter titled "State" is divided into various sections dealing with the State's powers, the major public institutions, and the relationships between them. The new constitution preserves the current parliamentary system and sets out a general framework for the functioning of the Constitutional Court and the Hungarian judicial system, but stipulates that an organic law must be passed to set out detailed rules on the functioning of these bodies. The new constitution introduces individual constitutional complaints to the Hungarian system of constitutional review, but by limiting the Constitutional Court's review powers to the domains it lists, it makes unpunished breaches of the constitution possible (especially in tax and budgetary matters).

The fifth chapter contains provisions on "Special legal orders", while the final chapter covers the "Closing provisions".

Fundamental Law of Hungary, *www.magyarkozlony.hu/*

[VARGAZS]

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Amendments to legislation following European Court of Justice judgment C-274/10

Following the European Court of Justice's judgment of 28 July 2011 (Commission v. Hungary, C-274/10), the Hungarian parliament modified the provisions of law CXXVII of 2007 on value-added tax.

With this judgment, the European Court of Justice ruled that the Republic of Hungary, "by requiring taxable persons whose tax declaration for a given tax period records an 'excess' within the meaning of Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to carry forward that excess or a part of it to the following tax year where the taxable person has not paid the supplier the full amount for the purchase in question, and because, as a result of that requirement, certain taxable persons whose tax declarations regularly record such an 'excess' may be required more than once to carry forward the excess to the following tax year, the Republic of Hungary had failed to fulfil its obligations under Council Directive 2006/112/EC".

In the aim of bringing Hungarian law into line with the provisions of Council Directive 2006/112/EC, law CXXIII of 2011 on the amendment of the law on VAT was adopted and came into force on 27 September 2011. According to the first article of the new law, taxable persons whose right to reimbursement of excess VAT was infringed upon by the national legislation that applied before the amendment may have the excess reimbursed by applying to the national tax authorities by 20 October 2011. After that date, they (and other taxable persons) may exercise their right to deduction according to the arrangements set out in the law on VAT, of which the provisions that were contrary to EU law were repealed by Article 5 of the amending law adopting following the European Court of Justice's judgment.

Law CXXIII of 2011 on the amendment of law CXXVII of 2007 on value-added tax and the special procedural rules for reimbursement of VAT, *www.magyarkozlony.hu/*

[VARGAZS]

Italy

Liberalisations and criteria for access to liberal professions

Two urgent measures were adopted in summer 2011 for the purpose of financial stabilisation. The first measure was introduced by decree-law

no. 98 of 6 July 2011, converted into law no. 111 of 15 July 2011, while the second (hereafter referred to as "the August measure" was introduced by decree-law no. 138 of 13 August 2011, converted into law no. 148 of 14 September 2011.

The legislature paid special attention to liberalisations and criteria for access to liberal professions.

Conversion law no. 111/2011 provides that economic activities and services shall be considered liberalised after an eight-month period, except for categories of profession that require a State exam to be passed in order to be able to exercise the profession.

The August measure, which anticipates the reform of Article 41 of the constitution, provides for the annulment of restrictions on access to and exercise of liberal professions and economic activities. In particular, it establishes that the local authorities and the State must comply with the principle that all private economic activities and professions are free and anything that is not prohibited by law is allowed. The law provides for prohibitions in the five following cases: obligations stemming from the international or EU judicial system; conflicts with constitutional provisions; harm to safety, freedom or dignity; protection of public health and the environment; and finally, State-managed games.

As regards access to professional associations, the old system has not been abolished. Article 3(5) of law no. 148/2011 confirms that a "State exam" must be passed for admission to professional associations and also for authorisation to exercise the profession, as provided for in Article 33(5) of the constitution.

However, the professional associations must ensure that the profession is exercised in line with the principles of free competition, that the offering is varied and differentiated, and that self-employed professionals may work anywhere in Italy. The aforementioned measures must be adopted within one year.

Finally, law no. 148/2011 stipulates that access to liberal professions is unrestricted and that exercise of such professions is based on the autonomy, the free judgement, and the intellectual and technical independence of those practising the profession. The number of people exercising a certain liberal profession in Italy may only be limited for reasons of public interest, where such a limitation would not create direct or indirect discrimination.

Decree-law no. 98 of 6 July 2011, converted into law no. 111 of 15 July 2011,
Decree-law no. 138 of 13 August 2011, converted into law no. 148 of 14 September 2011,
www.finanze.gov.it/export/finanze/index.htm

[GLA]

Romania

Reform of the Civil Code

Romania's New Civil Code (hereafter referred to as "the NCC") came into force on 1 October 2011 and amended the Civil Code that was adopted in 1865. The NCC aims to unify the provisions governing private legal relationships, given that they were formerly governed by separate legal provisions that have been amended many times. Under the Communist regime, the Civil Code was censored by the complete repeal of the first book, which was replaced with various separate standards that reflected the regime's aims at the time.

The NCC is divided into seven books and reflects a monist design: it contains all of the country's legal provisions on people, family relationships, and commercial relationships, while taking account of EU law and private international law.

The NCC also introduces some new provisions: for the first time, there is a definition in Romanian law of engagement (a reciprocal promise, between a woman and a man, to marry). There are no formal requirements for entry into an engagement, and engagement may be proven by any means. Any party arbitrarily breaking off an engagement may be required to pay damages, cover the debts incurred for the marriage, and pay for any shareable goods acquired during the couple's life together.

The Romanian legislature also expanded the system of matrimonial agreements by adding the regime of separate property during marriage to the list of matrimonial property regimes.

Drawing on the law of the other Member States, the NCC states, in Article 397, that joint custody of minor children would be the default custody arrangement in the event of divorce. The previous version of the Code limited custody to the parent granted custody of minor children by court decision.

Other new provisions on divorce and its effects were introduced, primarily by creating new procedures. In certain circumstances, divorce may be granted by administrative means, with the free mutual consent of the spouses, by the registrar in the municipality where the couple were married or where their last shared residence was. Spouses may also request a divorce from a notary, who may, within 30 days, deliver a divorce certificate not mentioning fault on the part of either spouse. However, the parties may choose to request a divorce through the courts or go to court to contest the administrative authorities' refusal to issue a divorce certificate.

The substantial amendments made by the NCC also affect contractual law. With this reform of civil law, courts can become involved in the contractual balance for the first time. They can now become involved in the performance of contracts when this becomes too expensive for one of the parties, if there have been significant changes to the conditions determining the contract's conclusion.

Moreover, the NCC has introduced provisions on private life and human dignity by including, in a special section on the subject, respect of the right to freedom of expression, the right to private life, the right to human dignity, and the right of personal portrayal. As per Article 71 of the NCC, there may be no interference in a person's personal, private, or family life, home, residence, or correspondence without that person's prior consent. Illegal interception of private conversations or use thereof and unauthorised surveillance of a person thus constitute violations of this legal provision.

Any person may exercise the right of portrayal to prohibit or prevent any form of reproduction of his or her image or voice. Article 72 of the NCC stipulates that it is prohibited to damage a person's honour or reputation without that person's prior consent.

The NCC also updates the judicial institutions created in 1865 and introduces many new provisions that were required in the context of Romania's accession to the European Union. In this vein, Article 5 of the NCC expressly asserts the primacy of EU law in all matters that it governs, regardless of the nature or status of the parties.

Law no. 71/2011 on the application of the New Civil Code, adopted by law no. 287/2009, JO no. 505, 15 July 2011,
www.noulcodcivil.just.ro

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Reform of competition law

The adoption of law no. 149/2011 of 11 July 2011 saw the entry into force of emergency ordinance no. 75/2010, which was adopted by the government to amend the law on competition. This new order is the first reform of Romanian competition law since Romania's accession to the European Union and it makes significant changes, most notably by increasing the powers of the Competition Council.

The most important changes include the introduction of the commitments procedure as an alternative the penalties applied to economic actors by the Competition Council. With a view to providing more transparency with regard to penalties, and especially with regard to the evaluation of the possible consequences of illegal behaviour, the new law created a threshold for fines: the amount of a fine may not be less than 5% of the turnover of the company being fined.

In the aim of ensuring uniform application of EU law, the provisions of the new ordinance on competition are formulated to match the provisions of the TFEU as closely as possible.

As per the principles derived from the case law of the European Court of Justice and the amendments made to EU law, the new Romanian law sets down that a company shall be assumed to have a dominant position if its market share exceeds 40%. At the same time, the references to individual and block exemption have been removed from the framework of the dispositions criminalising cartels, as the law now expressly provides for referral to EU regulations on block exemption, which are directly applicable to practices at national and EU level.

The reform also expanded the powers of the Competition Council: in line with Council Regulation (EC) No. 1/2003, it may now conduct investigations at the request if the competition authorities of the other Member States or of the European Commission, and the Commission may also perform surprise inspections in Romania.

Given the role of the public authorities in establishing the legal framework in which economic actors perform their activities, Article 9 of ordinance 75/2010 sets some deadlines for the public authorities to put right any anti-competitive behaviour on their part and provides for the Competition Council to fine them if they do not comply with the deadlines. Similarly, the Competition Council may penalise the public authorities if they do not provide the data it requires for its investigations.

Another significant amendment was made with regard to collusion, as the Competition Council was given the power to analyse economic collusion *ex officio* with a view to avoiding notifications of refusal from the companies. Finally, the ordinance contains one extremely innovative provision in that it makes notification compulsory for some forms of economic collision, even if the companies have shown good faith when concluding the agreement.

From a procedural viewpoint, the new law enshrines the principle of confidentiality of the correspondence between the economic actor and the economic actor's lawyer, and Article 6(6) reiterates the principles set out in Article 15 of Council Regulation (EC) No. 1/2003 on the possibility of the competition authority to submit observations to the national courts with regard to the application of Articles 101 and 102 TFEU.

Law no. 149/201 on the application of Emergency Government Ordinance no. 75/2010 on the law on competition, JO n° 490, 11 July 2011

[VACARGI/MSU]

United Kingdom

European Union Act 2011

The European Union Act 2011 (hereafter referred to as "the Act"), which fully came into force on 19 September 2011, marks a change in the UK's constitutional order and in its relations with the European Union.

The main purpose of the Act is to require the British government to hold a referendum before ratifying any amendments to the Treaty on European Union and the Treaty on the Functioning of the European Union.

Article 4(1) of the Act lists a series of cases in which a referendum must be organised, ranging from the extension (or limitation) of the objectives of the EU as set out in Article 3 TFEU to the extension (or limitation) of the EU's powers to support, coordinate or supplement actions. While a referendum is not required if the proposed amendment does not fall within the scope of application of Article 4 of the Act, it should be noted that the Article's scope of application is broad.

Articles 6 and 7 of the Act provide for a special procedure for the adoption of certain amendments relating to powers shared by the EU and the Member States. In this connection, the minister responsible for the subsection in question may not vote for or against the adoption of a modification proposed by the EU unless that minister has received the prior authorisation of the parliament of the United

Kingdom. This authorisation is also conditional upon the minister presenting the proposed amendment to parliament for its approval (explicit or tacit, depending on the case).

Furthermore, the parliament must give its prior approval for any decision made on the basis of Article 352 TFEU (formerly Article 308 EC), except in the specific cases listed in Article 8(6) of the Act, namely everyday decisions taken by the Commission by virtue of Article 308 EC.

Article 18 of the Act contains what is generally known as 'the sovereignty clause'. The article provides that: "directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act…".

In the view of some commentators, this adoption of this law – which attracted a lot of media attention – may create an obstacle to the advancement of the European project and is thus a potential problem as regards the future position of the United Kingdom within the European Union.

European Union Act 2011
http://www.legislation.gov.uk/ukpga/2011/12/contents

[OKM]

Sweden

Amendments to the constitution

Significant amendments to the Swedish constitution, Regeringsformen (1974:152), hereafter referred to as "the RF", came into force on 1 January 2011. These amendments may be split into five categories, and the most important amendments are described below.

1. The first category of amendments covers the hierarchy of standards and, more specifically, the consistency of a provision or law with standards of higher ranks, and the independence of the courts. Both prior and subsequent review is affected by the amendments regarding the hierarchy of standards. Prior review by the Lagrådet (Legislation Council) has been strengthened by the introduction of a requirement to consult the Lagrådet and the expansion of the matters covered by the Lagrådet's verification powers. Subsequent review has been strengthened in the sense that the inconsistency of a provision issued by the parliament or the government with a higher-ranked standard no longer needs to be obvious for that provision to become inapplicable. Subsequent review is still only performed in the specific situation of an ongoing case. The independence of the courts was boosted by the introduction of a provision stipulating that the government alone has the power to appoint judges. Moreover, a provision was added stating that the process for appointing judges to permanent positions should be defined by a law. From a structural point of view, all of the provisions on courts are listed in a single chapter.

2. The amendments regarding human rights and fundamental freedoms aim to enhance and explain the protection of individuals from any infringements on their rights by public bodies. A new provision was adopted on the protection of individuals against major infringements of their integrity that aim to keep them under surveillance or track them. The provision about the right to respect of property was amended to include an explanation that anyone who is subject to expropriation or a similar measure is entitled to full compensation. Protection against discrimination was expanded by the addition of a ban on discrimination based on sexual orientation. A new provision on freedom for research was also adopted, and it is also stipulated explicitly that all court proceedings must be fair and must be settled within a reasonable timeframe.

3. Amendments were made to the rules governing parliamentary, local, and regional elections. These amendments primarily aim to increase voters' influence when they vote for one specific person in the parliamentary elections. Moreover, these amendments bolstered the position of voters in municipal elections by enabling them to influence the municipalities' agendas.

4. The special position of the municipalities, based on their autonomy, is explained by the

amendments to the RF, and a principle of proportionality was added to the chapter on municipalities. It requires the legislature to examine whether it is possible to achieve its aim using methods that interfere as little as possible with the municipalities' autonomy.

5. In addition to the amendments listed above, it should also be noted that following the adoption of the amending law, the RF now states explicitly that Sweden is a Member State of the European Union and will participate in international cooperation within the United Nations and the Council of Europe.

Lag (2010:1408) om ändring i regeringsformen, *www.riksdagen.se*

[LTB]

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Changes to the method for appointing judges to permanent positions

The Swedish parliament, Sveriges riksdag, has adopted a new law on the appointment of judges to permanent positions (Lag (2010:1390) om utnämning av ordinarie domare), which came into force on 1 January 2011. It emerged from the work on reforming the constitution (En reformerad grundlag, Regeringens proposition 2009/10:80). According to this preparatory work, the appointment of judges to permanent positions is a task of constitutional significance and falls to the government alone, with the government being unable to delegate it. The government must exercise its power to appoint judges as part of its constitutional duty.

The law alters the procedure for appointing judges (particularly to the higher courts) by abolishing the 'invitation' procedure that was previously used. Now, any judge may apply for appointment to a permanent position.

The new law strengthens the position of the committee involved in the appointment of judges (Domarnämnden). The committee, which used to be dependent on the National Courts Institution and therefore was not an independent body, is now a State institution regulated by law. Its primary task is to prepare and submit to the government proposals for suitable candidates to fill vacant permanent posts as judges (Articles 2 and 3 of the law). The committee shall also make active, long-term efforts to meet recruitment needs for judges in permanent positions (Article 3). The committee has nine members, five of whom are (or were) judges in permanent positions. Two members are legal experts from outside the courts, and one of them must be a lawyer. The other two members represent the public. The committee's members may be appointed for a maximum term of four years. The government appoints all of the members except the two representatives of the public, who are chosen by the parliament (Article 4).

The committee must appropriately distribute information about vacant positions for judges (Article 6). Anyone wishing to apply for a position must apply to the committee in writing. The candidate's identity is not subject to the rules on secrecy. The bodies consulted during the discussions on the bill for this law had divided opinions on this point. However, during the preparatory work for the law, the government used arguments based on transparency and democracy to justify the chosen solution. These considerations are more important than arguments based on the recruitment problems likely to arise from transparency on candidate identity or the fact that the procedure would be simpler if the candidates' identities were not revealed. The appointment proposal submitted to the government must be reasoned (Article 9) and may not be contested (Article 10). The committee's proposal is not binding on the government, but if the government appoints a different candidate than the candidate put forward by the committee, it must give the committee an opportunity to express its opinion on the selected candidate.

Lag (2010:1390) om utnämning av ordinarie domare, www.riksdagen.se

[LTB]

D. Extracts from legal literature

EU citizenship and purely internal situations

The case law of the European Court of Justice sometimes evolves in rather unpredictable

ways. Particularly when it comes to "the exact shape given to European citizenship and the right to family reunification […] successive judgments are very dissimilar"[1]. The judgments in the *Ruiz Zambrano*[2] and *McCarthy*[3] cases are a perfect example of this. While the first judgment enabled the ECJ to "make considerable progress in the domain of rights based on European citizenship"[4], the ECJ took care to define these rights clearly in the second judgment[5].

By recognising that "a minor child's status as an EU citizen gives the child's parents, third-country nationals, the right of residence and the right to a work permit in the Member State where the family resides"[6] in the *Ruiz Zambrano* judgment, the ECJ "dramatically reversed case law by accepting, for the first time, that Articles 20 and 21 TFEU may be invoked by 'sedentary' European citizens[7]. This reversal is all the more remarkable given that it was made "as a result of a particularly concise judgment, in which the response on the substance of the case was condensed into less than ten points with very few grounds provided, contrasting sharply with Advocate General Sharpston's remarkably full and perceptive conclusions"[8]. "[If] [o]ver the last 15 years, the Court has turned Union citizenship into a crucial point of reference for the evolution of EU law […] *Ruiz Zambrano* presents us with another milestone"[9].

"While the Court's response was at least succinct […] it completely contradicted the position of the European Commission and of the eight Member States that had submitted observations", all of which agreed that the situation in the case in point was a "purely internal situation, excluding the application of EU law"[10]. Given the "expansive case law policy" that has been pursued in the domain in recent years, this "development in the Court's position is not […] a complete surprise "[11]. Although convention saw "the EU courts refuse to become involved and leave matters to national courts when faced with a purely internal situation "[12], some exceptions to this principle have been allowed in the past. The decisive step in this regard, which was taken with the *D'Hoop* judgment[13] "was that of considering that if a national was expatriated, he could, upon his return to his country, invoke his European citizenship against his State if the State brought against him considerations linked to his absence from its territory"[14]. This was not the only example of such an exception. The Court subsequently observed (most notably in its judgments in the *Garcia Avello*[15] and *Chen*[16] cases) that "a European citizen who has never left the territory of a Member State may invoke rights derived from the treaty as though he were a national of another Member State"[17]. Following on from this case law and "continuing in a direction that had already been sketched out in the *Rottmann* judgment[18]", the *Ruiz Zambrano* judgment "unequivocally […] breaks down […] the barrier linked to the absence of a cross-border dimension[19]. "By abandoning the connection factor to ensure the full effect of EU citizenship", the Court "has taken another step towards creating a form of European citizenship that is completely devoid of any concept of foreign element"[20] and "is establishing solid protection against any breaches of the core rights associated with it "[21]. In "a controversial and historic step in the development of EU citizenship"[22], "[b]y deriving the residence rights directly from Article 20 TFEU, the Court not only circumvent[s] the explicit cross-border requirement of Directive 2004/38 but also the condition not to become an unreasonable burden to the public finances of the host Member State"[23].

While it represented a significant advance for the affirmation of EU citizenship, the *Ruiz Zambrano* judgment nonetheless raised a few questions "both for what it says and for what it does not say"[24]. More specifically, the reasoning behind the Court's decision has been subject to a great deal of criticism. "Given the weakness of its reasoning, the judgment [seems to be] […] settling the matter based on 'humanity' or 'appropriateness', thus completely erasing, with its brief and aprioristic reasoning, the fundamental conceptual tensions that must surely have been raised in the Grand Chamber's deliberations"[25]. "Those who, after the all-embracing, sophisticated and fascinating opinion of Advocate General Sharpston […] had hoped for an equally elaborated decision by the Court […] might have been somewhat disappointed"[26]. "[Granted] [w]e could not expect the Advocate General's passion to be reflected in the judgment of the Court; but neither could we have expected that, having

conflated all of the issues and questions into one constitutional maelstrom, the Court would rewrite the fundamentals of EU law in just seven slender paragraphs of 'reasoning'"[27]. "In effecting an apparently seismic shift in both the scope and content of citizenship rights without any exploration of the underlying principles, any exposition of the specific grounds upon which it made the decision, or any other indications as to the reach of its implications, the value of the Court's 'clarification' is dubious at best"[28]. "Given the novelty of the 'substance of rights' doctrine, one could have expected the Court to provide the legal community with some basic explanations. Instead, the Court restricts itself to apodictic declarations of result. Such scarcity of judicial argument does not appear in a rosier light, even if you consider judicial activism as a virtue. The Court should give reasons for major innovations of its dynamic jurisprudence if it wants to be taken seriously as a legal actor. Moreover, open-ended judgments […] impede legal certainty, if, for example, they do not provide sufficient guidance for national courts on how to apply the novel 'substance of rights' standard in other circumstances[29]. "Unfortunately, the cursory judgment delivered by the Court raises many more questions than it answers"[30]. "What does the 'substance of the rights conferred by EU citizenship' actually mean? This is the premise on which the entire judgment rests […] [b]ut it is never explained"[31]. "And what exactly should be understood by 'dependent minor children'? For instance, if the children had been fifteen or sixteen years old, would a different conclusion have been reached? We cannot tell from the judgment"[32]. Everything seems to depend on whether a child could be considered capable of living alone, but the Court does not provide any clarifications in this respect. "Is this dependency purely financial, or does it include emotional dependency? [And] [w]hen does a child ever stop depending upon its parent? No clear guidance was provided in *Zambrano"*[33].

Moreover, if "the Court hoped, once more, to correct a serious paradox in European construction"[34] with this judgment, the fact remains that "while giving the concept of European citizenship an exponential scope"[35], it "has substantially modified […] the structure of the Treaty and the division of powers between the European Union and the Member States, but without providing any explanations to justify this extension of the Treaty's scope of application [...]. This significant change […] is likely to provoke angry reactions from the German Constitutional Court, among others"[36]. In this connection, "while some States believe that the right of residence guaranteed by the Court […] may 'open the floodgates for immigration', they could set stricter conditions for granting their nationality to prevent acquisition of the status of European citizen […]. That is what happened in Ireland [for example], where nationality law was reformed following the […] *Chen* judgment"[37]. "[Constituting] a highly significant encroachment into an area previously outwith the scope of Union regulation […] *Ruiz Zambrano* is likely to instigate a similar review of citizenship laws within member states, as evidenced by the amendment of the Belgian Nationality Code [even] before the judgment […] was delivered"[38].

While "[the] lack of precision, in the *Zambrano* judgment, as regards any limits to the application of Articles 20 and 21 TFEU to purely internal situations […] led to the belief that any situation involving a European citizen on EU territory fell within […] the scope of application of EU law, […] [one] element underlined the need for caution. As a basis for the decisive recital to its judgment, […] the Court referred to the recital to the *Rottmann* judgment in which the scope of application of European citizenship was determined […] by comparison to […] the 'consequences' of the situation facing the European citizen. This reference to a consequences-based definition of European citizenship would be […] the breach into which the *McCarthy* judgment would step"[39]. "Where the […] groundbreaking […] decision in *Ruiz Zambrano* opened the door to the application of EU citizenship rights in purely internal situations, the outcome of […] *McCarthy* reveals the limits to such approach. EU citizens who never exercised the right to free movement cannot invoke Union citizenship to regularize the residence of their non-EU spouse"[40].

While the latter judgment "ties in […] with the dominant case law that makes the benefit of rights derived from family reunification conditional upon prior movement of the

European citizen in the Member States of the EU", it does not necessarily contradict – at least, according to some legal literature – the *Ruiz Zambrano* judgment, both of which are the expression of "an interpretation of European citizenship law rooted in reviewing the genuine enjoyment of the rights conferred by the status of European Union citizen"[41]. Although "the Luxembourg court believed Mrs McCarthy's situation to be purely internal", this can be explained by the fact that, unlike in the *Ruiz Zambrano* case, "the national rules applying to her situation did not have the effect of 'depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen'"[42]. Set up as an "essential criterion for evaluating the consistency of national law with European Union law […] with regard to people's rights on view of the status of European Union citizen […], [the] condition of genuine enjoyment of the rights conferred by the status of European Union citizen"[43] poses some problems. Firstly, it is "no longer used to check the consistency of national legislation with the Treaty, as […] in the *Zambrano* case, but upstream, to mark out the scope of application of European citizenship to purely internal situations, based on reasoning oriented towards the effects of interference, following the example of the *Rottmann* judgment"[44]. This approach may be considered rather surprising. "The limitation of a rule's scope of application must be completely separate from any consideration relating to the violation of the rule's content […]. And yet the Court's reasoning seems to imply that a situation that started out as purely internal may fall within the scope of the treaty if the contested [national] rule genuinely damages the appellant's chances of subsequently exercising the right to freedom of movement. The European rule would apply if damage had been caused, thus establishing a reversal of the reasoning[45]".

Furthermore, the solution adopted in the McCarthy judgment "was completely contrary to the solution adopted two months before" in the *Ruiz Zambrano* judgment. It could have been expected that the Court would undertake to "carefully define the conditions under which a situation that started out as purely internal may fall within the scope of the Treaty […]. However, the Court's reasoning is fairly laconic. [By limiting itself] to finding that the appellant already has the unconditional right to reside – and therefore remain – in the United Kingdom because of her nationality […] and that her chances of subsequently exercising her right to freedom of movement in Europe [were thus] preserved […], the Court remains […] silent on the consequences […] of refusing to grant her the right of residence […] on her spouse, who is a non-EU national, namely the lack of a right of residence by association and, potentially, expulsion. The Court does not assess whether this possibility may deprive the appellant of genuine enjoyment of her rights by *de facto* forcing her to leave EU territory. The expulsion of the father of a minor EU citizen is assumed to have this effect, but this assumption is not made when the link is marital […]. Better justification should have been provided for [this] difference in treatment"[46]. This is all the more true given that this reasoning seems, a priori, difficult to reconcile with the importance that the Court's case law accords to the right to respect for family life. This reasoning is blatantly contrary to "the lessons taken from the *Carpenter* judgment[47] […], where the Court found that free movement of services precluded the expulsion of the spouse, an illegally staying third country national, of a European citizen who provides services in other Member States than the State in which he and his spouse resided […] given that the expulsion measure would interfere in the family life […] [of that European citizen]"[48]. "While the restrictive effect on future exercise of freedom of movement allows a situation that started out as purely internal to fall within the scope of the treaty, it must be admitted that this effect is not understood as liberally as it would be if it were a restriction on a [mobile] European citizen. [Such a citizen] would be protected against anything affecting his right to move freely in Europe and enjoy the general principles of this right […] [whereas] a European citizen who has never exercised the right to freedom of movement may only complain of a breach that could significantly reduce his chances of subsequently exercising these rights"[49].

"Whereas the *Ruiz Zambrano* judgment […] raised questions due to its broad interpretation of the effects of European citizenship, effects acquired without prior movement in the EU"[50], the *McCarthy* judgment seemed to reveal a "certain reluctance [on the part of the Court] to

bring the reasoning behind this case law to its logical conclusion"[51]. "Extending the reach of Union law to all purely domestic situations (i.e. also those outside the scope of 'core' rights) or the expansive understanding of the scope of EU fundamental rights on the basis of the *Ruiz Zambrano* ruling would provoke resistance on the side of the Member States, including national constitutional courts. Such conflict the ECJ certainly does not strive for. It therefore does not come as a great surprise that the Court positions itself for a great leap forward - and stops half way"[52]. "With [its] new approach, the ECJ tries to find a balance between the preservation of meaningful EU citizenship rights and the regulatory autonomy of the member states. It curtails the at first sight revolutionary consequences of *Ruiz Zambrano* in the sense that this judgment did not abolish the purely internal rule nor the potential of reverse discrimination. This may seem regrettable in the light of the idea that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' but appears to be an unavoidable consequence of the division of competences between the Union and the member states. Notwithstanding the Court's efforts to find some logic in defining the boundaries between the scope of application of EU and national law, the criteria of 'cross-border movement' and 'genuine enjoyment of citizenship rights' cannot rule out a feeling of legal uncertainty. Individual circumstances rather than a systematic and predictable interpretation seem to guide the Court's rulings"[53]. Finally, "by subjecting the foreign element to the deprivation of genuine enjoyment of the main rights held by a 'sedentary' European citizen, the Court […] is giving itself […] jurisdiction to rule, on a case by case basis, on anything falling within the scope of application of European citizenship in purely internal situations. It is clear that a great many references for preliminary rulings will be required to be able to define – with a more or less satisfying level of foreseeability – the exact form of this new area of application of European citizenship"[54]. Following the example of the judgment in the *Runevič-Vardyn* and *Wardyn* case[55], handed down a few days after the *McCarthy* judgment, the recent judgments in the *Dereci*[56], *Gaydarov*[57] and *Aladzhov*[58] cases have made an initial contribution in this regard.

[PC]

E. Brief summaries

* *European Court of Human Rights*: On 20 September 2011, the ECHR handed down its judgment in a case relating to the refusal of the Belgian Cour de Cassation/Hof van Cassatie and Conseil d'Etat/Raad van State respectively to make a reference for a preliminary ruling to the European Court of Justice, despite the appellants insistently requesting them to do so. The appellants argued that the Belgian law by virtue of which they were given criminal sentences was contrary to the principle of freedom of establishment. However, the Belgian courts dismissed this argument.

The ECHR pointed out that the Convention does not, as such, guarantee the right to have the domestic court refer a case to another court for a preliminary ruling. However, the court did emphasise that Article 6(1) of the Convention requires courts to provide reasons for their decisions to refuse to make a reference for a preliminary ruling, especially if the applicable law only allows such refusals as an exception. Within the specific framework of Article 234(3) EC (now Article 267(3) TFEU), this means that, in the view of the ECHR, national courts against whose decisions there is no judicial remedy in national law that refuse to make references for preliminary rulings to the European Court of Justice must provide reasons for their refusal in view of the exceptions provided for in the case law of the European Court of Justice. As set out in the Cilfit judgment (judgment of 29 February 1984, 77/83, ECR 1984 p. 1257), they must therefore list the reasons why they believe that the question is not relevant, that the provision in cause was already interpreted by the European Court of Justice, or that the correct application of EU law is so clear that there cannot be any reasonable doubt about it.

Consequently, the ECHR found that it had to determine whether reasons had been given for the contested refusal decision. The ECHR found that, in the case in point, the Belgian courts had indeed fulfilled the requirement to provide reasons, so the appellants' right to a fair hearing had not been infringed upon.

European Court of Human Rights, judgment of 20 September 2011, Ullens de Schooten and Rezabek v. Belgium (appeals no. 3989/07 and38353/07), www.echr.coe.int/echr

IA/33150-A

[CREM]

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In the case of Sfountouris and others v. Germany, the ECHR handed down a judgment declaring inadmissible the appeal of four Greek nationals who are descendants of victims of a massacre perpetrated in Distomo (Greece) in June 1944 by a unit of the Waffen SS, which was part of the German occupying forces.

The appellants brought a claim for compensation against Germany before the German courts. This claim having been dismissed, they argued that there had been a violation of Article 1 of Protocol No. 1 (protection of property) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights (hereafter referred to as "the Convention").

The ECHR underlined that the Convention did not impose any specific obligation on contracting States to provide redress for damages caused by their predecessor States. It noted that the German courts had ruled that the appellants did not have an individual right to compensation. Nothing here implies that these courts applied national or international law in an arbitrary manner. Consequently, the appellants had no legitimate expectation of obtaining compensation for the harm suffered, which is protected as property under Article 1 of Protocol No. 1.

Furthermore, the ECHR reiterated that the prohibition of discrimination under Article 14 did not have an independent existence, but rather assumed that the facts in question fell within the remit of another article of the Convention. Since this condition was not met, Article 14 was also inapplicable in the case in point.

The Distomo massacre has been the subject of another appeal in the past: in 1997, the Greek courts, which had been asked to rule on the matter by the appellants and around 250 other people, sentenced Germany to pay compensation. However, the Greek Justice Minister refused to authorise enforcement of the judgment against Germany. The ECHR declared inadmissible an appeal against the refusal of the Greek and German authorities to enforce the judgment (admissibility decision of 12 December 2002 in the case of Kalogeropoulou and others v. Greece and Germany).

By contrast, the Italian courts judged admissible the requests for the enforcement of the aforementioned Greek judgment in Italy, rejecting the exception of State immunity from jurisdiction relied upon by Germany. This case law is currently the subject of proceedings brought by Germany against Italy before the International Court of Justice.

Furthermore, following a reference for a preliminary ruling made by a Greek court handling claims for compensation for a massacre perpetrated by German soldiers in Kalavryta, Greece, on 13 December 1943, the European Court of Justice ruled (judgment of 15 February 2007, Lechouritou and others, C-292/05, ECR p. I-01519) that an action brought against a contracting State in the aim of obtaining compensation for harm caused by armed forces in the course of warfare does not constitute a "civil matter" within the meaning of the Brussels Convention. An appeal concerning this case was brought before the ECHR (no. 3737/07, Lechouritou and others v. the European Union and the 27 Member States of the European Union).

European Court of Human Rights, admissibility decision of 31 May 2011, Sfountouris and others v. Germany (appeal no. 24120/06), *www.echr. coe.int/echr*

IA/32846-A

[TLA]

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The ECHR ruled that Italy had not violated Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the

Convention") with regard to the review, by the administrative courts, of an independent administrative authority's decision to impose a fine.

In the case in point, the AGCM (Autorità Garante della Concorenza e del Mercato) imposed an administrative penalty on an Italian company marketing diabetes diagnosis tests for having established anti-competitive practices. The company lodged appeals against this decision with the Italian administrative courts of first and final instance, but these were dismissed. The company then brought a cassation complaint, but the high court declared the appeal inadmissible.

Finally, the company lodged an appeal with the ECHR, arguing that it had not had access to a body with full jurisdiction.

In this respect, the ECHR found that Article 6(1) of the Convention does not preclude administrative authorities from imposing fines. Nonetheless, the authority in question's decision should be reviewed by a judicial body with full jurisdiction.

Moreover, the regional administrative court and the Consiglio di Stato, before which the appellant company appealed against the administrative penalty, both meet the requirements of independence and impartiality that a court must meet by virtue of Article 6 of the Convention.

Lastly, the ECHR observed that the review performed by the two courts in the case in point was not a simple review of lawfulness. The courts actually checked that the AGCM had exercised its powers correctly, that its decision was proportionate, and that the penalty was appropriate given the infringement.

European Court of Human Rights, judgment of 27 September 2011, Menarini Diagnostics s.r.l. v. Italy (appeal no. 43509/08), www.echr.coe.int/echr

IA/32851-A

[GLA]

* *Germany*: The Bundesverfassungsgericht (German Constitutional Court) declared inadmissible a reference from a tax court requesting a constitutionality review of a provision of the law on the encouragement of investments that defines which investments may not receive subsidies from 2 September 1998. This provision transposes into German law a Commission decision of 20 May 1998 (1999/183/EC) concerning State aid for the processing and marketing of German agricultural products.

In the opinion of the referring court, this provision violates the principle of non-retroactivity inasmuch as it prevents the payment of subsidies for investments that had been decided upon in the past.

The Bundesverfassungsgericht reiterated that as long as the European Union provides an equivalent level of protection, the Bundesverfassungsgericht would not, in principle, examine the consistency of EU law – including decisions adopted by virtue of Article 288(4) TFEU – with German fundamental rights. Neither would it conduct such a review of a German law transposing European Union law insofar as there was no margin of appreciation in transposal.

Consequently, a reference to the Bundesverfassungsgericht is inadmissible when, as in the case in point, the referring court does not sufficiently clarify whether the law transposing EU law was adopted using a power defined by EU law. If necessary, the court must initiate preliminary ruling proceedings before the European Court of Justice by virtue of Article 267 TFEU to obtain clarification, even if it is not the court ruling in the final instance.

In the case in point, interpretation of the Commission's decision does not make it possible to assume (without referring the matter to the European Court of Justice for a preliminary ruling) that German legislature had the power to grant subsidies after the date mentioned in the contested provision. The reference to the Bundesverfassungsgericht was therefore declared inadmissible.

Bundesverfassungsgericht, order of 4 October 2011, 1 BvL 3/08, www.bundesverfassungsgericht.de

IA/33211-A

[TLA]

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The Bundesverfassungsgericht dismissed the constitutional appeal lodged against the Bundesgerichtshof's judgment of 22 January 2009 (I ZR 148/06) by an Italian limited-liability company that holds the exclusive right to produce and distribute certain items of furniture designed by Le Corbusier. The defendant in the main proceedings had furnished a cigar lounge in an exhibition hall with imitations of Le Corbusier furniture.

The Bundesgerichtshof ruled that the appellant's right to distribute the furniture had not been violated, referring to the case law of the European Court of Justice (judgment of 17 April 2008, Peek & Cloppenburg, C-456/06, ECR p. I-02731), according to which the concept of distribution to the public, within the meaning of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, implies transfer of ownership, which did not happen in the case in point. Since German copyright law is harmonised as closely as possible with the directive, the Bundesgerichtshof found that it could not provide more protection that that established in the directive. The appellant then lodged a constitutional complaint, arguing that there had been a violation of its fundamental right to property (Article 14 of the German Basic Law), which also protects copyright.

The Bundesverfassungsgericht found that although the German Basic Law only stipulates that fundamental rights may be enjoyed by German legal persons (Article 19(3)), foreign legal persons from European Union Member States may also rely on German fundamental rights. The court held that this extension of the scope of protection is a result of European Union law, particularly the primacy of fundamental freedoms in the common market (Article 26 TFEU) and the prohibition of all forms of discrimination on grounds of nationality. The fundamental right to property therefore applies to the appellant.

Given that European Union law does not determine the content of a provision of German copyright law, the German civil courts must apply an interpretation that is consistent with German fundamental rights. If a court wrongly concludes that there was no margin of appreciation when transposing EU law, it may misjudge the scope of application of German fundamental rights. In such a situation, a court should, if necessary, consider referring the matter to the European Court of Justice for a preliminary ruling. If there was no margin of appreciation, the court must, if appropriate, check the consistency of the contested provision of EU law with the fundamental rights of the European Union and, if necessary, refer the matter to the European Court of Justice for a preliminary ruling.

When these criteria are applied, the judgment in question does not violate the appellant's fundamental right to property as established by the German Basic Law. In view of the case law of the European Court of Justice, the Bundesgerichtshof was able to assume that Directive 2001/29/EC of the European Parliament and of the Council did not allow extension of German copyright protection to the mere provision of imitation furniture.

Bundesverfassungsgericht, order of 19 July 2011, 1 BvR 1916/09,
www.bundesverfassungsgericht.de

IA/33210-A

[TLA]

* *Belgium*: With its judgment of 2 May 2011, the Conseil d'Etat/Raad van State annulled the deliberations of the municipal council of the town of Namur, which aimed to hand over responsibility for managing a cinema to a non-profit association (hereafter referred to as "the association") without following the procedure for public-service concessions. The concession was awarded without a prior tendering procedure, thus disregarding Article 49 EC and the principle of equal treatment. After all, operation of a cinema constitutes a service within the meaning of Article 49 EC. Although the association ran cinemas without requesting any economic compensation for its services, the Conseil d'Etat/Raad van State highlighted the case law of the European Court of Justice

(judgment of 22 May 2003, C-355/00, ECR p. I-08585), according to which such operation remained a service activity for companies generally receiving payment for operation (derived from the money paid by cinemagoers in the case in point). In light of the case law of the European Court of Justice (especially the judgment of 13 October 2005, C-458/03, ECR p. I-05263) the Conseil d'Etat/Raad van State concluded that since there was no tendering procedure before the concession was awarded, these companies had been deprived of the opportunity to make a bid and their freedom to provide services had been violated. It also concluded that companies established in other Member States may have been interested in providing the service in question.

Conseil d'Etat/Raad van State, judgment of 2 May 2011, no. 212.886, www.conseildetat.be

IA/33151-A

[NICOLLO]

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In a judgment handed down on 27 July 2011, the Cour Constitutionnelle/Grondwettelijk Hof ruled that the applicable law and the court with jurisdiction with regard to an action for free release from guaranty in respect of a bankrupt debtor were defined by Articles 3 and 4 of Council Regulation (EC) No. 1346/2000 on insolvency proceedings (OJ L 160 of 30 March 2000, p. 118). In the view of the Cour Constitutionnelle/Grondwettelijk Hof, an action for release from guaranty requires insolvency proceedings to be opened and cannot be viewed as separate from such proceedings. The court added that in any case, it did not have jurisdiction to review the consistency of a European regulation (such as Council Regulation (EC) No. 1346/2000, mentioned above) with the principles of equality and non-discrimination set out in the Belgian constitution.

Cour Constitutionnelle/Grondwettelijk Hof, judgment of 27 July 2011, no. 142/2011, www.const-court.be

IA/33149-A

[CREM]

* *France*: At the request of the Prime Minister, the Conseil d'Etat wrote a report on the creation of a European Public Prosecutor's Office. In this report, which was published in May 2011, the Conseil d'Etat advocated the creation of a strong European Public Prosecutor's Office, with expanded material jurisdiction and greater powers. The Conseil d'Etat believes that the jurisdiction of the European Public Prosecutor's Office should not be restricted to crimes affecting the financial interests of the Union, as provided for in Article 86(1) TFEU, but should extend, by virtue of Article 86(4) TFEU, to serious crime with a cross-border dimension (such as human trafficking, terrorism, terrorist networks, or prostitution networks). Moreover, the Conseil d'Etat seems to be in favour of a decentralised structure composed of European Public Prosecutor and deputy prosecutors in the Member States. It emphasised that the European Public Prosecutor's Office must be independent and must have significant investigation and prosecution powers in order to be effective.

The study also looked at the consequences for national law of the creation of a European Public Prosecutor's Office. More specifically, the Conseil d'Etat put forward suggestions for linking up the European Public Prosecutor's Office, the national public prosecutor's office, and the national judicial police forces. It also highlighted the importance of adopting a solid base of shared procedural rules for major coercive search warrants. Furthermore, the Conseil d'Etat stressed the need to define common criteria to identify the national court with jurisdiction and proposed a "system of tempered legality".

The report also describes the different positions of the Member States with regard to the project. It points out that while some Member States embrace the idea wholeheartedly (Belgium, Luxembourg and the Netherlands), some have reservations about the practical arrangements (Spain, Italy and France), some are concerned about the Office's immediate usefulness (Germany, Austria and Latvia) and some are even sceptical about the whole idea (Czech Republic, Finland and Poland). It seems that there is still a long way to go before a real European Public Prosecutor's Office can be created. Nevertheless, this observation does not weaken the Conseil d'Etat's conviction that there

is a real need to strengthen European justice, particularly by establishing a European Public Prosecutor's Office.

Conseil d'Etat, Reflexion sur l'institution d'un parquet européen, La documentation française, May 2011,
www.conseil-etat.fr

[MNAD]

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The Commercial Chamber of the Cour de Cassation's judgment of 1 March 2011 concerned the case of a cartel in a tendering procedure that was launched in 2002 for the supply of jet fuel to Air France on Réunion (a French overseas department). The cartel was penalised at the time by the French Competition Council, now known as the French Competition Authority.

The judgment being appealed against, which was handed down by the Cour d'Appel de Paris, had confirmed the Competition Council's analysis of the situation and the penalty it applied. The companies forming the cartel had put forward seven arguments in defence of their appeal: notably, Total Reunion based its line of argument on the fact that the practices in question did not cover the whole of France, but rather only part of it. After referring to the case law of the European courts and the Commission's guidelines to confirm the analysis of the Cour d'Appel describing the effect on trade, the Cour de Cassation censured the judgment submitted to it, stressing the criteria to use to determine that effect on trade was appreciable. Since the cartel in question only covered part of a State, namely the island of Réunion, the Cour d'Appel could not base its judgment on "grounds relating to the size of the companies and the place of their activities", these being insufficient for establishing that trade between Member States was appreciably affected. The cartel should have been evaluated in view of the "volume of sales affected by the practice in relation to the overall volume of sales of the products in question within the State".

It should be pointed out that this case gave rise to two priority questions on constitutionality, both of which were declared inadmissible by the Cour de Cassation (one of which, in the court's opinion, aimed solely to contest the constitutionality of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 EC, now Articles 101 and 102 TFEU). Also worthy of note is the fact that this was the first time the French Competition Council made use of the cooperation between national competition authorities established by Article 12 of Council Regulation (EC) No. 1/2003 by having the headquarters of the companies concerned visited by the British Office of Fair Trading.

Cour de Cassation, Commercial Chamber, judgment of 1 March 2011, appeals no. 09-72655, 09-72657, 09-72705, 0972830 and 09-72894, www.legifrance.gouv.fr

IA/32943-A

[ANBD]

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In its judgment of 17 May 2011, the Social Chamber of the Cour de Cassation ruled that an employee may, as an individual, hold his or her employer liable on the grounds that the employer did not establish staff representative bodies, thus depriving the employee of an opportunity for representation.

In the view of the Cour de Cassation, any employer that despite being legally required to do so, does not take the necessary steps to establish staff representative bodies without issuing a notice of the failure to establish such a body, is behaving in a negligent manner that harms its employees, since the employer's actions deprive them of an opportunity to represent and defend their interests. The Cour de Cassation derived this approach from the joint application of the relevant provisions of domestic law on staff representation, particularly Article 8 of the preamble to the 1946 constitution, Articles L2323-1 and L2324-5 of the Labour Code and Article 1382 of the Civil Code, and the relevant provisions of European Union law, including Article 27 of the Charter of Fundamental Rights of the European Union, which relates to workers' right to information and consultation within the undertaking, and Article 8(1) of

Directive 2002/14/EC of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community.

The Cour de Cassation thus censured the reasoning adopted by the Cour d'Appel d'Angers which, dismissing the employee's claim for compensation, found that the appellant, as a "single employee", could not request the establishment of staff representative bodies within the company. The Cour de Cassation considered that the employer's inappropriate and harmful behaviour, which resulted from its failure to appoint staff representatives, undoubtedly harmed the employee (who therefore did not have to prove that this harm existed) and entitled the employee to compensation.

The solution reached in this Cour de Cassation judgment makes it possible to ensure that employees are indeed able to enjoy their right to information and consultation within their companies, as guaranteed by the Charter of Fundamental Rights of the European Union and Directive 2002/14/EC of the European Parliament and of the Council, which establishes a general framework on the issue. In fact, the solution corresponds particularly well to Article 8(1) of the directive, which requires Member States to ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from the directive to be enforced.

Cour de Cassation, Social Chamber, judgment of 17 May 2011, no. 10-12.852,
www.legifrance.gouv.fr

IA/32945-A

[CZUBIAN]

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With its judgment of 10 October 2011, the Conseil d'Etat acted on the European Court of Justice's judgment of 14 October 2010 (Union syndicale Solidaires Isère, C-428/09) and repealed the decree regulating working time for people holding educational commitment contracts, such as instructors at holiday camps, on the grounds that the decree did not provide for equivalent periods of compensatory rest or appropriate protection, thus disregarding the aims of Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time.

In the case in point, the Conseil d'Etat had been asked by the Union syndicale Solidaires Isère to rule on an appeal on the misuse of powers regarding decree no. 2006-950, which introduced educational commitment contracts into French law. This decree provides that the cumulative duration of contracts entered into by the same person cannot exceed 80 days in a period of 12 consecutive months. It also includes a provision specifying that the persons employed under such contracts are entitled to a weekly rest period of at least 24 consecutive hours. However, it makes no mention of a daily rest period, since educational commitment contracts are not subject to the working time provisions of the Labour Code. Since the decree did not provide for a daily rest period, the Union syndicale Solidaires Isère held that it contravened the aims of Directive 2003/88/EC of the European Parliament and of the Council, which gives workers the right to a daily rest period of at least 11 consecutive hours.

With its initial judgment of 2 October 2009 (no. 301014), the Conseil d'Etat referred the matter to the European Court of Justice for a preliminary ruling on the interpretation of the directive, and more specifically, Article 3 on the daily rest period and Article 17, which lists allowable derogations. In its judgment of 14 October 2010, the European Court of Justice ruled that persons employed under educational commitment contracts fall within the scope if Directive 2003/88/EC of the European Parliament and of the Council, although it also held that the rest period arrangements for such persons may be subject to the derogations, provided for in the directive, to the daily rest period of 11 hours. However, the Court found that the contested provisions did not meet the conditions set in Article 17(2) for application of these derogations, since it provided for neither equivalent periods of compensatory rest nor appropriate protection, since the annual threshold of 80 days worked cannot be deemed appropriate protection.

The Conseil d'Etat's judgment of 10 October 2011 factored in the judgment of the European Court of Justice and repealed the contested provisions. Consequently, since no new derogatory provisions consistent with EU law have been adopted, instructors in holiday camps are entitled a minimum daily rest period of 11 consecutive hours.

This Conseil d'Etat judgment provoked a great deal of commentary, both in legal literature and in the media, given its socio-economic implications. Holiday camps have an important role in French society from a social viewpoint, from an economic viewpoint – given the seasonal jobs they provide – and from the point of view of spatial planning, since they link up associations.

A few days after the Conseil d'Etat handed down its judgment, the French National Assembly adopted a bill aiming to simplify law and make administrative procedures easier. The members of parliament reviewed, among other things, the provisions on working time for persons employed under educational commitment contracts.

Conseil d'Etat, judgment of 10 October 2011, no. 301014, Union syndicale Solidaires Isère, www.legifrance.gouv.fr

QP/06529-P1

[CZUBIAN]

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In a judgment handed down on 15 February 2011, the Commercial Chamber of the Cour de Cassation ruled on the location of the "centre of main interests" of a debtor who was a natural person within the framework of Council Regulation (EC) No. 1346/2000 on insolvency proceedings. While Article 3(1) of the regulation states that for legal persons, "the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary", nothing is said about natural persons.

In the case in point, a natural person had asked a French court to initiate liquidation proceedings on her behalf, on the basis of Article L670-1 of the Commercial Code. The judges ruling on the main proceedings refused to do so, finding that the courts of another country had jurisdiction since the appellant's "centre of main interests" within the meaning of the regulation was in Germany, where the appellant performed her activities and accrued numerous debts. The appellant lodged a cassation complaint against this decision, arguing that her "centre of main interests" was in France, where she resided.

The Cour de Cassation dismissed her appeal, ruling that Article 3(1) of the regulation was not applicable by analogy to natural persons and thus did not give the court in the applicant's place of residence jurisdiction to open insolvency proceedings. Furthermore, the Cour de Cassation reiterated the appeal judges' observations, which emphasised the artificial nature of the appellant's residence in France (she did not speak French, all her family lived in Germany, she had never bought anything other than food in France, and she had entered into an employment contract with a French company that possibly did not have any activities), on which basis it concluded that the appellant's "centre of main interests" was not in France, in the sense that the term describes "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties" (see recital no. 13 of the regulation).

This judgment demonstrates how careful French judges are being to prevent forum shopping in the application of the Insolvency Regulation. Upon reading the judgment, it appears that the appellant behaved fraudulently to make it appear that her "centre of main interests" was in France, very probably to avoid collective insolvency proceedings under German law.

Cour de Cassation, Commercial Chamber, 15 February 2011, no. 10-13.832, www.legifrance.gouv.fr

IA/32942-A

[MHD]

* *Italy*: The Corte di Cassazione (Court of Cassation) ruled the settlement of pending VAT disputes to be consistent with EU law.

According to the court, this measure, provided for in Article 16 of law no. 289/02, did not mean that the financial authorities were waivering verification of taxable transactions. Rather, it merely aimed to conclude pending proceedings, at the applicant's request, by guaranteeing the payment of a lump sum for a debt of an uncertain amount.

Moreover, as far as judicial proceedings regarding VAT are concerned, this dispute settlement method is compatible with Sixth Council Directive 77/388/EEC, despite the European Court of Justice judgment declaring the Italian tax amnesty measure to be inconsistent (C-132/06, Commission v. Italy, ECR 2008 p. I-05457).

The Corte di Cassazione noted that firstly, the aforementioned ECJ judgment should be interpreted restrictively and secondly, it should be applied when there have not been court proceedings between the authorities and the taxpayer.

By contrast, according to the scenario set out in Article 16 of law no. 289/02, the taxpayer accepts the conditions set by the authorities in the aim of settling the proceedings, which implies that the authorities have already exercised their power to verify taxable transactions. Consequently, settlement of the proceedings is a positive outcome for both parties, as it enables each one to protect its own interests.

Nonetheless, in a subsequent judgment (see Corte di Cassazione, sez. trib., judgment of 27 September 2011, no. 19681), the Corte di Cassazione ruled, on the basis of the aforementioned ECJ judgment, that the tax amnesty measure regarding penalties for failure to pay or late payment of VAT was inadmissible in view of EU law, and should therefore not be applied.

Corte di Cassazione, sez. tributaria, judgment of 22 September 2011, no. 19333,
www.dejure.giuffre.it

IA/32853-A

[GLA]

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The Corte di Cassazione extended the application of the legislation on extra-contractual liability to the discretionary activity of CONSOB (independent administrative authority for regulating the financial markets).

In the case in point, the Corte di Cassazione had sentenced CONSOB to compensate savers who had lost the investments they made in a company approved by CONSOB. CONSOB had not performed the usual checks on this company, even though it was obvious that the company was part of a group of companies carrying out the activity of an intermediary without having obtained the requisite permits.

In this connection, the Corte di Cassazione emphasised that public administration activities, particularly that of CONSOB, should not only be performed in compliance with the special legislation that created them, but also in compliance with the overriding rule of the general duty of care, in light of the principles of lawfulness, impartiality and good governance.

Consequently, on the basis of the Corte di Cassazione's remarks and bearing in mind that the aforementioned principles result from limits not related to the administration's discretionary activity, the general rule on Aquilian liability set down in Article 2043 of the Civil Code was extended to apply to CONSOB.

Corte di Cassazione, Sez. III, judgment of 23 March 2011, no. 6681, www.dejure.giuffre.it

IA/32852-A

[GLA]

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In a judgment handed down on 3 June 2011, the Plenary Assembly of the Consiglio di Stato ruled that universities could not form companies for the purpose of producing goods and services that were not strictly connected to and compatible with their institutional purpose. Neither, according to the court, could they acquire or hold stakes – even minority stakes – in commercial companies that exist solely to make profit.

However, universities are allowed to create companies to serve their own institutional

purposes, namely research and teaching, as long as the conditions of the in-house system are met.

Within the limits mentioned above, the Plenary Assembly therefore accepted that universities may be tenderers or bid for public service contracts, either directly or through a company created to that end.

This judgment was made following the European Court of Justice's judgment of 23 December 2009 (C-305/08, CoNISMa, ECR p. I-12129), which, by clarifying the concept of "economic operator", interpreted the provisions of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts in the sense that entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – may take part in a public tendering procedure for the award of a service contract.

According to the European Court of Justice, the Member States may determine whether or not such entities are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes.

Consiglio di Stato, Ad. Plen., judgment of 3 June 2011, no. 10,
www.lexitalia.it

IA/32854-A

[VBAR]

* *Lithuania*: In its order of 7 February 2011, the Lietuvos Aukščiausiasis teismas (Supreme Court, hereafter referred to as "the LAT") ruled on an appeal about the seizure of EU financial agricultural income aid paid to a beneficiary who had no other way of settling his debts.

In the case in point, the appellant, the accredited national paying agency, argued that the defendant, a bailiff, had wrongly seized the EU financial aid (direct payment) due to a farmer.

However, according to the LAT, the payment of financial aid is not dependent upon the purposes for which it will be used. EU financial aid becomes the property of the beneficiary as soon as the beneficiary meets the conditions, set down in laws, to receive it. Moreover, the relevant laws provide neither for checks on the use of the aid nor for a prohibition on seizing it.

Consequently, the LAT found that neither EU law (more specifically, Council Regulation (EC) No. 1290/2005 on the financing of the common agricultural policy) nor national law preclude that EU financial agricultural income aid may be subject to enforcement measures.

Lietuvos Aukščiausiasis teismas, order of 7 February 2011, no. 3K-3-32/2011, www.lat.lt

IA/32678-A

[LSA]

* *The Netherlands*: In a judgment handed down on 6 September 2011 on the interpretation of the concept of a "durable relationship", mentioned in Article 3(2)(b) 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, the Raad van State ruled that the directive does not preclude that a relationship may only be considered durable if the EU citizen and his or her partner have been in a relationship for at least six months and have lived together during this period. Furthermore, the parties concerned may be required to provide proof of their durable relationship. However, the Raad van State argued that it could not be required that proof of their durable relationship be derived from their registration at the same address in the population register or from the birth of a child. The Raad van State explained that registration in the population register was only possible for people who were legally resident in the Netherlands. Consequently, requiring the parties concerned to provide evidence of their registration in the population register to demonstrate their durable relationship implied that the partner of the EU citizen had to already have been resident in the Netherlands, which makes it very difficult for

the parties concerned to exercise the rights given to them by the directive.

The Raad van State found that the minister had to examine all the evidence submitted by the parties concerned and explain, if necessary, why the evidence was insufficient. In any case, the minister may not use the fact that the parties concerned were not registered in the population register as the sole reason for a decision.

Raad van State, 6 September 2011, Vreemdeling v. Minister van Justitie, LJN BS1678
www.rechtspraak.nl

IA/33146-A

[SJN] [WILDENA]

* *Czech Republic*: The Nejvyšší správní soud (Supreme Administrative Court) ruled once more on the concept of "contracting authority", interpreting the criteria of meeting "needs in the general interest not having an industrial or commercial character". In the case in point, a State company responsible for managing public forests concluded a contract with a service provider with a view to performing forestry activities and other activities associated with forest utilisation without using the procedure for the award of public contracts. By virtue of the case law of the European Court of Justice, the Nejvyšší správní soud concluded that the State company was a public-law body and was therefore a contracting authority required to run tendering procedures for public contracts.

Firstly, the Nejvyšší správní soud examined the activities of the company in question. Based on numerous European Court of Justice judgments giving broad interpretations of the concept of "needs in the general interest", the Nejvyšší správní soud concluded that this autonomous Community definition was very close to the definition in Czech law. General interest differs from private interest in that an indeterminate number of people may benefit from it, which justifies these needs being satisfied directly by the State or indirectly, through State control of activities for meeting these needs. In this respect, the Nejvyšší správní soud ruled that the administration of State property, forestry, and the management of forest ecosystems undeniably constituted needs in the general interest.

Secondly, the Nejvyšší správní soud evaluated the industrial or commercial character of the activities being performed. It noted that the existence of other, private economic operators on the same market did not, in itself, constitute a reason for ruling out that the State company could be a public-law body. It was also necessary, in the court's view, to take account of the circumstances under which the company was created and the conditions in which it performed its activities. In that connection, the company's founding statutes showed that since it was created, it has been responsible for meeting needs in the general interest, without necessarily aiming to make profit. Furthermore, it was noted that the company did not seem to be faced with strong competition in all of its sectors of activity.

Nejvyšší správní soud, judgment of 31 May 2011, no. 1 Afs 98/2010-399, www.nssoud.cz

IA/33037

[KUSTEDI]

* *United Kingdom*: On 3 August 2011, the United Kingdom Supreme Court handed down its judgment in the case of Lucasfilm Ltd. v. Ainsworth, which aimed to determine whether Mr Ainsworth had violated the appellant company's copyright through unauthorised reproduction of the helmets worn by Stormtroopers, the Galactic Empire's soldiers in the famous film Star Wars.

After the uncertainty created by the judgments of the court of first instance and the Court of Appeal, the Supreme Court's decision put an end to the legal battle. The judgment, which attracted considerable media coverage, covered two main aspects, namely, the description of the helmets as works of art and the justiciability before the British courts of Lucasfilm's United States copyright claims.

As regards the description of the helmets, the Supreme Court investigated the definition of "work of art" in United Kingdom law and concluded that normal use of language excluded the application of this term to a 20th century

military helmet. The court thus dismissed the appellant company's claims on the grounds that the helmets were purely functional and were not works of art, meaning that under British copyright law, they were only protected for 15 years.

As regards the justiciability of United States copyright in the United Kingdom, the Supreme Court performed a significant reversal of case law. The British courts had not had jurisdiction to hear appeals regarding foreign rights not recognised by British law since a House of Lords judgment in 1893. However, on the basis of Article 22(4) of Council Regulation (EC) No. 44/2001 and Regulation (EC) No. 864/2007 of the European Parliament and of the Council, the Supreme Court recognised the possibility of the British courts hearing actions on copyright violation, even when copyright has been violated according to foreign laws.

Supreme Court of the United Kingdom, judgment of 3 August 2011, Lucasfilm Ltd and ors. v. Ainsworth and another, [2011] UKSC 39, www.bailii.org

IA/32670-A

[OKM]

* *Slovakia*: In its judgment of 26 January 2011, the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic, hereafter referred to as "the Ústavný súd") found that by virtue of Articles 125(1), 125(7) and 125(2) of the constitution, it had jurisdiction to review the consistency of national standards with the international treaties through which the Slovak Republic transferred some of its powers to the European Union, and thus with the TFEU. Such review proceedings may be launched by those persons mentioned in the constitution, except for courts, which must, in such cases, refer to the European Court of Justice for a preliminary ruling. If, at the request of the appellant, the Ústavný súd concludes that the national provision is not consistent with the constitution, it is no longer necessary, in principle, to review its consistency with EU law. However, if a question is raised as to whether a national standard is consistent with EU law, with no reference to the constitution, the Ústavný súd must examine the issue and rule on it, either on the basis of the case law of the European Court of Justice or after having referred the matter to that court for a preliminary ruling.

Ústavný súd, judgment of 26 January 2011, PL US 3/09378, www.concourt.sk/

IA/33036-A

[VMAG]

* *Sweden*: On 30 December 2010, the Högsta domstolen (Swedish Supreme Court) ruled that Council Regulation (EC) No. 44/2001 could not be applied retroactively. This question was raised following an application to declare enforceable a judgment handed down in Romania. The issue at hand in the case was that of knowing how the transitional provisions and the provisions for entry into force would apply to judgments handed down in Romania before 1 January 2007 but after 1 March 2002 (the date on which the regulation came into force).

The Romanian judgment was handed down on 5 October 2006, before Romania joined the European Union and before Council Regulation (EC) No. 44/2001 came into force in Romania. First of all, the Högsta domstolen pointed out that under Article 66 of the regulation, the regulation only applies to legal proceedings instituted after its entry into force, so the judgment must also have been handed down before that date. In its analysis, the court referred to the fact that retroactive application of the Brussels and Lugano Conventions was not possible.

The Högsta domstolen observed the Act of Accession of Romania does not contain an exception or special provisions implying that the regulation may be applied before its entry into force in Romania. In the view of the Högsta domstolen, the regulation does not, as such, contain any provisions allowing retroactive application – quite the contrary, in fact. The court highlighted that before the regulation came into force in 2002, the provisions on enforcement could not be applied between Member States of the European Union to decisions made before the entry into force of the regulation. This inapplicability remains despite the EU Member States' longstanding cooperation within the framework of the Brussels Convention, which is practically

identical to the regulation. The Högsta domstolen added that the expression "after the entry into force thereof" must be understood as meaning that at the time, the regulation came into force for all Member States simultaneously. For these reasons, the provisions on enforcement cannot be given any other meaning than "after the entry into force thereof for each respective Member State", which in turn means "after the entry into force thereof for Romania".

Högsta domstolen, judgment of 30 December 2010, case no. 6 5591-09, *http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2010/2010-12-30%20O%205591-09%20beslut.pdf*

IA/32579-A

[LTB]

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[1]A. Riguax, "Droit au rapprochement familial", *Europe*, July 2011, comm. 239.
[2]Judgment of 8 March 2011, C-34/09, not yet published.
[3]Judgment of 5 May 2011, C-434/09, not yet published.
[4]S. Corneloup, S., "Citoyenneté européenne: la Cour de justice apporte une nouvelle pierre a son édifice", *Recueil Dalloz*, 19 May 2011, no. 19, p. 1325.
[5]F. Picod, Chronique "Citoyenneté", *La semaine juridique — éd. générale*, no. 20, 16 May 2011, p. 986.
[6]M. Aubert, E. Broussy and F. Donnat, Chronique "Citoyenneté de l'union", *AJDA*, 2011, p. 1007.
[7] T. Bombois, "La citoyenneté européenne appliquée aux situations purement internes: portée et enjeux des arrêts *Zambrano* et *McCarthy", Jurisprudence de Liège, Mons et Bruxelles*, 2011/26, pp. 1227-1228.
[8]A. Rigaux, "Citoyenneté européenne", *Europe*, May 2011, comm. 149.
[9] K. Hailbronner and D. Thym, *Annotation on Case C-34/09, Ruiz Zambrano, C.M.L.Rev.* 2011, pp. 1253-1269.
[10] C. Boutayeb and A. Raccah, A., "Le bénéfice du regroupement familial élargi aux parents d'enfants citoyens de l'Union", *Revue de droit sanitaire et social*, 2011, pp. 449-450.
[11] S. Corneloup, op. cit., p. 1326.
[12]M. Houser, Chronique "Droit fondamental et liberté publique", *AJDA*, 30 May 2011, pp. 1082-1086.
[13]Judgment of 11 July 2002, C-224/98, ECR p. I-6191. See "Citoyenneté de l'Union", *Reflets no. 3/2003*, p. 32 (available in French only).
[14]J. Cavallini, "Portée de la citoyenneté européenne", *La semaine juridique — éd. sociale*, no. 16-17, 19 April 2011, pp. 25-26
[15]Judgment of 2 October 2003, C-148/02, ECR p. I-11613. See "Citoyenneté européenne, non discrimination et droit au nom", *Reflets no. 2/2004*, p. 32 (only available in French).
[16]Judgment of 19 October 2004, C-200/02, ECR p. I-9925.
[17]T. Bombois, op. cit., p. 1230.
[18]Judgment of 2 March 2010, C-135/08, ECR p. I-1449.
[19] M. Aubert, E. Broussy and F. Donnat, op. cit., p.1007.
[20]J. Cavallini, op. cit., p. 1195.
[21]T. Bombois, op. cit., p. 1235.
[22]A. Hinarejos, "Extending Citizenship and the Scope of EU Law", *Cambridge Law Journal*, 2011, pp. 309-312.
[23]P. Van Elsuwege, "Shifting the Boundaries? European Union Citizenship and the Scope of EU Law", *Legal Issues of Economic Integration*, 2011, pp. 263-271.
[24]S. Corneloup, op. cit., p. 1326.
[25]-A. Rigaux, "Citoyenneté européenne", cit. supra, p. 13.
[26]H. Van Eijken and S. A. De Vries, "A new route into the promised land? Being a European citizen after Ruiz Zambrano", *E.L.Rev.*, 2011, p. 704.
[27]N. Nic Shuibne, "Seven questions for seven paragraphs", *E.L.Rev.*, 2011, pp. 161-162.
[28]A. Lansbergen and N. Miller, "European Citizenship Rights in Internal Situations: An Ambiguous Revolution?", *European Constitutional Law Review*, 2011, pp. 287- 291.
[29]K. Hailbronner and D. Thym, op. cit., p.1259
[30]A. Lansbergen, and N. Miller, op. cit., p. 291.
[31]N. Nic Shuibne, op. cit., p.162.
[32]S. Corneloup, op. cit., pp. 1326-1327.
[33] R. Morris, Case note on Case C-34/09 *Gerardo Ruiz Zambrano, Maastricht Journal of European and Comparative Law*, 2011, pp. 179-184.
[34]C. Boutayeb and A. Raccah, op. cit., p. 449.
[35]A. Rigaux, "Citoyenneté européenne", cit. supra, p. 12.
[36]D. Martin, "La Cour de justice et les situations internes à un Etat membre: vive la révolution ?", *RJS*, 6/2011, pp. 450-452.
[37]S. Corneloup, op. cit., p. 1327.
[38]A. Lansbergen, and N. Miller, op. cit., pp. 301-302.
[39]T. Bombois, op. cit., p. 1231.
[40]P. Van Elsuwege, "European Citizenship and the Purely Internal Rule Revisited", *European Constitutional Law Review*, 2011, p. 308.
[41]S. Hennion, "L'effectivité des droits conférés par la citoyenneté européenne", *La semaine juridique - éd. générale*, no. 27, 4 July 2011, pp. 800-803.
[42]T; Bombois, op. cit., p.1231.
[43]S. Hennion, op. cit., p. 805.
[44]T. Bombois, op. cit., p. 1231.
[45]J. Cavallini, "Inapplicabilité du droit de l'Union aux situations purement internes", *La semaine juridique — éd. sociale*, no. 30, 26 July 2011, pp. 1363-1365.
[46]Ibid.
[47]Judgment of 11 July 2002, C-60/00, ECR p. I-6279. See "La notion d"obstacle' à la libre prestation des services et le droit fondamental à la protection de la vie privée", *Reflets no. 3/2003*, p. 30 (only available in French).
[48]T. Bombois, op. cit., p. 1238.
[49]J. Cavallini, "Inapplicabilité...", cit. supra, pp. 1365-1366.
[50]S. Hennion, op. cit., pp. 802-803.
[51]M. Aubert, E. Broussy and F. Donnat, Chronique "Citoyenneté de l'Union et situation purement interne", *AJDA*, 2011, pp. 1614-1616.
[52]K. Hailbronner and D. Thym, op. cit., pp. 1269-1270.
[53]P. Van Elsuwege, "European Citizenship.", cit. supra, pp. 323-324.
[54]T. Bombois, op. cit., p. 1241.
[55]Judgment of 12 May 2011, C-391/09, not yet published.
[56]Judgment of 15 November 2011, C-256/11, not yet published.
[57]Judgment of 17 November 2011, C-430/10, not yet published.
[58]Judgment of 17 November 2011, C-434/10, not yet published.