



REFLECTS

No. 3/2012

Brief information on legal developments of European Union interest

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A. Case law

I. European and international courts

European Court of Human Rights

*European Convention on Human Rights –
Right to respect for family and private life –
Right to an effective remedy – Prohibition of
discrimination – Provision of national law
providing for a naturalisation procedure –
Failure to submit the application by the set
deadline – Erasure from the register of
permanent residents – Violation of Article 8
and Articles 13 and 14 in conjunction with
Article 8 of the Convention*

The Grand Chamber of the European Court of Human Rights (hereinafter referred to as "the ECHR") unanimously ruled that Slovenia had violated the right to respect for family and private life (Article 8 of the Convention), in conjunction with a breach of the right to an effective remedy (Article 13 of the Convention) and of the prohibition of discrimination (Article 14 of the Convention). These breaches were committed against a group of people known as the "erased", namely nationals of other former Yugoslav who lost their status as permanent residents after Slovenia declared independence.

The events that were the subject of the case date back to the dissolution of Yugoslavia, but their effects continue into the present day. The case concerned the procedure for establishing Slovenian nationality and the erasure of a number of non-Slovenian citizens from the register of permanent residents.

It should be noted that the State of Slovenia had established a naturalisation procedure for nationals of other republics that had belonged to the Socialist Federal Republic of Yugoslavia (hereinafter referred to as "the SFRY"). However, due to the deadline that was set for naturalisation, some citizens were erased from the register of permanent residents and became illegal aliens or stateless persons. This resulted in measures to remove them from Slovenia.

The ECHR dismissed the Slovenian government's objection of lack of victim status.

In that connection, the ECHR pointed out that the applicants could only lose this status if the national authorities recognised, either expressly or in substance, that the Convention had been violated and remedied the breach. However, recognising the breach and issuing the applicants with permanent residence permits was found not to constitute appropriate, sufficient redress at national level. Consequently, the ECHR dismissed the government's objection and found that the six applicants who had been granted permits could still claim to be victims of the alleged breaches.

With regard to the violation of Article 8 of the Convention, the ECHR first confirmed the chamber's conclusions, according to which the erasure had infringed upon the rights derived

from that article. Following this confirmation, the ECHR considered other aspects, such as whether the interference was in accordance with the law, whether it pursued a legitimate aim and whether it was necessary.

Thus the ECHR observed that the applicants "could not reasonably have expected, in the absence of any clause to that effect, that their status as aliens would entail the unlawfulness of their residence on Slovenian territory and would lead to such an extreme measure as the erasure". Moreover, the lack of prior notification, the unforeseeable and inaccessible legislation and administrative practice and the lack of clarity in the national legal system led the ECHR to conclude that the contested measure was not in accordance with the law.

While analysing the legitimacy of the pursued aim and its necessity, the ECHR acknowledged that the short deadline for naturalisation had been set in the aim of protecting the country's national security interests and controlling the residence of aliens within its territory. Nevertheless, the ECHR found that the applicants had suffered harmful consequences as a result of being removed from the Slovenian register of permanent residents and that "the regularisation of the residence status of former SFRY citizens was a necessary step which the State should have taken in order to ensure that failure to obtain Slovenian citizenship would not disproportionately affect the Article 8 rights of the 'erased'". Consequently, the absence of such regularisation upset the fair balance which should have been struck between the legitimate aim of the protection of national security and effective respect for the applicants' right to private or family life or both".

Since Article 8 was found to have been breached, the ECHR held that the government had not upheld the applicant's right to an effective and adequate remedy to redress the violation of Article 8. As a result, it found that there had been a breach of Article 13 in conjunction with Article 8.

Finally, the ECHR found that Slovenia had violated Article 14 of the Convention, in conjunction with Article 8 of the same, by comparing the treatment of nationals of former SFRY republics with that of nationals of other

States. In that connection, the ECHR stated that "as a consequence of the independence legislation, former SFRY citizens suddenly found themselves in a situation of unlawfulness ... and in a disadvantaged position vis-à-vis 'real' aliens, as only the permanent residence permits of the latter remained valid".

European Court of Human Rights, judgment of 26 June 2012, Kurić and others v. Slovenia (application no. 26828/06), www.echr.coe.int/echr

1A/32883-A

[GLA]

European Convention on Human Rights – Implementation of Resolution 1267 of the United Nations Security Council – Restrictive measures applied to persons linked to the Taliban – Prohibition on entering and transiting through Swiss territory – Violation of Article 8 of the Convention – Absence of effective remedies against national measures – Violation of Article 13 of the Convention in conjunction with Article 8

On 23 May 2012, the European Court of Human Rights (hereinafter referred to as "the ECHR") passed judgment in the case of *Nada v. Switzerland*, which related to Switzerland's implementation of sanctions established by Resolution 1267 of the United Nations Security Council. The Grand Chamber of the ECHR unanimously ruled that Article 8 of the Convention had been violated through the prohibition on the applicant entering and transiting through Swiss territory. The ECHR also found that the absence of effective remedies against this measure constituted a breach of Article 13 of the Convention.

In the case in point, the applicant, Mr Nada, an Italian and Egyptian national, lived in Campione d'Italia, an Italian enclave of around 1.6 km² surrounded by the Swiss canton of Ticino and separated from the rest of Italy. In 2001, his name was added to the list held by the Security Council's Sanctions Committee and to the list in an annex to the Ordinance Instituting Measures Against the Taliban, which was adopted by the Swiss Federal Council with a view to implementing the provisions of Security Council

Resolution 1267. As a result of this, the applicant was no longer allowed to move between Switzerland and Italy. In May 2005, the criminal proceedings against Mr Nada in Switzerland were discontinued as suspicions that he had participated in activities linked to international terrorism turned out to be manifestly unfounded. However, the applicant's applications to the relevant Swiss authorities to have his name removed from the annex to the Ordinance Instituting Measures Against the Taliban were dismissed. The Tribunal Fédéral Suisse, when asked to rule on the matter, found that uniform application of the sanctions regime would be jeopardised if one of the State parties to the European Convention deviated from it in order to protect certain individuals' fundamental rights.

With regard to the alleged breach of Article 8 of the Convention, the ECHR first pointed out that the Convention did not as such guarantee an individual's right to enter a country of which he or she is not a national. Nevertheless, the ECHR found that the prohibition on the applicant leaving the very confined area of Campione d'Italia for six years was likely to make it more difficult for him to exercise his right to maintain contact with others, in particular his friends and family.

The ECHR then considered whether the interference with the applicant's right to respect for family and private life was necessary in a democratic society. The ECHR acknowledged that Switzerland had a margin of appreciation, which, although limited, was no less real, in the implementation of the Security Council resolution (it should be noted that some of the judges disputed this finding in their concurring opinions). It also pointed out that Switzerland had not informed the Sanctions Committee of the conclusions of investigations until September 2009 and had not taken any steps to encourage Italy to begin a procedure before that Committee. Finally, the ECHR noted that the case involved medical considerations, in view of the applicant's age and state of health.

Consequently, the ECHR ruled that the Swiss authorities had not sufficiently taken account of the specific characteristics of the case and had not taken all possible steps to adapt the sanctions regime to the applicant's personal situation.

With regard to the alleged violation of Article 13 of the Convention, the ECHR noted that while Mr Nada had brought his case before the domestic courts, they had found that they did not have jurisdiction to lift the sanctions imposed on the applicant. Referring to point 299 of the European Court of Justice's judgment in the Kadi case (judgment of 3 September 2008, C-402/05 P and C-415/05 P, ECR p. I-06351), which established that "it [was] not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms [was] excluded by virtue of the fact that that measure [was] intended to give effect to a resolution of the Security Council", the ECHR found that the same reasoning should be applied to the case in hand. The ECHR therefore concluded that there had been a breach of Article 13 in conjunction with Article 8 insofar as the applicant did not have any effective means of obtaining the removal of his name and, as such, no way to defend himself against the infringement on his rights.

European Court of Human Rights, judgment of 23 May 2012, Nada v. Switzerland (application no. 10593/08), www.echr.coe.int/echr

1A/32889-A

[KIRILIN]

European Convention on Human Rights – Convicted prisoners' voting rights – Provision in national law providing for the right to vote to be forfeited as an ancillary penalty for certain offences – No violation of Article 3 of Protocol No. 1

On 22 May 2012, the Grand Chamber of the European Court of Human Rights (hereinafter referred to as "the ECHR") ruled with regard to disenfranchisement of convicted prisoners.

The application was submitted by an Italian national who had received a prison sentence and a ban from serving in public office, leading to forfeiture of his right to vote, for murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm. The applicant claimed that the ancillary penalty of

automatic, permanent forfeiture of the right to vote violated Article 3 of Protocol No. 1. The chamber handling the case unanimously concluded that the prohibition applied to the applicant was contrary to the Convention because it "was of the general, automatic and indiscriminate nature referred to in the Hirst judgment (Hirst v. United Kingdom (No. 2), application no. 74025/01)".

By contrast, the Grand Chamber reiterated and reaffirmed the general principles of the right to free elections, specifying that the right to vote was not a privilege, but neither was it an absolute right, since States have a broad margin of appreciation in that sphere.

Nevertheless, limitation of the right to vote must not be disproportionate, in terms of the manner of its application and the legal framework surrounding it, to the legitimate aims pursued.

In addition, removal the right to vote without a judicial decision does not, in itself, give rise to a violation of Article 3 of Protocol No. 1.

In the case in point, the ECHR ruled that the disenfranchisement provided for in the Italian legal system did not constitute a violation of Article 3 of Protocol No. 1. In the ECHR's view, this measure, although it interfered with the applicant's rights, pursued a legitimate aim. Consequently, in the case in point, the applicant had his right to vote removed with a view to "enhancing civic conduct and respect for the rule of law".

Moreover, the ECHR found that the relevant Italian legislation connects this measure with the nature and gravity of the offence committed and that it showed "the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand".

Furthermore, in order to corroborate the direction taken by its case law, the Grand Chamber of the ECHR confirmed that "when disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it is not compatible with Article 3 of Protocol No. 1".

With regard to the observations submitted by the United Kingdom, the third-party intervener, which proposed reversing the conclusions delivered in the Hirst case, the ECHR stated that "[i]t [did] not appear ... that anything has occurred or changed ... since the Hirst (no. 2) judgment that might lend support to the suggestion that the principles set forth in that case should be re-examined".

Finally, the ECHR specified that disenfranchisement, as provided for in Italian law, did not have the general, automatic and indiscriminate character that led it, in the Hirst case, to find a violation of Article 3 of Protocol 1.

European Court of Human Rights, judgment of 22 May 2012, Scoppola v. Italy No. 3 (application no. 126/05), www.echr.coe.int/echr

1A/32882-A

[GLA]

EFTA Court

European Economic Area (EEA) – Freedom of establishment – Scope of application - Relocation of the head office of a company governed by national law to another EEA State – Practice by the tax authorities consisting of considering the company liquidated as a result of the transfer – Taxation of latent capital gains relating to transferred assets – Immediate recovery of this taxation

A Norwegian court asked the EFTA Court to rule on a question on the interpretation of Articles 31 and 34 of the Agreement on the European Economic Area, which relate to freedom of establishment. The dispute in the main proceedings questioned a decision made by the Norwegian tax authorities in 2010 finding that the 2001 relocation to the United Kingdom of the headquarters of a company registered in Norway gave rise to an obligation to liquidate the company and pay a liquidation tax. This decision required the immediate recovery of taxation on latent capital gains relating to the transferred assets. However, the issue of whether relocating company headquarters abroad gives rise to an obligation to liquidate the company is not clearly

settled by Norwegian company law. Moreover, in the case in point, the Norwegian authorities had not taken any measures to obtain the winding-up and liquidation of the company. First of all, the court observed that:

"In the absence of clear and precise provisions of national law that a company moving its head office out of Norway must liquidate, and of any decision by the competent authorities or courts putting the liquidation into effect, the relocation of Arcade's head offices to the United Kingdom does not frustrate its right to rely on Article 31 EEA in the present case (...)."

After determining that the provisions of the EEA Agreement that relate to freedom of establishment were applicable in the case in hand, the court found that:

"The definitive establishment of the amount of tax payable by a company that relocates its head office outside the realm of Norway based on the assessment of the tax authorities that it is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law, constitutes a restriction under Articles 31 and 34 EEA if companies deemed to be in breach of such an obligation, but not seeking relocation, are not subject to liquidation taxation."

With regard to objective justification for such a limitation the court determined that:

"The definitive establishment of the amount of tax payable by a company based on the assessment of the tax authorities that the company is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law may be justified on the grounds of maintaining the balanced allocation of powers of taxation between the EEA States and preventing tax avoidance(...)

(This) must be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of powers of taxation between the EEA States and to prevent tax avoidance, insofar as it provides for the consideration of objective and verifiable elements in order to determine whether the relocation of a head office represents an

arrangement incompatible with the rules of domestic company law.

If (...) the company is not in compliance with the rules of national company law and should therefore be subject to liquidation, the definitive establishment of the amount of tax payable must be confined to the consequences of liquidation in order to remain compatible with the principle of proportionality."

Finally, with special reference to the European Court of Justice's judgment in case C-371/10, National Grid Indus, the EFTA Court found that:

"A national measure that prescribes the immediate recovery of tax on unrealised assets and tax positions at the time of the assessment of the tax authorities that a company has lost its status as a separate legal entity under national law, but without any decision by the authorities or courts competent to determine that the company has lost that status, is precluded by Article 31 EEA."

EFTA Court, judgment of 3 October 2012 in case E-15/11 Arcade Drilling AS and the Norwegian State, represented by Tax Region West, www.eftacourt.int

IA/32888-A

[SIMONFL]

Court of the Eurasian Economic Community

Court of the Eurasian Economic Community – Power to review the validity of decisions adopted by the institutions of the Eurasian Economic Community – Direct applicability to the decisions of the Customs Union Committee – Use of ambiguous, declaratory or informative wording - Exclusion

The Eurasian Economic Community (hereinafter referred to as "the EurAsEC") is an intergovernmental organisation founded on 30 May 2001. Its members are the Russian Federation, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan. Its institutions include the Court of the EurAsEC, located in Minsk (Belarus).

On 5 September 2012, the Court of the EurAsEC handed down the first judgment in its history.

The case in question was between mining company Yuzhny Kouzbass and the Customs Union Committee (hereinafter referred to as "the CU Committee"). The Court of the EurAsEC was asked to rule on the compatibility of the first paragraph of decision no. 335 of 17 August 2010 of the CU Committee with the international agreements concluded within the framework of the Customs Union (between Russia, Belarus and Kazakhstan) and the Eurasian Economic Community. The first paragraph provides for "taking account of" the information provided by the Russian Federation, according to which rules on customs declaration for a certain category of goods exported from Russia to other Member States of the customs union must remain applicable to facilitate the collection of statistical data.

First of all, the Court of the EurAsEC pointed out that as the regulatory body of the Customs Union, the CU Committee had the power to adopt binding decisions that were directly applicable in the Member States of the Customs Union. These decisions form the legislation of the Customs Union and may not, as a matter of principle, include ambiguous wording or provisions that are declaratory or informative in nature. With regard to decision no. 335, the Court of the EurAsEC found that it did not contain any defects of form that could call into question its binding, regulatory nature. In the court's view, the CU Committee could have adopted recommendations that would not be binding on the Member States of the Customs Union instead of the contested decision.

For that reason, the enforceability of decision no. 335 of the CU Committee resulted in the direct application of the decision by Russian border services, thus incurring the administrative liability of mining company Yuzhny Kouzbass, which had not completed a customs declaration for some goods..

The Court of the EurAsEC then moved on to the question of the contested provision's consistency with international agreements. In that connection, it held that retaining the obligation to declare certain goods twice was inconsistent with the aims and founding principles of the Customs Union, such as the establishment of a common customs policy and non-discrimination between private operators. Furthermore, the need to fill

out additional statistical forms represented a disproportionate burden for Russian companies and violated the principle of the prohibition of arbitrary discrimination and hidden restrictions to trade within the Customs Union.

With this judgment, the EurAsEC asserted that it has jurisdiction to rule on the validity of decisions adopted by the institutions of the Eurasian Economic Community. Its jurisdiction cannot be limited on the grounds that certain provisions do not have legal effect.

Суд Евразийского экономического сообщества, judgment of 5 September 2012,
www.sudevrazes.org
www.evrazes.com

1A/32890-A

[KIRILIN]

II. National courts

1. Member States

Germany

Transport – Air transport – Regulation (EC) No. 261/2004 of the European Parliament and of the Council – Compensation to passengers in the event of a flight cancellation – Exemption from the requirement to pay compensation in extraordinary circumstances – Scope – Strike call by a pilots' association

With a judgment handed down on 21 August 2012, the Bundesgerichtshof (German Federal Court of Justice) ruled on whether an airline that cancelled flights in order to adapt its services to the repercussions of an announced strike, could be exempted from the requirement to compensate passengers derived from Regulation (EC) No. 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

The appellant had reserved a return flight between Düsseldorf and Miami, with the return journey due to be made on 22 February 2010. Following a strike call for the period from 22 to 25 February 2010, issued by a pilots' trade union

on 17 February 2010, the respondent, an airline, cancelled the return flight and transferred the appellant to a later flight, with the result that she arrived at her destination three days later than planned. She therefore requested the compensation provided for in Article 7 of Regulation (EC) No. 261/2004 of the European Parliament and of the Council.

The Bundesgerichtshof found that in such a situation, the airline could be exempted from the requirement to pay compensation since the cancellation was due to "extraordinary circumstances" within the meaning of Article 5(3) of the regulation. In the view of the Bundesgerichtshof, a strike call by a pilots' union, in the context of industrial action, could give rise to such "extraordinary circumstances" for the airline in question. Although such strike call would lead to a strike by the airline's own pilots, it has external effects on the company and is not a normal part of its habitual activities.

Since there was an industrial conflict within the company, the respondent could admittedly have avoided the strike by giving in to the trade union's demands. Nevertheless, the Bundesgerichtshof highlighted that this possibility did not immediately preclude the respondent from being exempt from the requirement to pay compensation. If it did, the airline would have to give up the trade union freedom accorded to it by EU law and take on the loser's role in every industrial dispute. That would not be tolerable for the airline, nor would it be favourable to passenger interests in the long term.

While the lower court had arrived at a different conclusion, in line with some legal literature, the Bundesgerichtshof did not make a reference for a preliminary ruling as it believed that the correct interpretation of "extraordinary circumstances" could clearly be established from the case law of the European Court of Justice.

However, the Bundesgerichtshof could not rule on the merits of the case as regards the compensation claimed by the appellant, so it referred the case back to the lower court so that it could establish whether the respondent had taken all reasonable measures to prevent the flight's cancellation. The Bundesgerichtshof specified that in view of the extraordinary circumstances, it

would be appropriate to give the airline a certain margin of discretion when it came to evaluating reasonable measures.

Nevertheless, it should be noted that in the Finnair case (European Court of Justice judgment of 4 October 2012, C-22/11), the airline had denied the appellant boarding after his flight was rescheduled as a result of a strike at the airport two days before, which had led to a flight being cancelled. Unlike in the case under discussion, the appellant in this case did not have a reservation on the cancelled flight, but rather on a later flight that went ahead on the scheduled date. The European Court of Justice ruled that in such situations, the airline could not claim extraordinary circumstances to exempt itself from paying the compensation due in the event of denied boarding.

Bundesgerichtshof, judgment of 21 August 2012, XZ 138/11, www.bundesgerichtshof.de

IA/33242-A

[TLA]

European Union – Common foreign and security policy – Combating terrorism – Order of the plenary assembly of the Bundesverfassungsgericht allowing army intervention, with specific tools, on German territory providing very strict conditions are met

On 3 July 2012, the plenary assembly of the Bundesverfassungsgericht passed a judgment through which it relativized the prohibition on army intervention with weapons – or, to use the court's own wording, "specific tools" – on German territory. Such intervention may take place, but very strict conditions must be met. This is the plenary assembly's fifth judgment since the Bundesverfassungsgericht was created in 1951.

The case was referred to the plenary assembly by the second chamber, which wanted to adopt a different position from the first chamber, the latter having ruled on the old version of the Air Security Act on 15 February 2006 (see *Reflets no. 1/2006*, p. 14, for more on this judgment [in French only]). It should be noted that the purpose

of this piece of legislation was to adapt German air security rules to the requirements of Regulation (EC) No. 2320/2002 establishing common rules in the field of civil aviation security. The first chamber of the Bundesverfassungsgericht had declared the Air Security Act invalid as it authorised the armed forces to shoot down any aircraft that could be being used as a weapon against human beings. The German supreme constitutional court had found that the law violated the right to life, physical integrity and human dignity of the passengers and crew of the aircraft, who had nothing to do with the criminal activity in question. The first chamber based its judgment of 15 February 2006 on, among other things, the assumption that the Basic Law did not, as a matter of principle, permit army intervention with use of weapons on national territory.

The plenary assembly of the Bundesverfassungsgericht departed from the reasoning adopted by the first chamber to the extent that it related to army intervention with "specific tools" on German territory; shooting down an aircraft would remain prohibited.

The Bundesverfassungsgericht noted that the Basic Law limits army intervention to certain extremely rare scenarios. Article 35 of the Basic Law allows army intervention in the event of a natural disaster or an extremely serious accident. This provision was created for cases of natural disasters, like the floods that afflicted Hamburg in 1962. However, in the view of the plenary assembly, the wording and classification used in Article 35 of the Basic Law meant that it could not be concluded that army intervention was ruled out as a matter of principle. Thus the army could also take action to guarantee air security, even though the police are usually responsible for protecting national security.

Any army intervention would have to meet very strict conditions and, in particular, would only be justified if there were fear that damage of catastrophic proportions could be caused. Army intervention must always be the last resort for eliminating a threat.

This judgment was not passed unanimously. One of the judges issued a dissident opinion, finding that the interpretation offered by the plenary assembly of the Bundesverfassungsgericht did

not fit in with the system of the Basic Law and actually constituted an amendment thereof.

Bundesverfassungsgericht, order of 3 July 2012, 2 PBvU 1/11, www.bundesverfassungsgericht.de

1A/33244-A

[AGT]

Belgium

Environment – Evaluation of the environmental impact of certain plans and programmes – Amendments to the Brussels Spatial Planning Code – Reference for a preliminary ruling submitted to the European Court of Justice – Breach of Directive 2001/42/EC of the European Parliament and of the Council

A number of non-profit environmental associations brought an application for the annulment of two provisions of a Brussels-Capital Region decree amending the Brussels Spatial Planning Code (hereinafter referred to as "the COBat") before the Cour Constitutionnelle. In support of their application, the appellants argued that there had been a violation of Articles 10 and 11 of the constitution (principle of non-discrimination) read in conjunction with Articles 3 and 6 of Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment. The court had issued an interlocutory judgment by which it referred the matter to the European Court of Justice for a preliminary ruling on the interpretation of these provisions. Following the ECJ's judgment of 22 March 2012 (Inter-Environnement Bruxelles and others, C-567/10), the Cour Constitutionnelle ruled on the merits of the application for annulment.

The appellants held that the new provisions of the CoBat were not consistent with European Union law in that they did not provide for environmental assessments, within the meaning of Article 2(b) of the directive, when a land use plan is repealed, whereas such assessments are compulsory when land use plans are amended. The Cour Constitutionnelle first reiterated that in its preliminary ruling, the ECJ had found that the fact that Article 2(a) only referred to the

preparation and modification of plans and programmes did not prevent this provision from being interpreted as meaning that the repeal procedure for a plan, as organised by the CoBat, did indeed fall within the directive's scope of application. It then highlighted the directive's core objective, which is to have environmental assessments performed for all plans and programmes that may have a significant impact on the environment during the preparation stage, before they are adopted.

The Cour Constitutionnelle found that the fact that the procedure for repealing a plan did not provide for an environmental assessment to be written was not, in itself, enough to reach the conclusion that the contested provisions of the CoBat were inconsistent with the directive.

In this connection, the Cour Constitutionnelle highlighted that the repeal of a plan could well not have any significant impact on the environment. However, it also pointed out that only the rules on preparing and modifying plans allowed the competent authorities to check whether the plan was likely to have a significant impact on the environment, with such checks not being provided for in the case of repeal.

The Cour Constitutionnelle therefore ruled that the contested provisions of the Brussels decree were inconsistent with Articles 3 and 6 of Directive 2001/42/EC of the European Parliament and of the Council in that they exempted repeals of land use plans from environmental assessments within the meaning of Article 2(b) of the directive.

Cour Constitutionnelle, judgment of 19 July 2012, n° 95/2012, www.const-court.be

QP/06933-P1

[FLUMIBA]

Estonia

International law – European Union law – Article 4(4) of the Treaty establishing the European Stability Mechanism – Constitutionality review by the supreme court of the Republic of Estonia

With its judgment of 12 July 2012, the plenary assembly of the Riigikohus (Supreme Court) ruled on the Treaty establishing the European

Stability Mechanism (hereinafter referred to as "the TESM") and the commitments stemming from it for Estonia.

The Riigikohus found that the ombudsman of the Republic of Estonia's application challenging the constitutionality of Article 4(4) of the TESM (emergency voting procedure) was admissible. It follows from the constitution that the TESM is an international agreement that may be challenged by the ombudsman. The Riigikohus also found that the TESM was not an integral part of the primary or secondary legislation of the European Union. Nevertheless, this does not preclude that the TESM may, in future, become part of the primary or secondary law of the European Union. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, which was signed by the European Council in Brussels on 2 March 2012, explicitly refers to incorporating the substance of the treaty into the legal framework of the European Union. Consequently, there is a desire for the legal relationships that are to be created through the establishment of the European Stability Mechanism (hereinafter "the ESM") to be incorporated into European Union law.

In order to assess the constitutionality of Article 4(4) of the TESM, the Riigikohus weighed up two aspects, namely the limitation resulting from the provision, which will limit Estonia's power to take decisions regarding public funds, and the interpretation of Article 4(4) of the TESM, which aims to guarantee that the ESM decision-making procedure will be efficient in the event of financial instability in the eurozone. The Riigikohus observed that financial instability and economic instability in the eurozone – two closely-linked concepts – would also jeopardise Estonia's financial and economic stability. Financial and economic stability is vital if Estonia is to uphold the commitments deriving from its constitution, which include guaranteeing fundamental rights.

By joining the ESM, the parliament of the Republic of Estonia (hereinafter referred to as "the Parliament") will make a financial commitment for Estonia, the upper limit of this commitment being set down in the TESM. In addition, the Riigikohus held that since the Parliament has ratified the TESM, it is bound by

that instrument, thus restricting its capacity to allocate funds to other State projects. However, fundamental rights and constitutional values are protected by virtue of Article 4(4) of the TESM as it ensures a stable economic environment. The Riigikohus took into account that the emergency voting procedure would only be used to provide financial support if a number of stringent conditions were met, such as co-decision by the European Central Bank and the European Commission.

Finally, the Riigikohus ruled that Article 4(4) of the TESM did not conflict with the constitution of the Republic of Estonia and rejected the ombudsman's application.

Riigikohus, plenary assembly, judgment of 12 July 2012, constitutional review case no. 3-4-1-6-12, published on the website of the Riigikohus, www.riigikohus.ee

IA/33324-A

[TOPKIIJA]

It should be noted that the European Court of Justice ruled on the Pringle case (C-370/12) on 27 November 2012. Besides, judgments on both the ESM Treaty and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union have been handed down in Germany (see p. 41 of this edition of *Refllets*), France (see p. 42) and Hungary (see p. 14).

Finland

Approximation of laws – Trade marks – Directive 2008/95/EC of the European Parliament and of the Council – Absence of any distinctive character – Smileys ":-)" and ":-)"

In two judgments handed down on 13 August 2012, the Korkein hallinto-oikeus (Supreme Administrative Court) ruled that the emoticons (smileys) ":-)" and ":-)" could not be registered as trade marks as they did not have any distinctive character. The applications for registration were submitted on 27 October 2005 for products and services belonging to categories 9, 35 and 38. The patents and registration authority registered the signs on 31 May 2006, and on 31 May 2007, it dismissed challenges to this registration, observing that the signs had a

distinctive character. Appeals were lodged with the appeals committee of the patents and registration authority, but the committee confirmed the authority's decision on 4 December 2009. Ruling on the appeals of the opponents of registration, the Korkein hallinto-oikeus found that the smileys did not meet the requirements of Article 13 of the Finnish Trade Mark Act as they lacked distinctive character. It consequently cancelled their registration. In the court's view, the Finnish provision must be interpreted in line with Article 3 of Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks, and with the case law relating to it. In particular, it referred to the European Court of Justice's judgments in the *Libertel Groep BV* (6 May 2003, C-104/04, p. I-03793) and *Agencja Wydawnicza Technopol* cases (10 March 2011, C-51/10, not yet published in the European Court Reports).

In the view of the Korkein hallinto-oikeus, the smileys ":-)" and ":-)" are signs expressing emotions and have no equivalent in traditional language. Nevertheless, they are widely known and the positive message they impart is readily understood. The court observed that while these emoticons could not be 'translated' into words, they could be assimilated to descriptive verbal expressions, which cannot be registered as trade marks because they must be used, with no restrictions, by all economic operators. Emoticons expressing positive emotions, when used in connection with any product or service, could be compared to verbal praise concerning that product or service. In view of the nature of emoticons and the way they are used, the objective of unrestricted use is particularly important for products and services in the domain of electronic communication (categories 9, 35 and 36).

Korkein hallinto-oikeus, judgments of 13 August 2012 (KHO 13.8.2012 T 2131 and KHO 13.8.2012 T 2132), www.finlex.fi

1A/33331-A

[PSN]

France

Social policy – Protection of the health and safety of workers – Organisation of working

time – Entitlement to paid annual leave – Directive 2003/88/EC of the European Parliament and of the Council – Employer obligations in terms of employees actually taking paid annual leave – Scope – Assimilation, to allow entitlement to paid annual leave, of an employee's absence as a result of an accident on the way between home and work to absence as a result of an occupational accident

With two judgments handed down on 13 June and 3 July 2012 respectively, the Social Chamber of the Cour de Cassation significantly developed its case law on paid annual leave in line with recent judgments by the European Court of Justice on the subject.

In the first case, an employee had, after resigning, gone to the industrial-relations court in order to obtain payment of compensation and damages to redress the harm caused by not having taken paid annual leave for over five years. Dismissing his application, the court of appeal, which reiterated the employer's arguments, found that while his pay slips did not mention any dates on which paid annual leave had been taken, the employee had received a 10% pay rise by way of compensation for untaken annual leave. Moreover, applying a consistent interpretation of case law, the court of appeal noted that the employee had not proven that he had been unable to take paid annual leave because of his employer.

The Cour de Cassation reversed case law in the matter by censuring the reasoning applied by the court of appeal. After reiterating the purpose attributed to paid annual leave by Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, the Cour de Cassation ruled that the employer was responsible for taking its own measures to ensure that employees were able to actually take paid annual leave and, if disputed, to show that it had fulfilled the duties incumbent upon it due to the law. The purpose of the entitlement to paid annual leave, which, according to the European Court of Justice, is "to enable the worker to rest and enjoy a period of relaxation and leisure", lays the burden of proof upon the employer, which must then demonstrate that it has fulfilled its obligations. In the ECJ's view, the payment of

compensation cannot make up for annual leave not taken, so employees can claim for damages for the harm caused.

In the second case, an employee who had been unfit for work for over a year as the result of an accident on the way between home and work, went to an industrial-relations court upon resuming work in the aim of obtaining the paid annual leave to which she was entitled during her absence, on the basis of Directive 2003/88/EC of the European Parliament and of the Council, mentioned above. The employee's line of argument was based on the application of Article L 3141-5 of the Labour Code, which provides that uninterrupted periods of up to one year during which performance of the employment contract is suspended as a result of an occupational accident or occupational disease must be considered actual working time when calculating the amount of paid annual leave due to the employee affected. In the case in point, the employee argued that this system should be extended to include accidents on the way between home and work. Dismissing her application, the court of appeal applied a consistent interpretation of case law and found that the employee, who had been involved in an accident on the way between home and work, could not invoke the provisions that applied to occupational accidents.

On the basis of the European Court of Justice's judgment of 24 January 2012 (Dominguez, C-282/10, not yet published in the European Court Reports), which had been made following a reference for a preliminary ruling, the Cour de Cassation reversed two points of case law and quashed the court of appeal's judgment. The Cour de Cassation found that uninterrupted periods of up to one year during which performance of the employment contract is suspended as a result of an occupational accident or occupational disease should be taken into account both for calculating the duration of annual leave and for giving entitlement to paid annual leave. It also found that when it comes to determining an employee's entitlement to paid annual leave, absence resulting from an accident on the way to or from work should be assimilated to absence resulting from an occupational accident. With this judgment, the Cour de Cassation provided an interpretation that was in line with national law, as suggested by the European Court of Justice in

the Dominguez case, and so ensured that national law was consistent with Directive 2003/88/EC of the European Parliament and of the Council, mentioned above.

Thus, by clearly developing its case law, the Cour de Cassation has completely integrated the principle put forward by the European Court of Justice, according to which entitlement to paid annual leave is "a particularly important principle of (...) social law".

Cour de Cassation, Social Chamber, 13 June 2012, no. 11-10929,
Cour de Cassation, Social Chamber, 3 July 2012, no. 08-44834,
www.legifrance.gouv.fr

IA/32973-A
QP/06774-P1

[CZUBIAN]

***Border controls, asylum and immigration –
Immigration policy – Return of illegally-staying
third-country nationals –
Directive 2008/115/EC of the European
Parliament and of the Council – Inconsistency
of a national provision providing for placement
in custody of illegally-staying third country
nationals with European Union law, as
interpreted by the European Court of Justice***

On 5 July 2012, the First Civil Chamber of the Cour de Cassation handed down three judgments ruling that in certain situations, a third-country national may not be placed in detention within the framework of a 'flagrante delicto' procedure being conducted on the sole basis of Article L.621-1 of the Code governing Entry and Residence of Foreigners and the Right of Asylum (CESEDA), which criminalises illegal staying. In so doing, the First Civil Chamber followed the Criminal Chamber's opinion of 5 June 2012 (see *Reflets no. 2/2012*).

The First Civil Chamber found that according to the El Dridi (28 April 2011, C-61/11 PPU, not yet published in the European Court Reports) and Achughbabian judgments (6 December 2011, C-329/11, not yet published in the European Court Reports), 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 "precludes legislation of a Member State repressing illegal stays by criminal sanctions, in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive or has already been placed in custody and has not reached the expiry of the maximum duration of that detention". The Cour de Cassation pointed out that in cases of flagrante delicto, placement in custody could only be selected as a measure "in the event that there were ongoing investigations into offences punishable by imprisonment. Given that foreign nationals in one of the situations described in the aforementioned European Court of Justice judgments would not be subject to imprisonment under Article L.321-1 of the CESEDA, they cannot be placed in custody within the framework of a 'flagrante delicto' procedure being conducted on the basis of that article alone.

Following these judgments, the Minister of Justice and the Minister of the Interior adopted two circulars on 6 July 2012 (Ministry of the Interior circ. no. NOR : INTK1207284C, 6 July 2012. – Ministry of Justice circ. no. 11-04-C39, 6 July 2012). These asked prosecutors and prefects to make sure that judicial police officers had access to other measures that could lead to the removal of non-EU nationals: identity checks, hearing without placement in custody, and administrative detention.

Furthermore, in October 2012, the Minister of the Interior presented a bill on detention for the purposes of checking the right to stay and amending the offence of aiding illegal staying. This bill creates an administrative procedure of short-term detention lasting no more than 16 hours and associated with a range of guarantees, namely the right to an interpreter, a lawyer, a doctor and legal assistance. This procedure will replace custody in such cases.

Cour de Cassation, First Civil Chamber, 7 July 2012, nos. 11-30.371, 11-19.250 and 11.30-530, www.legifrance.gouv.fr

1A/32972-A
1A/32974-A
1A/32975-A

Liability for defective products – Council Directive 85/374/EEC – Liability of the service provider for damage caused, in the context of hospital care, by defective products or equipment – Service provider not the producer within the meaning of Article 3 of the directive

In a Grand Chamber judgment of 21 December 2011, Centre hospitalier de Besançon (C-495-10, not yet published in the European Court Reports), the European Court of Justice interpreted Council Directive 85/374/EEC on liability for defective products at the request of the French Conseil d'État. In its judgment, it ruled that rules on the liability of persons who use defective products while providing services, such as providing care in a hospital environment, without being the producers of the products in question do not fall within the directive's scope of application. Therefore there is nothing to preclude a Member State maintaining rules providing for the no-fault liability of a healthcare service provider with regard to damage caused by the defective products it used, such as those existing in France, providing that the liability rules established by the directive are not affected.

The time then came to implement the ECJ judgment at national level.

The Conseil d'État was the first French court to consider the implications of this judgment, within the framework of the case for which the reference for a preliminary ruling had been made. The case in point concerned a claim for compensation submitted by a young patient against a hospital with regard to burns caused by a heated mattress in the course of an operation. In its judgment of 12 March 2012, CHU de Besançon (no. 327449, to be published in the Lebon review), the Conseil d'État found that the European Court of Justice's judgment did not preclude the public hospital service from being held liable, even though it was not at fault, for the damaging consequences to users of defects in the healthcare equipment and products it uses (however, the hospital's warranty claim remained explicitly reserved). It thus confirmed the contested decision of the Cour Administrative

d'Appel, which had sentenced the hospital to pay compensation for the damage caused to the young patient. With this judgment, the Conseil d'État confirmed its case law as established in the Mazouk case (Conseil d'État, 9 July 2003, no. 220437, court reports p. 338), through which it aligned its case law to that of the ordinary courts and abandoned its previous case law, which required there to be a fault on the part of the hospital in order for it to be held liable for damage caused by improper functioning of equipment.

More recently, the Cour de Cassation ruled on the issue of the liability of medical service providers for the defective products that they used in a judgment handed down on 12 July 2012 (First Civil Chamber, 12 July 2012, no.11-17.510). The case in point concerned an action relating to the safety of a product, which was brought by a patient against a surgeon who had fitted him with a testicular prosthesis, the action being brought after the prosthesis burst during a game of tennis. The Cour d'Appel had applied the previous case law of the Cour de Cassation and held the surgeon liable, not because he was at fault, but rather because he had failed in his obligation to provide safety with regard to the items he used. The Cour de Cassation overturned the lower court's ruling with its judgment of 12 July 2012. Its judgment is interesting in two respects.

First of all, on the basis of the case law of the European Court of Justice and a relatively broad interpretation thereof, the Cour de Cassation found that "the liability of healthcare service providers, which cannot be considered equivalent to distributors of medical equipment or products and of which the essential aim is to care for patients using the most appropriate treatment and techniques to aid their recovery, does not fall within the scope of application of the directive, except in cases where healthcare service providers are themselves the producers". The Cour de Cassation thus explicitly precluded healthcare providers from being considered suppliers within the meaning of Article 3(3) of Council Directive 85/374/EEC, even when their actions are not limited to using the product during a procedure (as in the case of a heated mattress) but instead somehow involve giving the product to the patient (e.g. prostheses, implants).

However, the other interesting feature of the judgment (relating to national law this time) is the reversal regarding liability rules for healthcare service providers. On the basis of the fact that these service providers do not fall within the directive's scope of application, the Cour de Cassation has decided that their liability can only be engaged when they are at fault in the use of the medical products, equipment or devices required to exercise their profession or perform a medical procedure. Since the surgeon in the case in point did not commit a fault, he cannot be held liable.

As a result of these judgments, both of which aim to consider the implications of the European Court of Justice's judgment, healthcare service providers are clearly excluded from the directive's scope of application, since they are not producers, and will remain subject to specific national rules. However, it should be noted that the victims of medical accidents are subject to different rules depending on whether they were treated in a public hospital or by a private practitioner.

Cour de Cassation, First Civil Chamber, 12 July 2012, no. 1117.510, FS-P+B+I, Conseil d'État, 12 March 2012, CHU de Besançon, appeal no. 327449, www.legifrance.gouv.fr

IA/32969-A
QP/06899-P1

[MEYERRA]

Hungary

International agreements – Ratification and promulgation of international treaties – Parliamentary authorisation – Majority required – Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – Interpretation of the Fundamental Law

Having been asked for a ruling by the government upon the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (hereinafter referred to as "the TSCG"), on 11 May 2012 the Alkotmánybíróság (Constitutional Court) handed down a judgement on the interpretation of Hungary's Fundamental Law as regards the rules on ratifying and promulgating international treaties. The issue at hand was that of

determining whether a simple majority or a qualified two-thirds majority was necessary for parliamentary authorisation for the ratification and promulgation of the treaty.

Under law no. L of 2005 on the procedure regarding international treaties, international agreements in an area falling under the National Assembly's powers must receive parliamentary authorisation, expressed as a simple majority, before being ratified. However, Article E) of Hungary's Fundamental Law specifies that the ratification and promulgation of a treaty in application of which "Hungary, as a member of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary for the exercise of the rights and obligations provided for in the founding treaties of the European Communities and the European Union, must be the subject of a vote passed by a two-thirds majority of the National Assembly".

In the case in point, the Alkotmánybíróság was called upon to settle the question of whether an international treaty with the characteristics of the TSCG belonged to the category of treaties covered by Article E) of the Fundamental Law.

The Alkotmánybíróság began by reiterating that, as it had ruled in its judgment no. 143 of 14 July 2010, the constitutional provisions that had acted as a legal basis for the joint exercise with the EU institutions of certain powers falling under Hungary's sovereignty had to be interpreted as meaning that the idea of "treaties" covered other treaties than just the founding treaties. The treaties in question were those that seemed necessary for Hungary, as a member of the European Union, to be able to exercise its rights and fulfil the obligations arising from the fundamental treaties as the European Union developed. It follows from this that some elements of Hungary's sovereignty could be transferred to the European Union if the constitutional conditions are met.

In order to answer the government's questions, the Alkotmánybíróság listed in its judgments the evaluation factors that had to be taken into account to determine whether an international treaty belonged to the category of treaties covered by Article E) of the Fundamental Law.

First of all, it must be determined whether Hungary and the other State parties to the agreement took part in drafting the treaty in question as Member States of the European Union. In the case in point, the court highlighted that the 25 State signatories of the TSCG were members of the European Union and had negotiated the agreement in that capacity. The next decisive factor is evaluating whether the treaty involves transferring new sovereign powers to the European Union. With regard to that matter, the Alkotmánybíróság observed that the TSCG imposed new financial obligations on the signatory States and gave new powers to the institutions of the European Union. However, it should be noted that the treaty's designation as a European Union treaty (or otherwise) is not a decisive factor.

After listing these evaluation factors, the Alkotmánybíróság stated that the government and the National Assembly should apply them in the case in point.

The National Assembly vote had not yet taken place on 23 November 2012.

Alkotmánybíróság, judgment of 11 May 2012, no. 22/2012, Official Gazette (Magyar Közlöny) no. 57/2012,
www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK12057.pdf

IA/33327-A

[VARGAZS]

Ireland

International agreements – European Union agreements – Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) – Directive 2001/92/EC of the European Parliament and of the Council – Not prohibitively expensive – Concept

This case relates to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter referred to as "the Convention") and the directives transposing it into European Union law.

The appellant wished to challenge a decision by the Environmental Protection Agency that allowed the release of genetically modified potatoes. The appellant lodged, on an *ex parte* (without a defendant) and *ex ante* (before the beginning of the proceedings) basis, an application for an order stating that if proceedings were to be commenced, it would only have to pay costs that were not prohibitively expensive. This application was based on Article 9 of the Convention, with Article 9(2) providing that members of the public must have been able to challenge the legality of decisions subject to the provisions of the Convention. Article 9(4) adds that any proceedings relating to such challenges must be "equitable, timely and not prohibitively expensive". The appellant argued that this meant it was entitled to an order guaranteeing that the costs it would have to pay within the framework of the proceedings would not be too high, without which it might be deterred from challenging the decision due to the risk of unfavourable financial consequences.

The Irish parliament has not yet transposed the Convention into Irish law, so the High Court found that the Convention was only part of national law by virtue of its transposal into European Union law, specifically through Directive 2011/92/EC of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment. Articles 11(1) and 11(4) of that directive require that any review procedure relating to the legality of acts or omissions subject to the provisions of the directive be "not prohibitively expensive".

The High Court then examined the European Court of Justice's judgment in the *Commission v. Ireland* case (judgment of 16 July 2009, C-427/07), which looked at the meaning of the phrase "not prohibitively expensive". The European Court of Justice found that the expression "[did] not prevent the courts from making an order for costs provided that the amount of those costs complie[d] with that requirement". The High Court also noted that there was at that time a reference for a preliminary ruling, submitted by the Supreme Court of the United Kingdom, pending before the European Court of Justice with regard to the meaning of that phrase (*R. (Edwards) v. Environmental Agency*, C-260/11).

Against that backdrop, the High Court found that the meaning of "not prohibitively expensive" was unclear and that further clarification from the ECJ was required. It also observed that it was not even clear whether the provisions of the directive transposing the Convention applied to the contested decision. Besides, even if the High Court had jurisdiction to hear such an application, making the order on an *ex parte* basis would infringe upon the defendant's rights, specifically its right to good administration within the meaning of Article 41 of the EU Charter of Fundamental Rights. The High Court therefore refused to grant the requested order.

High Court, judgment of 28 August 2012, NO2GM v Environmental Protection Agency, [2012] IEHC 369, www.bailii.org/ie/cases/IEHC/2012/H369.html

IA/33414

[TCR] [DUNNEPE]

Italy

Competition – Dominant position – Abuse – Concept – Use of regulatory procedures to delay competitors' market entry – Unwarranted acquisition of protection certificates keeping manufacturers of generic medication out of the market – Abusive nature – Evaluation

The Italian competition authority (hereinafter referred to as "the AGCM") ordered the companies Pfizer Health A.B. and Pfizer Inc. to pay a fine of over €10 million for abuse of their dominant position on the market for pharmaceutical products, and more specifically beta blockers used to treat glaucoma. The AGCM had launched an investigation in 2010 on the basis of a complaint received from the company Radiopharm Italia with regard to the delay caused to the market entry of equivalent generic products based on latanoprost (the main active ingredient in beta blockers) by extension of the patents held by the Pfizer Group. The behaviour of which the companies were accused, which was part of a strategy aiming to extend the main patent, included: i) submitting a number of divisional applications; ii) acquiring families of patents relating to the same product and conducting repackaging practices; iii) submitting a divisional application and an application for supplementary protection certificates in Italy in

view of the shorter duration of the main protection in that country; iv) applying for extension of the patent so as to conduct tests for paediatric applications; and v) bringing a number of court actions against competitors.

In the view of the AGCM, the commercial behaviours of the Pfizer Group companies were all part of a strategy to exclude competitors from the market by creating a "labyrinth of patents" to generate a state of legal uncertainty, thus discouraging the marketing of generic products.

The AGCM drew on the General Court of the European Union's judgment of 1 July 2010 in the Astra Zeneca case (T-321/05, ECR p. II-649) and determined that the anti-competitive purpose of the companies' behaviours was confirmed, firstly, by the timing of the divisional application; secondly, by the fact that this application was not followed by the market entry of a new product; and thirdly, by the fact that an application for a supplementary protection certificate was only submitted in Italy, where the main protection lasted a shorter time (see M. Colangelo, *Dominanza e regulatory gaming: il caso Pfizer in Mercato, concorrenza e regole*, 2012, no. 2, p. 330). Furthermore, to determine whether the court actions brought by the Pfizer Group companies had been abusive in nature, the AGCM applied the criteria of "harassment" of the opposite party and inclusion of court actions in a strategy aiming to eliminate competition, as identified by the General Court in its judgment of 17 July 1998, ITT-Promedia, (T-111/96, ECR. p. II-2937).

This decision is particularly significant given the considerable and serious consequences, in terms of interference with competition in the pharmaceutical sector, of abusive use of various techniques to extend patent protection. After all, companies in this sector are essentially competing with regard to innovation, and the manufacturers of generic products, which enable prices to be lowered and large savings to be generated especially for healthcare systems, can only market their products once patents have expired. This decision comes as the AGCM sharpens its focus on fighting anti-competitive practices of this type.

Autorità garante per la concorrenza e il mercato, decision of 11 January 2012, no. 23194, www.agcm.it

IA/ 32892-A

[MSU]

Principle of State immunity – Crimes under international law – Acts constituting an immediate and direct manifestation of the exercise of public power (acta jure imperii) – Application –Italian courts having no jurisdiction

With its judgment of 30 May 2012, the Corte di Cassazione overturned the judgments by which the Court of Rome and the Military Court of Appeal ordered the Federal Republic of Germany to pay compensation to the Italian nationals who were subjected to captivity and exploitation as forced workers between 1944 and 1945.

The two sentencing orders were issued as a result of 14 judgments handed down by the Corte di Cassazione itself on 29 May 2008 (see *Reflets no. 3/2008*, p. 28 [available in French only]), wherein the court ruled out the applicability of the principle of State immunity in cases of crimes against humanity and recognised that the Italian courts had jurisdiction to hear applications lodged against the German State.

This reversal of the Corte di Cassazione's case law follows on from the judgment pronounced by the International Court of Justice (hereinafter referred to as "the ICJ") on 3 February 2012, after it had been asked to rule on the matter by the Federal Republic of Germany.

In contrast to the Corte di Cassazione, the ICJ found that the German State could rely on State immunity in this case and that, as a result, the Italian courts did not have jurisdiction to rule on actions for damages against that State. It thus asked that Italy eliminate the effects of the sentencing orders against the German State, either by legislation or through the courts.

The Corte di Cassazione noted that while it retained its full discretionary powers, a solution in line with the ICJ's judgment should be sought since that judgment constituted the court analysis with the greatest legal value in terms of

interpretation of international principles. However, it also highlighted the scope of its previous case law. In its view, while its judgments of 2004 (judgment of 11 March 2004, no. 5044, Ferrini, mentioned in *Reflets no. 3/2004*, p. 19 [available in French only]) and 2008 (mentioned above) represented a solution that was relatively isolated at international level, they were nevertheless an attempt to develop the application of the principle of State immunity in cases of *acta jure imperii* (i.e. acts constituting an immediate and direct manifestation of the exercise of public power) that could be considered crimes against humanity.

Finally, the Corte di Cassazione observed that the application of the principle of State immunity in cases of serious violation of fundamental rights, as adopted by the ICJ, may contravene the provisions of the Italian constitution.

Despite this, the Corte di Cassazione decided not to refer a question on the subject to the Corte Costituzionale, primarily in the interests of preserving relations with the German State and avoiding exposing Italy to another appeal to the ICJ by Germany. The court thus contented itself with overturning the sentencing orders issued by the Court of Rome and the Military Court of Appeal.

Corte di Cassazione, judgment of 30 May 2012, no. 32139,
www.lexitalia.it

IA/32886-A

[VBAR]

It should be noted that when asked for a preliminary ruling by the Tribunale ordinario di Brescia, the European Court of Justice responded with an order issued on 12 July 2012 (Curra, C-466/11, not yet published in the European Court Reports) declaring that it clearly had no jurisdiction *ratione materiae*.

Czech Republic

Agriculture – Common market organisation – Sugar – Production refunds – Direct applicability and effect – Belated granting of refunds – Breach of European Union law –

Member State liability for harm caused to individuals

In a recent judgment, issued on 20 August 2012, the Nejvyšší soud (Supreme Court) finally clarified the link between the system for government liability and the system for Member State liability with regard to harm caused to individuals by a breach of European Union law. The matter under dispute in the case in the main proceedings was the belated granting of a production refund to the appellant, a sugar processing company, by virtue of Council Regulation (EC) No. 1260/2001 on the common organisation of the markets in the sugar sector and the regulation enforcing it, Commission Regulation (EC) No. 1265/2001. The appellant claimed compensation for the harm it suffered as a result of non-payment of the production refund (hereinafter referred to as "the refund") in July 2004, namely the first month in which the regulations were applicable in the Czech Republic.

The appellant argued that it had been prevented from receiving the refund in the first month of the regulations' application because the regulations had been implemented late and there had been an excessive delay in issuance of the certificate giving entitlement to payment by the competent authority (in August 2004). However, the lower courts ruled that the delay did not preclude the national arrangements from being justified with regard to the nature of the administrative procedure in question. They therefore found that there had been no wrongful acts or omissions that would result in the public authorities being held liable.

The Nejvyšší soud did not confirm the reasoning used by the lower courts. In its view, by disregarding the basic principles of European Union law, by virtue of which European Union regulations have direct effect and therefore grant individuals rights which the national authorities must respect and guarantee, the lower courts failed to fulfil their obligation to apply the regulations directly. In that connection, the questions to be resolved in the case in point were whether the appellant could exercise its right to compensation for July 2004 directly by virtue of the regulations, and what the consequences would be for government liability.

The Nejvyšší soud considered the special nature of Commission Regulation (EC) No. 1265/2001, of which Article 3(2) gives Member States the option of making payment of the refund subject to prior approval by the processors. Since the Czech Republic had decided to make use of that option, it had to be determined how this would affect the direct effect and applicability of the regulations in question. Referencing the relevant case law of the European Court of Justice, the Nejvyšší soud found that this option had been offered to the Member States in order to facilitate the implementation of the regulations and that it could not, under any circumstances, deprive individuals of rights bestowed upon them by the regulations. Indeed, since the regulations gave processors the right to a refund from 1 July 2004, the Czech Republic, in intending to make this right subject to prior approval, was implicitly required to do so in respect of processors who had begun their activities before that date, up to 30 June 2004. A different interpretation would not only contravene the principles of direct effect and applicability, it would also risk destabilising the common organisation of the sugar market.

As the competent authority did not apply the regulations directly in the case in point, it breached European Union law. In this context, the Nejvyšší soud observed, with reference to the Ústavní soud (Constitutional Court) judgment of 9 February 2011 (see *Reflets no. 2/2011*, p. 24, IA/33027-A), that it could not harm the appellant to engage government liability, that is, a different liability system. In situations such as this one, where there are no appropriate provisions governing State liability for breaches of European Union law, the liability conditions resulting from the case law of the European Court of Justice must be applied, in accordance with the principle of primacy. National law no. 82/1998 Sb government liability for unlawful decisions or wrongful acts or omissions is applied if and to the extent that it is consistent with the system of liability in European Union law, or otherwise to issues not covered by that system.

Bearing in mind the considerations outlined above, the Nejvyšší soud overturned the judgments of the lower courts and referred the case back to the court of first instance, asking it to check whether the appellant had met all the conditions for receiving the refund as set by the

two regulations. If it had, in order to determine the amount of compensation due to the appellant, the court would have to identify whether the omission on the part of the competent authority was the sole reason for the harm suffered by the appellant or whether the appellant had contributed thereto.

Nejvyšší soud, judgment of 20 August 2012, n° 28 Cdo 2927/2010, www.nsoud.cz

IA/33084-A

[KUSTEDI]

Romania

Constitutional Court – Decision-making process – Referendum of 29 July 2012

Mr Traian Băsescu, the president of Romania, was suspended by parliamentary decision on 6 July 2012. On the basis of Article 95 of the constitution, a referendum was organised on 29 July 2012 with a view to removing the president from office. According to the results published by the Central Electoral Office, 7,406,836 if the 18,292,464 people on the official electoral register voted in favour of the president's dismissal, with 943,375 voting against it.

On 21 August 2012, the plenary assembly of the Curtea Constituțională (Constitutional Court) voted by a two-thirds majority to declare the referendum invalid because the required voter turnout had not been achieved. Three of the court's judges filed dissident opinions.

A number of challenges were submitted to the Curtea Constituțională following the referendum of 29 July 2012. Dismissing these challenges, the court analysed the concepts of "permanent electoral register" and "supplementary electoral register". On the basis of law no. 35/2008 on the election of members to the Chamber of Deputies and the Senate, the court found that the permanent electoral register covered all citizens with the right to vote and living in the place for which the register is drawn up. By contrast, the supplementary electoral register covers citizens resident abroad. The court explained this distinction by stating that since they are not resident in Romania, Romanian citizens living abroad must not influence the voter turnout,

which is calculated on the basis of the permanent electoral register.

On 7 August 2012, a correction was published in the Romanian Official Gazette, in which the Curtea Constituțională stated that Article 2(1)(c) of law no. 370/2004 on election of the president was applicable in the case in point. According to that article, Romanian citizens aged 18 or over on the day of the election are listed on the permanent electoral register, regardless of whether they are domiciled or resident in Romania or abroad. This correction was not accepted by all of the judges of the Curtea Constituțională: three of them publicly declared that they had not been consulted about its adoption.

What was the nature of the correction? Did it correct an error of formulation or introduce a change tainting the substance of the proceedings. In point 4.2 of its final judgment of 21 August 2012, the Curtea Constituțională stated that it was simply a clarification regarding the applicable legal basis. It should be noted that the scope of the concept of "permanent electoral register" was widened as a consequence of this correction, which later had a significant impact on the voter turnout.

From a procedural viewpoint, Articles 281 to 281b of the Code of Civil Procedure lay down the conditions under which a judgment may be amended by a correction. Notwithstanding the fact that those conditions did not seem to have been met in the case in point, a court judgment must be corrected under the same conditions as existed when it was adopted. In the case in point, the correction was adopted without the involvement of certain members of the court, who had nevertheless taken part in adopting the original judgment.

These arguments were also raised by the three judges who filed dissenting opinions. They held that including citizens who were domiciled or resident abroad on the permanent electoral register had a considerable impact on the basis for calculating the voter turnout, which led to the referendum being declared invalid. As mentioned by the judges, there was no precedent in constitutional law for the legal channel used by the Curtea Constituțională to adopt the correction.

Curtea Constituțională a României
www.ccr.ro/default.aspx?page=deciziitotal/default

IA/32970-A
IA/32976-A

[CLU]

United Kingdom

European Union law – Rights granted to individuals – Obligation to pay compensation in the event of a breach by a national court – Manifest nature of the breach – Criteria – Failure to refer the case to the European Court of Justice for a preliminary ruling – Excusable error given the state of the law at the time

With its judgment of 12 May 2010, the Court of Appeal ruled on the first case in the UK courts to deal with national courts' liability for a breach of European Union law. In the case in point, the breach was considered not sufficiently serious to engage State liability on the basis of the principles set out in the Köbler judgment (judgment of 30 September 2003, C-224/01, ECR 2003, p. I-10239).

The appellant is a member of the Council for the Protection of Rural England (hereinafter referred to as "the CPRE"), a charitable organisation working to promote a sustainable future for the English countryside. In 1999, the CPRE went to court with an application for the annulment of a London local authority's decision to grant outline planning permission without determining whether it was necessary to perform an environmental impact assessment, as required by Article 2 of Council Directive 85/337/EEC. The application was dismissed first by the High Court, then by the Court of Appeal, and finally by the High Court again on the grounds that it had not been lodged by the applicable time limit for challenging the decision and that in any case, the appellant could not rely upon the direct effect of Article 2 of the aforementioned directive because the directive had been correctly transposed into national law and national law did not require an assessment to be performed. In that connection, the requirement to perform an impact assessment could not be based solely on the obligations provided for in Article 10 EC (now Article 4(3) TEU) and Article 249 EC (now Article 288 TFEU).

However, in light of the European Court of Justice's judgment in the Barker case (judgment of 4 May 2006, C-290/03, ECR 2006, p. I-03949) and the subsequent decision by the House of Lords, it became clear that an environmental impact assessment could be required even at the stage of outline planning permission being granted. The CPRE therefore went back to the High Court in order to obtain compensation for the errors committed in 1999. While admitting that errors had been committed, the High Court nevertheless found that the breach of European Union law was not sufficiently serious to engage State responsibility. In that connection, the court mentioned that the contested provision could be interpreted in more than one way, thus concluding that the choice made in 1999 was consistent with European Union law as it stood at the time.

Having been asked to rule on the appeal, the Court of Appeal found that the judgments handed down in 1999 breached European Union law in that the English courts had failed to submit a reference for a preliminary ruling to the European Court of Justice to determine whether the appellant could rely on the direct effect of Article 2, regardless of the fact that the deadline for bringing challenges had passed. The Court of Appeal referred to the criteria established in the Köbler judgment to determine the nature of the breach. It found that the first condition had been met as both Article 2, mentioned above, and Article 234 EC (now Article 267 TFEU) had been breached, both of them being directly applicable provisions.

As to the second condition, the Court of Appeal held that the point of departure for analysis should be the meaning of the term "permission", as understood by the national courts until the Barker judgment. In this respect, it should be borne in mind that the judgments handed down in 1999 were consistent with other judgments made by national courts in similar cases. Furthermore, the European Court of Justice had pointed out that the European Commission had been notified of the national transposal legislation before it came into force in 1988 and was not the subject of complaint until November 2000, which is to say, after the judgments were handed down.

Bearing in mind all of these factors, the Court of Appeal ruled that the failure to refer the matter to the European Court of Justice was an excusable error, the fact being that the national courts examined the issue and reached a different conclusion than the European Court of Justice. The court dismissed the appellant's request to have the case referred to the European Court of Justice as it considered that there was no real doubt about the legal issues in question.

On 19 October 2010, the Supreme Court refused the appellant's application for leave to appeal.

Court of Appeal (Civil Division), judgment of 12 May 2010, Cooper v Attorney General [2011] 2 WLR 448, www.bailii.org

IA/33404-A

[PE]

Competition – Dominant position – Abuse - Operation at below-cost prices in the aim of excluding a competitor – Appeal of competitor harmed by its exclusion from the market – Evaluation of the harm caused – Award of exemplary damages in the event that an unacceptable risk is taken in order to breach competition law

On 5 July 2012, the Competition Appeal Tribunal decided, for the first time ever, to award exemplary damages to a third party that had suffered harm as a result of the defendant's abuse of its dominant market position.

From April 2004 until a few months before its liquidation in May 2005, the appellant offered low-cost bus services in Cardiff, the capital of Wales. In response to the new competitor's arrival on the market, the defendant company, which already had activities in the market and was the dominant operator, launched a new bus service known as the "White Service" because its vehicles were not marked with a company name or logo. That service, which had to be run at a loss, served the same routes as the appellant. The defendant stopped offering low-cost bus services shortly after the appellant ceased its activities in the market.

In November 2004, the appellant submitted a complaint to the Office of Fair Trading

(hereinafter referred to as "the OFT"), the British competition authority, which decided in 2008 that the defendant had abused its dominant position by using predatory pricing practices intended to exclude the competition. However, no sanctions were applied due to the defendant's low turnover.

Following the decision, the appellant's liquidator appealed to the Competition Appeal Tribunal on the basis of section 47A of the Competition Act 1998. This provision allows submission of an appeal by a person who has suffered harm as a result of a breach of the 1998 Act, among other things, as confirmed by an OFT decision. The liquidator claimed for damages of £10 million in respect of the loss of earnings caused by the cessation of activities, the loss of a capital asset (the company as a going concern), the loss of a business opportunity, wasted staff and management time resulting from cessation of activities, and costs relating to liquidation. The liquidator also claimed for exemplary damages to be awarded in addition to the damages proper, if any, in order to punish the company that caused the harm and deter it from acting in a similar way in future. For its part, the defendant rejected the claim that there was a causal link between its practices and the appellant's liquidation.

In its judgment, the Competition Appeal Tribunal upheld the appeal on the first point, namely the loss of earnings. It determined that if the anti-competitive behaviour had never taken place, the appellant would have made a profit of £33,000 (€41,802). The appeal was dismissed on the other points, as the court considered that even if the breach of the 1998 Act had never happened, the appellant would still have gone into liquidation in May 2005 as a result of constant, pre-existing financial management problems.

The Competition Appeal Tribunal also awarded exemplary damages with respect to the second point of the appeal, the loss of a capital asset. In that connection, it recognised that exemplary damages could be awarded for breaches of competition law resulting from an intentional or reckless action and explained that in the context, "recklessness" should be understood as taking an unacceptable risk in order to breach competition law. Several criteria may be applied to determine whether a risk is unacceptable: the company's awareness that the conduct was "clearly

unlawful" or "probably unlawful"; any expected pro-competitive effects of the practice; the degree and seriousness of the conduct; the company's motive; and the fact that the same commercial gains could be achieved through a course of action entailing less risk from a competition viewpoint.

In the case in point, the Competition Appeal Tribunal awarded exemplary damages of £60,000 (€74,612). It took into account the fact that the defendant had received legal advice on the risk associated with its strategy given its position on the market, that the defendant's intention was to exclude the appellant from the market (and not, as it claimed, to test the market), and that the defendant's management had not sought more legal advice, having considered that the strategy should be pursued regardless of the consequences, even though it was probably unlawful.

Competition Appeal Tribunal, judgment of 5 July 2012, 2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19,

www.bailii.org

IA/33407-A

[PE]

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Police and judicial cooperation in criminal matters – Council Framework Decision 2002/854/JHA on the European arrest warrant – Applicability of the framework decision and the relevant case law of the European Court of Justice in the United Kingdom – Limits – Concept of "issuing judicial authority" – Prosecutor – Inclusion

On 30 May 2012, the Supreme Court ruled by five votes to two that a European arrest warrant issued by a prosecutor must be considered to have been issued validly in light of Council Framework Decision 2002/584/JHA. In reaching this conclusion, the court confirmed the decision to surrender Mr Assange, the founder of the association WikiLeaks, to the Swedish authorities.

The case's origins date back to December 2010, when the Swedish Prosecutor's Office issued a European arrest warrant for the appellant. The

arrest warrant indicated that he was suspected of committing rape and sexual molestation in August 2010. The appellant, an Australian national, presented himself to London police and was remanded in custody while awaiting a decision on his extradition. After being released on bail, the appellant was placed under house arrest.

The appellant unsuccessfully challenged the Swedish arrest warrant before the High Court, which dismissed his argument that the mandate did not meet the requirements set out in Council Framework Decision 2002/854/JHA. In the appellant's view, the term "issuing judicial authority", used in Article 6(1) of the framework decision, should be interpreted as only referring to independent bodies or persons exercising judicial powers or functions. While the High Court acknowledged that it would be possible to refuse to enforce a warrant issued by a non-judicial authority, it concluded that in the case in point, the Swedish Prosecutor's Office is subject to independent control by the Swedish courts. The High Court also found that the lack of a decision concerning proceedings against the appellant in Sweden did not invalidate the arrest warrant.

In his subsequent appeal to the Supreme Court, the appellant limited his appeal to focus solely on the interpretation of the term "judicial authority". He argued that the Swedish Prosecutor's Office could not be considered independent to the extent that it was a party in the criminal process against him. For its part, the Prosecutor's Office argued in favour of a broad, autonomous interpretation of the concept.

For the Supreme Court, the issue at hand was the interpretation of the framework decision and, more specifically, the relevance of the case law of the European Court of Justice. In the view of Lord Mance, it follows from Articles 9 and 10 of Protocol No. 36 to the Treaty on the Functioning of the European Union that the framework decision, the Pupino judgment (ECJ judgment of 16 June 2005, C-105/03) and the principle of conforming interpretation derived from that judgment on police and judicial cooperation in criminal matters are not part of United Kingdom law. Indeed, Articles 1 and 2 of the European Communities Act 1972, the legal text that gives European Union law effect in domestic law, do

not incorporate former Title VI of the Treaty on European Union into national law, yet the framework decision was adopted on the basis of that title.

Although the other judges of the Supreme Court shared that conclusion, most of them found that despite there being no requirement of conforming interpretation, the definitions of judicial authority, as used in the framework decision and the national transposal legislation, should be interpreted in the same way. This is in line with the principle that the parliament did not intend the national legislation to conflict with the United Kingdom's international obligations.

For the purposes of interpreting the concept of "judicial authority", most judges considered it appropriate to refer to the general rules of interpretation set down in Article 31 of the Vienna Convention on the Law of Treaties. According to Article 31.3(b) of that convention, it is permitted to take into account any subsequent practice in the application of the framework decision. In that connection, the Supreme Court observed that a number of Member States had accorded their prosecutors the right to act as issuing and executing judicial authorities, and that this had not given rise to objections by States that had appointed courts as issuing authorities. The Supreme Court therefore ruled that a prosecutor could be considered a judicial authority and dismissed the appellant's appeal.

After the judgment was issued, the appellant's lawyer applied to have it reopened, claiming that it had been formed on the basis of points of law that had not been debated during the hearing, namely the application of the Vienna Convention. In its decision to dismiss the appeal on 14 June 2012, the Supreme Court pointed out that one of the judges had asked the lawyer a question on the subject. The lawyer did not deny this.

Supreme Court, judgments of 30 May 2012 and 14 June 2012, Assange v Swedish Prosecution Authority [2012] 2 WLR 1275 and [2012] 3 WLR 1, www.bailii.org

IA/33403-A
IA/33403-B

[PE]

Slovakia

Competition – Cartels – Agreement between undertakings – Agreement concluded between banks established in a Member State – Agreement aiming to terminate and not renew current account contracts between the banks and another competing company – Company affected by the agreement operating unlawfully on the market concerned – Effect

With its judgment of 19 May 2011, the Supreme Court of the Slovak Republic (Najvyšší súd) ruled on the scope of application of Article 81 EC (Article 101 TFEU) and Article 4 of the Slovak Competition Protection Act.

In the case in point, the competition authority of the Slovak Republic (hereinafter referred to as "the defendant") had fined a bank established in Slovakia (hereinafter referred to as "the appellant") for its participation in the cartel resulting from a meeting between several banks on 10 May 2007 and subsequent e-mail correspondence, which aimed to terminate current accounts with a third company and refuse to conclude new contracts with it. The defendant argued that their agreement aimed to restrict competition within the meaning of Article 81 EC.

The third company, which was headquartered in another Member State, performed foreign exchange transactions in the Slovak Republic. As such, in the view of the defendant, it was a competitor of the companies involved in the cartel. In the years 2008 and 2009, it operated on the market without a licence from the National Bank of Slovakia. In that connection, the appellant claimed that the entity, as it did not have a licence, was not entitled to legal protection because the conditions for competition had not been met. The banks' conduct, which eventually had the effect of eliminating from the market an illegally-operating undertaking, was therefore not punishable.

Nonetheless, the defendant contended that the unlawfulness of the third company's activities was irrelevant to its assessment of the conduct of the parties to the agreement. After all, there was nothing to prevent them from using other instruments to ensure the company's business failed. The commission of an administrative

offence (concluding an agreement that restricts competition) could not be justified by the fact that the action aimed to prevent an illegal activity.

The Najvyšší súd overturned the defendant's decision, concluding that only agreements affecting companies operating lawfully on the market concerned could be considered restrictive of competition. Consequently, an agreement against the company in question in this case could not harm competition. Rather, the agreement should be considered as intending to protect the appellant's reputation and its customers' interests.

Finally, it should be noted that this judgment was handed down before another chamber of the Najvyšší súd submitted a reference for a preliminary ruling on the same point of law to the European Court of Justice (case C-68/12).

Najvyšší súd, judgment of 19 May 2011, 5Szh/4/2010, www.supcourt.gov.sk/rozhodnutia/

IA/33086-A

[VMAG] [MREKAEV]

Slovenia

Visas, asylum and immigration – International protection – Council Directive 2004/83/EC – Evaluation of the facts and circumstances behind an application for international protection – Concept – General credibility of the applicant – Criteria for evaluation – Charter of Fundamental Rights of the European Union and European Convention on Human Rights – Right to effective judicial protection – Non-refoulement principle

In a judgment issued on 29 August 2012 in relation to asylum law, the Upravno sodišče Republike Slovenije (Administrative Court of the Republic of Slovenia, hereinafter referred to as "the Upravno sodišče") interpreted the concept of "general credibility of the applicant", as mentioned in Article 4(5)(e) of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

The case related to an Afghan national (hereinafter referred to as "the applicant") whose application for international protection had been refused by a decision of the Slovenian Ministry of Home Affairs (hereinafter referred to as "the contested decision"). After comparing the grounds that allegedly led to the applicant leaving Afghanistan and the general situation in that country at present, the ministry determined that the condition regarding the "general credibility of the applicant", within the meaning of Article 4(5)(e) of Council Directive 2004/83/EC, had not been met.

Consequently, the applicant lodged an appeal against the decision with the Upravno sodišče. In his appeal, he claimed, in particular, that the ministry wrongly believed he had applied for international protection because he had been threatened by his cousins and his uncle wanted to appropriate his land. According to the applicant, the main reason for his departure was the risk of his cousin's friends and family taking revenge on him. He had been threatened and attacked by his uncle and cousins a number of times in the past, and during one of these conflicts, he stabbed his cousin and had to flee Afghanistan as a result, at the age of twelve. His family subsequently looked for him in Afghanistan and the bordering countries.

The applicant also argued that the minister's interpretation of the general situation in Afghanistan was inaccurate. Various relevant documents published by the United Nations Refugee Agency indicated that the applicant's province of origin was one of the most dangerous in Afghanistan as the Taliban issued threats and carried out attacks on a daily basis there.

For these reasons, the applicant concluded that he risked being subjected to torture, within the meaning of Article 3 of the European Convention on Human Rights (hereinafter referred to as "the Convention"), if he were returned to Afghanistan.

In view of the applicant's claims, the Upravno sodišče found that the most pertinent issue in this case was determining the relevant criteria for evaluating the phrase "general credibility of the applicant" as it appears in Article 4(5)(e) of Council Directive 2004/83/EC. While the wording of that article does not indicate how the

phrase is to be interpreted, it is nevertheless clear from Article 23(4)(g) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status that the European legislature provided for credibility to be evaluated in cases of applications for international protection which are not credible due to a lack of sufficient evidence.

The Upravno sodišče then went over the factors that had to be examined for the purposes of evaluating the applicant's credibility: firstly, the inconsistency of the applicant's claims, including any contradictions in all of the assertions he made; secondly, the external inconsistency of the claims, which can be assessed by comparing the allegations made in the application with objective information about the applicant's country of origin; and thirdly and finally, whether it is possible to tell from the description of events in the application that the applicant is believable.

Furthermore, as highlighted by the Upravno sodišče, this last criterion can also encompass the degree of detail used in the application, the amount of detail used in the reasons given for not providing evidence, the time required to submit the application for international protection and the truthfulness of the assertions on which the application is founded.

Thus, in the view of the Upravno sodišče, the general credibility of the applicant must be based on all of the actions performed and allegations made by the applicant both before and after he submitted his application for international protection.

The Upravno sodišče pointed out that these criteria were consistent with the requirement of effective judicial protection within the meaning of Article 39 of Council Directive 2005/85/EC, Article 47 of the Charter and Articles 3 and 13 of the Convention. Moreover, in the view of the court, even if an applicant lacks general credibility, this should not prevent him or her from benefiting from the application of the non-refoulement principle, within the meaning of Article 3 of the Convention. In such cases, the ministry must always determine whether that principle may apply.

Consequently, the contested decision was annulled and the case was referred back to the Slovenian Ministry of Home Affairs.

Upravno sodišče Republike Slovenije, judgment of 29 August 2012, Sodba I U 787/2012, www.sodisce.si

1A/33328-A

[SAS]

Sweden

State immunity – Enforcement of a decision – Seizure – Building partly covered by State immunity - Admissibility

In a judgment handed down on 1 July 2011, the Högsta domstolen (Swedish Supreme Court) ruled that a foreign State's possession of a real estate property located in Sweden was not covered by State immunity, meaning that the property in question was not protected from being seized as the result of a judgment ordering the foreign State in question to pay court costs.

The origins of the case lay in the Russian government's confiscation of property located in St Petersburg between 1994 and 1996. The owner of the properties in question was a German national. Article 10 of the bilateral contract between the Soviet Union and Germany provided that any disputes would be settled by an arbitral tribunal established by the Stockholm Chamber of Commerce. The arbitrament, which was in favour of the German national, was contested before the local court in Stockholm before being brought to the Svea Hovrätt (Stockholm Court of Appeal). However, both courts found against the Russian Federation.

Following the Svea Hovrätt's judgment, the owner of the properties that had been confiscated requested that the judgment be enforced either by seizing a property owned by the Russian Federation or by seizing the income from rent associated with that property. The Public Collection Service (Kronofogdemyndigheten) determined that the property was covered by State immunity and was consequently protected from enforcement. This decision was later confirmed by the local court in Nacka. The Svea Hovrätt reached the opposite conclusion, finding

that there was no obstacle to enforcement, and the Högsta domstolen confirmed its judgment.

By way of introduction, the Högsta domstolen explained that the jurisdiction of States had changed and was no longer as absolute as it once was. Jurisdiction covers immunity with regard to genuine State measures. According to the restrictive theory of immunity, State activities falling under commercial or private law are exempt from immunity with respect to the Courts of another State. The Högsta domstolen then pointed out that in the past, the adoption of coercive measures with regard to a State's property was considered a more significant interference with another State's sovereignty than an opinion required by a judicial authority.

The Högsta domstolen also scrutinised the United Nations Convention of 2 December 2004 on Jurisdictional Immunities of States and Their Property. Article 19(c) of the convention allows the property of a foreign State to be seized on the condition that the property is not used for purposes relating to the exercise of that State's sovereignty or for similar, official tasks. The Högsta domstolen stressed that despite there being no clear demarcation between State immunity and diplomatic immunity, State immunity must cover a real estate property owned by a foreign State and of which a significant share is used to house the embassy. However, it is not clear from Article 19(c) whether a building is still covered by State immunity if it is only partly used for official or similar purposes. It seems that such scenarios would have to be examined on a case-by-case basis.

To that end, the Högsta domstolen settled the matter of whether State immunity prevented the enforcement of the judgment in question. The Högsta domstolen determined that there were no obstacles to enforcement. When the request for enforcement was made, the building did not house the embassy, meaning it was not used for activities relating to the embassy or its commercial delegation. The actual use of the building was rental of apartments to the staff of the embassy of the Russian Federation. The embassy also had two rooms there, one of which was used for archives and the other for vehicles belonging to the embassy. In the Högsta domstolen's view, this use was covered by State

immunity. The rest of the building was used for private-law (but non-commercial and unofficial) purposes, notably allowing researchers and students to visit Sweden and stay there for a time as the result of a bilateral contract between the Russian Federation and the Swedish State. Finally, the Högsta domstolen found that the rent paid by a tenant to the owner of a building falls under private law and ownership of a real estate property is typically covered by commercial law. In the case in point, the fact that the tenants did not pay any real rental costs was irrelevant.

This judgment conforms with a Högsta domstolen judgment of 30 December 2009, in which the court ruled that the Belgian State could not invoke State immunity with regard to the respect of obligations arising from a rental contract concerning the Belgian embassy in Sweden.

Högsta domstolen, judgment of 1 July 2011, no. Ö710-10, www.rattsinfosok.dom.se/lagrummet/Detailf_Ram.jsp?detailjTyp=detailj&detailjTitel=%D6170-10%20H%F6gsta%20domstolen&tmpWebLasa re=Microsoft

1A/33333-A

Högsta domstolen, judgment of 30 September 2009, n° Ö2753-07, www.rattsinfosok.dom.se/lagrummet/Detailf_Ram.jsp?detailjTyp=detailj&detailjTitel=%D62753-07%20H%F6gsta%20domstolen&tmpWebLasa re=Microsoft

1A/33332-A

[LTB]

2. Non-EU countries

United States

Constitutional law – Eighth Amendment to the constitution (prohibition of cruel and unusual punishment) – Minors convicted of homicide – Mandatory sentence of life imprisonment without the possibility of parole – Violation of the Eighth Amendment

On 25 June 2012, the Supreme Court of the United States issued a judgment on the mandatory sentencing of minors convicted of homicide to life imprisonment without the possibility of parole.

In these joined cases, the appellants were convicted of homicide when they were just 14 years old. They were tried as adults and received mandatory sentences of life imprisonment without the possibility of parole. After unsuccessfully challenging the sentences in the courts of the federal states, the appellants appealed to the Supreme Court.

The Supreme Court ruled by five votes to four that mandatory sentencing of minors convicted of homicide to life imprisonment without the possibility of parole violated the prohibition on cruel and unusual punishment established in the Eighth Amendment to the US constitution.

The case law of the Supreme Court prohibits sentencing practices that create an imbalance between the culpability of a category of sentenced persons and the gravity of the penalty. The Supreme Court had already invalidated the death penalty for minors (judgment of 1 March 2005, *Roper v. Simmons*, 543 US 551 (2005)) and life imprisonment without the possibility of parole for minors convicted of offences other than homicide (judgment of 17 May 2010, *Graham v. Florida*, 560 US ___ (2010)).

The constitution recognises that there is a difference between minors and adults in terms of sentencing. In the Supreme Court's view, minors often lack maturity and are more likely to behave recklessly. Compared to adults, a minor's actions are less likely to be evidence of "irretrievable depravity".

When deciding whether a sentence of life imprisonment without the possibility of parole is necessary in a particular case, the court must examine the impact a minor's age has had on his or her actions. However, mandatory penalty schemes do not allow this to be taken into account. The case law of the Supreme Court also recognises similarities between life imprisonment with no possibility of parole, when applied to minors, and the death penalty (*Graham v. Florida*). When a court rules on the death

penalty, it must take account of the individual characteristics of the offender and the circumstances surrounding the offence. Given the similarities with the death penalty, this requirement must also apply with regard to life imprisonment without the possibility of parole for minors. If a particular penalty is mandatory, these factors cannot be assessed.

The Supreme Court therefore ruled that the mandatory sentencing of minors convicted of homicide to life imprisonment without the possibility of parole violated the Eighth Amendment to the constitution.

Supreme Court of the United States, Opinion of 25 June 2012, Miller v Alabama, Jackson v Hobbs, 567 U.S. (2012),
www.supremecourt.gov/opinions/11pdf/10-9646g2i8.pdf

IA/33413-A

[TCR] [DUNNEPE]

Immigration – Foreign nationals staying unlawfully – Distribution of powers between the federal states and the federal government – Federal state law on illegal immigration – Pre-emption doctrine – Invalidity

On 25 June 2012, the Supreme Court of the United States handed down a judgment that suspended various provisions of the Support Our Law Enforcement and Safe Neighborhoods Act, 2010, (S.B. 1070) (hereinafter referred to as "the Act"), an Arizona law on illegal immigration.

The Act introduced a number of provisions addressing the issue of illegal immigration in Arizona. Section 3 creates a new offence, non-compliance with federal requirements on registration of immigrants. Under Section 5(C), it is an offence for an unlawfully resident immigrant to look for or perform paid work in Arizona. Section 6 authorises the arrest without mandate, by the police authorities, of any person suspected on reasonable grounds of having committed a breach of public order that would justify that person's removal from the United States. Finally, Section 2(B) required, in some cases, the police authorities to verify the immigration status of anyone they stop, detain or

arrest. The federal government filed for an injunction to prevent the Act's implementation.

In its judgment, the Supreme Court highlighted that the federal government possessed broad, undoubted power over the subject of immigration. The Supremacy Clause in the United States constitution (Article 6(2)) gives the law of the United States supremacy over the law of the individual federal states. The pre-emption doctrine states that when there are provisions of federal law in a certain domain, the federal states may not take legal measures relating to that domain. The provisions of federal law may 'pre-empt' a domain, either explicitly or implicitly. The pre-emption doctrine also provides that where state laws contradict federal law, they are not valid.

It was against this backdrop that the Supreme Court examined the validity of the Act's provisions. It found that Section 3 encroached upon the domain of registration of foreign nationals in the United States. Given that there are federal rules governing this domain, section 3 was subject to pre-emption. The court then determined that Section 5(C) went against the federal system, which provides for application of criminal sanctions to those who employ illegal immigrants, not to the immigrants themselves. With regard to Section 6, there are no federal rules specifying that being present illegally in the United States is a criminal offence. While federal law does provide for cooperation between local and federal authorities in connection with the identification and removal of illegally-staying immigrants, this cooperation does not allow the state police authorities to unilaterally decide to make an arrest.

Finally, the Supreme Court found that there was insufficient justification for suspending the effect of Section 2(B) if it is not known how it will be interpreted by the Arizona courts. The section in question already contains significant limits and must comply with the constitutions of both Arizona and the United States. The requirement to verify the immigration status of a detained person is not contrary to federal law as Congress has already provided for information to be shared by the local and federal authorities.

Supreme Court of the United States, Opinion of 25 June 2012, Arizona et al v United States, 567 US _ (2012),
www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf

IA/33415-A

[TCR] [DUNNEPE]

Russia

Supreme Court of Arbitration of the Russian Federation – Industrial property – Fees relating to protection of trade marks and patents – Discrimination against non-residents of Russia – Breach of the Partnership and Cooperation Agreement between the European Communities and their Member States and the Russian Federation – Direct effect of Article 98(1) of the agreement

In its judgment no. 308/2012 of 11 April 2012, the Высший Арбитражный Суд (Supreme Court of Arbitration of the Russian Federation, hereinafter referred to as "the VAS") ruled on the lawfulness of charging non-residents of Russia a higher fee for examination of objections against registration of trade marks by third parties than residents of Russia (16,200 roubles compared to 2,400).

The appellant, a Czech entrepreneur, asked that the VAS repeal one of the provisions featuring in the list of legal actions relating to trade marks and patents, which was created by a decision of the Russian government on 10 December 2008. In support of his request, he claimed that there had been a violation of Articles 2, 33, 48, 49 and 98 of the Agreement on Partnership and Cooperation establishing a Partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (hereinafter referred to as "the Agreement").

First of all, the VAS highlighted that under Article 15 of the Russian constitution and Article 7 of the Russian Civil Code, the international treaties concluded by the Russian Federation and the universally recognised principles and norms of international law were an integral part of the Russian legal system. As such, if there is a conflict of laws with the

provisions of an international treaty, the international treaty takes precedence.

The VAS then analysed the scope of Article 98(1) of the Agreement. The VAS found that the provision in question described clearly and in detail the rights and obligations of the parties to the treaty. It provides that the parties mutually undertake to ensure that natural and legal persons have access free of discrimination to the competent courts and administrative organs to defend their individual rights and property rights, including those concerning intellectual and industrial property.

Lastly, the VAS considered that the Agreement did not contain any provisions implying that Article 98(1) was not binding, or was only binding under certain conditions. Consequently, the VAS recognised that the provision had direct effect.

The VAS therefore dismissed the Russian government's arguments about the nature of the Agreement. The Russian government asserted that the Agreement was a framework agreement setting out the principles and areas for development of the cooperation between Russian and the United Kingdom and that it did not govern concrete legal relationships.

By recognising the direct effect of Article 98(1) of the Agreement, the VAS followed the line taken by the case law of the European Court of Justice, without citing it (see the European Court of Justice's interpretation of the Agreement in its judgment of 12 April 2005 (Simutenkov, C-265/03, ECR. p. I-02579)).

Finally, it is worth noting that the VAS handed down a similar judgment in a case between the same two parties on 28 August 2012. With this judgment (no. 513/2012), the VAS repealed other provisions from the list of legal actions taken by the competent authority which provided for higher fees to be charged to non-residents in respect of protection of their industrial property rights (more specifically, fees for the registration of trade marks and patents).

Высший Арбитражный Суд, judgment of 11 April 2012, no. 308/2012, www.arbitr.ru

IA/32891-A

[KIRILIN]

Switzerland

Agreement between the Swiss Confederation and the European Community on the free movement of persons – Annex II to the agreement on coordination of social security schemes – Regulation (EEC) No. 1408/71 of the Council – Old age insurance – Insurance under the Swiss scheme for employees of non-governmental organisations residing in third countries – Discrimination based on nationality – Lawfulness

In a judgment issued on 17 February 2012, the Tribunal Fédéral Suisse ruled on how to handle an application for coverage under the Swiss old age insurance scheme (hereinafter referred to as "the AVS") from a German national not domiciled in Switzerland but working for a Swiss missionary organisation in Tanzania.

By virtue of Article 1a of the federal law on old age and survivors' insurance, the compulsory old age insurance scheme in Switzerland covers not only natural persons domiciled in Switzerland or doing paid work in Switzerland, but also some Swiss nationals working abroad, including Swiss nationals working for non-governmental organisations that receive significant funding from the Swiss Confederation within the framework of development cooperation.

The appellant, who is a German national but works for a Swiss missionary organisation in Africa, requested coverage under the AVS on the basis of the latter provision. Ruling on the competent authority's refusal to grant coverage, the social insurance tribunal of Basel canton upheld her request on the basis, in particular, of the Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (hereinafter referred to as "the AFMP") and 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.

However, when the Tribunal Fédéral was asked to rule on this decision, it reached a different conclusion than the canton court.

First of all, the Tribunal Fédéral found that the appellant could not rely on Article 3(1) of Regulation (EEC) No. 1408/71 of the Council (in the version applying in Switzerland at the time) in order to receive equal treatment. The court pointed out that that provision only accords equal treatment to people living in one of the Member States. The background to the case in point showed that the appellant was not resident in Germany, but in Africa, where she had established the habitual centre of her interests. She therefore could not rely on Article 3(1) of Regulation (EEC) No. 1408/71 of the Council to demand the same treatment as Swiss citizens.

The Tribunal Fédéral then determined that a different solution would not be reached through reliance on Article 9(2) of Annex I to the AFMP, by virtue of which an employed person, while on the territory of a contracting party, enjoys the same social benefits as national employed persons. The appellant does not fall within the scope of application *ratione personae* of the provision, as she lacks a sufficiently close connection with the Swiss labour market, nor does she fall within its scope of application *ratione materiae*, since the social benefits she requested are within the scope of application of Article 3(1) of Regulation (EEC) No. 1408/71 of the Council. In fact, Article 9(2) of the AFMP may only be applied as an alternative.

Finally, the Tribunal Fédéral ruled out the application of Article 2 of the AFMP, by virtue of which nationals of any one contracting party who are lawfully resident in the territory of another contracting party shall not, in application of and in accordance with the provisions of Annexes I, II and III to the AFMP, be the subject of any discrimination on grounds of nationality. The Tribunal Fédéral found that this provision was generally applicable, regardless of the provisions of the annexes to the AFMP. However, this general application is restricted to situations falling within the agreement's scope of application. As indicated in its preamble, the AFMP aims to bring about free movement of persons between the contracting parties on the basis of the rules applying in the European Community. The system applying to relations with third States is not subject to Community law, remaining a competence of the contracting parties.

Consequently, the Tribunal Fédéral concluded that Article 1a of the federal law on old age and survivors' pensions could be applied independently of European rules established by treaty. There was therefore no reason to provide the German national with coverage under the compulsory old age insurance scheme, which is, in this case, only available to Swiss nationals, with discrimination on grounds of nationality not falling within the scope of application of the AFMP.

Tribunal Fédéral Suisse, judgment of 17 February 2012, ATF 126III129,
www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.html

IA/32887-A

[MEYERRA]

B. Practice of international organisations

World Trade Organisation

WTO – Agreement on Technical Barriers to Trade – Measures concerning the importation, marketing and sale of tuna and tuna products

The report by the WTO Appellate Body (hereinafter referred to as "the AB") on the prohibition of the importation and sale of tuna and tuna products in the United States was adopted by the Dispute Settlement Body (hereinafter referred to as "the DSB") on 13 June 2012.

This dispute arose as the result of a complaint by Mexico about certain measures contained in a United States federal law setting out the conditions for use of the "dolphin-safe" label for tuna products and made access to the "dolphin-safe" label in the United States conditional upon the presentation of documentary evidence that varied depending on the area in which the tuna was caught and the method used to catch it. More specifically, Mexico, which is a major exporter of tuna products, claimed that these measures were discriminatory, unnecessary and, as such, inconsistent with the provisions of the GATT of 1994 and Articles 2.1, 2.2 and 2.4 of the Agreement on Technical Barriers to Trade

(hereinafter referred to as "the TBT Agreement").

In its report of 15 September 2011, the Panel determined that the provisions in question constituted a technical regulation. However, it dismissed the claim based on Article 2.1 of the TBT Agreement, which related to the discriminatory nature of the measures. While the Panel found that Mexican tuna products were similar to tuna products from the United States or any other country within the meaning of Article 2.1 of the TBT Agreement, it concluded that Mexican products were not afforded less favourable treatment than products from the United States or other countries in terms of the US provisions on labelling. The Panel also dismissed Mexico's claim that the United States violated the provisions of Article 2.4 of the TBT Agreement as the relevant international standards for the type of labelling in question were neither appropriate nor effective for achieving the objectives pursued by the United States. However, the Panel upheld the claim based on Article 2.2, according to which the measures in question created unnecessary barriers to trade and were more restrictive than necessary to fulfil the legitimate objectives.

The AB found that the Panel had not been wrong to define the measure at issue as a "technical regulation", but reversed the Panel's findings as to whether the measure was consistent with Article 2.1 of the TBT Agreement. By excluding Mexican products from access to the label while granting access to most products from the US and other countries, the measure modified the conditions of competition in the US market to the detriment of Mexican products. The AB also reversed the Panel's finding that the measure was more trade restrictive than necessary to fulfil the legitimate objectives mentioned in the TBT Agreement, thus declaring it consistent with Article 2.2 of that Agreement.

The European Union participated in the proceedings as a third party and, during the DSB meeting, it welcomed the interpretation of Article 2.2 of the TBT Agreement regarding the factors to take into account to determine whether a measure is more trade restrictive than necessary to fulfil a legitimate objective and the term "technical regulation". It also welcomed the analysis of the concept of "less favourable

treatment", featuring in Article 2.1 of the TBT Agreement, and the interpretative analysis.

Report of the Appellate Body, WTO, of 16 May 2012, case DS381, www.wto.org

[LOIZOMI]

C. National legislation

Bulgaria

New law on confiscation by the State of illegally-acquired property published in the Bulgarian Official Gazette of 18 May 2012, coming into force on 19 November 2012

I. Background

Under the Cooperation and Verification Mechanism set out by the European Commission, Bulgaria must "implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals".

In 2005, Bulgaria adopted its law on confiscation by the State of the proceeds of crime (hereinafter referred to as "the 2005 law") as a complement to the property confiscation system established by the general provisions of the Criminal Code.

The 2005 law incorporates the idea of recovering the proceeds of crime by way of civil court proceedings. It sets out the details and the procedure for seizure and confiscation by the State of any property that was directly or indirectly acquired through criminal activities and could not be returned to the victim or confiscated by the State under another provision. The multi-disciplinary committee for the identification of assets gained through criminal activities (hereinafter referred to as "the CEBAAD") may ask the courts to freeze the assets in question, but may not request the confiscation of any property until the criminal proceedings have been concluded and the accused has been sentenced. Between 2005 and 2008, the CEBAAD only handled 10 confiscation proceedings undertaken in application of the 2005 law, against 10 people charged with corruption offences. It explained

that this lack of efficiency was due to the limited powers attributed to it by the 2005 law.

In its most recent report on Bulgaria's progress with regard to the Cooperation and Verification Mechanism, the European Commission considered that the lack of progress made in terms of action taken by the CEBAAD in application of the 2005 law was largely due to the fact that assets gained through crime were only frozen at some point during the pre-trial phase or during investigation, so the measure lost much of its effectiveness. The Commission also found that the conditions for asset-freezing set down in the 2005 law were too restrictive and were insufficient for addressing the reality and extent of organised crime in the country.

In view of this criticism, the Bulgarian authorities drafted a new law on confiscation by the State of illegally-acquired property (hereinafter referred to as "the new law"), which is examined below.

II. The new law

The new law keeps to the same philosophy as the previous legislation, while making a number of substantial changes. The new committee for the confiscation of illegally-acquired assets (hereinafter referred to as "the committee") has the power to open an investigation into suspicious property that was not acquired exclusively through criminal activities linked to the specific offences set down in the Criminal Code and listed in the bill, but was nonetheless gained through other illegal activities. The commission also has fairly broad investigatory powers. The most noteworthy new feature in this respect is the commission's ability to request the confiscation of property even when a criminal sentence has not been passed. During the injunction and confiscation proceedings, the burden of proof lies with the person who owns the property, who must demonstrate that the funds used to purchase the property in question were acquired lawfully.

Article 1 of the law does not restrict the confiscation proceedings to property acquired directly or indirectly through criminal activities, like the 2005 law did. Instead, it expands the scope of the proceedings to cover any property that was acquired illegally.

Article 5 of the new law establishes the committee, which is a national body tasked with performing investigations in respect of civil confiscation and opening civil forfeiture proceedings and has a term of five years. The committee is a joint administrative body made up of five members: a Chairman, who is appointed by the Prime Minister, a Vice-Chairman and two members elected by the National Assembly, and a member appointed by the president of Bulgaria (Article 6(3)). This make-up was chosen in order to ensure that the committee is independent and impartial.

Article 15 provides that the committee must submit an annual activity report to the National Assembly, the president of Bulgaria and the Council of Ministers.

The committee may make a number of decisions by virtue of Article 11, including the decision to reach an out-of-court settlement (Article 11(5)).

Under the new law, civil forfeiture proceedings comprise two steps:

- proceedings by the committee with a view to verifying the sources for the property's acquisition and ordering seizure before judgment; and
- undertaking confiscation proceedings before a civil court.

The new law provides for proceedings to be brought before the committee for it to rule on the confiscation of property assumed to have been acquired illegally when criminal proceedings have not been opened against the person in question, or have been suspended or closed. This shows the essence of civil forfeiture, which is generally applied when mechanisms associated with criminal proceedings cannot be applied.

Articles 28 to 36 grant broad investigatory powers to the committee's authorities, namely the directors and inspectors in the regional offices. Some of these may give cause for concern. Article 34(1) allows the committee's authorities to "request the assistance of all national and municipal authorities, commercial operators, banks, credit institutions, other legal persons, notaries and private law enforcement agents and collect information from them". Under Article 93 of the law, failure to communicate the information requested within one month is

punishable by a fine of up to 5,000 BGN (around €2,500), if it is not considered a criminal offence.

Furthermore, for the purposes of the investigation, the law authorises the committee's authorities to "request explanations from the person under investigation, his/her spouse and third parties" and "request information, explanations and documents from physical persons in the aim of establishing the provenance and value of property".

The information and documents obtained during the investigation may lead to the seizure and confiscation of assets.

It is important to note that this law contains a number of guarantees so as not to infringe upon the right to a defence, which is enshrined in Article 6(1) of the European Convention on Human Rights and Article 56 of the Bulgarian constitution (a person's right to be assisted by a lawyer when appearing before a public body).

The new law is intended as a favourable response to calls by international organisations for reform of Bulgaria's legislation on fighting organised crime.

Bulgaria is the fifth country to adopt such a law, after Ireland, Italy, the United Kingdom and the United States. The new Bulgarian law draws heavily on Ireland's Proceeds of Crime Act.

This new law demonstrates the Bulgarian authorities' desire to establish more means of combatting organised crime more effectively at national level.

Praven sviat *review*, issue 10/2012,
www.legalworld.bg

Law on State confiscation of illegally-acquired assets, published in Bulgarian Official Gazette no. 38 of 18 May 2012, amended in Bulgarian Official Gazette no. 82 of 26 October 2012, in force since 19 November 2012,
www://dv.parliament.bg/

[NTOD]

Cyprus

Law no. 106(I)/2012 regulating betting and online betting

Law no. 106(I)/2012 of the Republic of Cyprus regulating betting (hereinafter referred to as "the Law") came into force on 11 July 2012.

The Law implements a system for regulating betting, which applies both to the services provided by gambling establishments and those provided through online betting. More specifically, the Law prohibits, for the first time, the operation of online casinos and all forms of betting not linked to sporting events. It also prohibits trade taking the form of bets. The Law is a technical regulation for the purposes of transposing Directive 98/34/EC of the European Council and of the Parliament into national law.

The Law provides for the creation of licences authorising service provision, with one licence type targeting owners of gambling establishments and the other targeting providers of online services (hereinafter referred to as "the Service Providers"). It also provides for the establishment of a national authority (hereinafter referred to as "the Authority") in charge of overseeing the Law's implementation, monitoring Service Providers and ensuring that they comply with the Law. More specifically, the law contains very detailed regulations on online betting. These regulations comprise a great number of provisions, particularly with regard to registration of clients, payment methods, payment of winnings and supplier control. The law also introduces a new tax amounting to 10% of net profit from betting and creates a contribution, payable to the Authority, of 3% of net profit. Moreover, it provides for new, severe penalties for breaches of its provisions. Any Service Provider providing an illegal bet may be fined €300,000 or sentenced to a maximum of five years' imprisonment. The sentence for participation in illegal betting is a fine of €50,000 or a maximum of one year's imprisonment.

Since the law came into force, the Cyprus police have begun applying its provisions: they have raided 650 gambling establishments, made arrests and confiscated equipment. A number of betting service providers have ceased operations, while some owners of gambling establishments have had their licences revoked.

The international online betting group Betfair, which earns 4% of its annual income through the

online betting market in Cyprus, lodged an official complaint with the European Commission. In its complaint, Betfair claimed that the law infringed on the provisions of European Union treaties on market freedoms and was discriminatory in that it made an exception for the services provided by a Greek State company, OPAP, which runs lotteries in Cyprus. The Cyprus government has already responded with brief statements to the effect that the provisions of the Law are justified and constitute a proportional response to the risk of money laundering and that they help create effective, efficient regulations for tackling tax evasion. The Cyprus government also considered that OPAP was excluded from the provisions of the Law by virtue of a bilateral agreement concluded between Greece and Cyprus in 1969.

Law no. 106(I)/2012 regulating betting and online betting (Official Gazette, Annex I, Part I, no. 4346, page 1338),
www.mof.gov.cy/mof/gpo/gpo.nsf/All/66F5784059719CCFC2257A38003B5881?OpenDocument

[LOIZOMI]

Sweden

Document on the ethical rules governing the professional conduct of judges

The first (consolidated) written document on ethical rules and obligations for Swedish judges was published in September 2012. It was drawn up by the former First President of the Swedish Court of Appeal, Johan Hirschfeldt, at the request of the National Courts Administration (Domstolsverket), which had, in turn, been appointed this task relating to judges' ethics by the Swedish government in 2010.

The document is divided into three parts: 1. Principles and questions (Grundsatser och frågor); 2. Ethics and liability (Om etik och ansvarstagande); and 3. Public service liability and monitoring.

The first part of the document is the main part and deals with principles and questions. It is intended to serve as a basis for judges reflecting on their conduct as they exercise their profession, but also in their role as legal experts and in their activities as private individuals. Other than the

requirements relating to integrity, which is of greater value, independence, impartiality, equal treatment and skills, the document does not set out guidelines. Rather, it raises questions to be considered. According to the document's author, this approach was chosen in part because judges arrive at their final decisions by way of complex thought processes, and in part because of the different ways of dealing with moral issues from one time period and generation to another. This approach to judges' ethics draws on a German document, *Säulen richterlichen Handels* (2007), among others, which also uses questions to address issues.

The second part of the document (a memorandum containing detailed, significant information), titled "Ethics and taking responsibility", looks at good conduct on the part of judges. It deals with how judges should handle the ethical issues they face in a way that will enable them to retain the trust of the participants in the proceedings. It also looks at judges' liability in a broader context, taking in the matter of public service liability by including secondary occupations, disciplinary rules and criminal and civil liability.

The third part, "Public service liability and monitoring" covers case law linked to ethical rules for judges. It stems from the following bodies, in particular: the parliamentary ombudsman (Justitieombudsmannen), the Justice Chancellor (Justitiekanslern), the Supreme Court (Högsta domstolen), the Supreme Administrative Court (Högsta förvaltningsdomstolen), the Courts of Appeal (Hovrätterna) and the Labour Tribunal (Arbetsdomstolen), as well as the State committee on liability of high-ranking civil servants (Statens ansvars nämnd).

The document may be accessed on the website of the National Courts Administration, Domstolsverket, www.domstol.se

[LTB]

D. Extracts from legal literature

The scope of application of European Union citizenship

"Defined by Kelsen¹ as the area in which a provision is valid, the scope of application covers all of the situations to which a given provision applies [...]. [Although] in European Union law, the material scope is subject to a special rule taking the form of the requirement that there be a 'cross-border' element [...], the issue was very much revived by two judgments by the European Court of Justice [...]: *Ruiz Zambrano* and [...] *McCarthy*², which the ECJ then tried to further clarify with a more recent judgment, the *Dereci*³ judgment of 15 November 2011"⁴. "Falling within the spirit" of the former two judgments, the *Dereci* judgment "confirms the extent, for European Union citizens, to which the fact of not having exercised one's right to freedom of movement constitutes a decisive factor in evaluating the applicability of European Union law to oneself or the members of one's family. It also confirms that even if there is no cross-border situation, the scope of application of European Union law covers a national measure that deprives European Union citizens of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'"⁵.

Following "the trend embarked upon by the ECJ with [...] *McCarthy*, where it already corrected the wrong impression that a derived right of residence could be acquired all too easily for family members of a Union citizen living in the Member State of which he or she is a national"⁶, the judgment handed down in the *Dereci* case "goes some way in limiting [...] the scope of the *Zambrano* judgment. Visibly shocked by its own daring, which, incidentally, represented an encouraging step in terms of emancipating Union citizens from mere 'market citizenship', the Court [...] gave a restrictive interpretation [...] to the criterion relating to deprivation of the substance of the rights conferred by virtue of their status as citizens of the Union "⁷. "By introducing strict criteria which harness the new jurisdiction test that national measures may not affect the genuine enjoyment of EU citizenship rights, the Court further narrows down the potential of its innovative reasoning in *Ruiz Zambrano* and

preserves the Member States' regulatory autonomy and core responsibilities for the protection of fundamental rights outside the scope of EU law"⁸.

"The responses provided in the *Dereci* judgment shed a little more light on the conditions under which a citizen of a third country, who is the family member of an EU citizen, may benefit from [...] a derived right of residence by virtue of Article 20 TFEU"⁹. With this right of residence "not [being] recognised by secondary law, it is extremely unusual for it to be admitted, on the basis of primary law on Union citizenship, when the right of residence with the Union citizen is the last means of preventing that citizen from having to leave Union territory"¹⁰. While the position adopted by the European Court of Justice has the undeniable "merit of being clear [...], [w]e are nonetheless reluctant to believe that this is what the Court had in mind when it issued the *Zambrano* judgment declaring that Union citizens could not be deprived 'of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union': if the 'substance' of these rights can be confused with the mere right to not have to leave the European Union, this 'substance' seems very limited indeed"¹¹. "It is doubtless worth acknowledging that the Court was trying to clearly define a concept that was applied inelegantly in the *Ruiz Zambrano* case, with a very flawed reference to *Rottman*¹², which only referred to the rights 'attaching' to citizenship"¹³. The substance of these rights seems all the more limited in view of the Court's interpretation of the dependency that must exist between the Union citizen and the third-country national family member(s)". The judgment in *Dereci* [...] reveals that dependence of the 'static' EU citizen on one or more third-country national(s), which is instrumental on deciding on the applicability of citizenship rights, should be interpreted strictly. Whereas sentimentality [seems] to have inspired the *Ruiz Zambrano* judgment, the Court makes it clear in *Dereci* that the mere desire to keep family members together in the territory of the Union is insufficient to claim residence rights for third-country nationals under art. 20 TFEU. One remarkable consequence of that approach is the essentially economic content given to dependence [...]. [If] financial maintenance can easily be provided from abroad, whereas personal contact, support in the education of

children and daily caretaking activities cannot [...] the judgment nevertheless instructs that emotional ties such as those that naturally developed between Mr Dereci and his children cannot be taken into consideration when verifying whether his children's essential citizenship rights are at stake. [Although] [t]his solution is along the lines of *McCarthy*, where the Court reached a comparable outcome for spouses [...], [i]t is noteworthy that dependence on the residence of a third-country family member is given a much more flexible interpretation in cross-border contexts"¹⁴.

While the Court "seems [...] to have provisionally closed [...] the Pandora's box that could have been opened by the *Zambrano* judgment [...], [w]e are nonetheless sorry that it was only moderately receptive to the doubts expressed by the Advocate-General [...]. One of these was "the fact that in order to keep the family together, a citizen of the Union may have to exercise his or her right to freedom of movement, which is clearly not a satisfying solution"¹⁵. It is indisputably the case that "[t]he criterion set by the Court seems [...] to invite citizens to move to another Member State in order to subsequently return to their State of origin"¹⁶.

This "redefinition of the scope of application of European citizens' rights could [however] cause applicability and application of Union law to become confused to some extent [...], [leading] to an inversion of normal legal reasoning, which would see the applicability of a standard reviewed before compliance with that standard [...]. [T]hrough successive shifts, we have arrived at a situation where violation of a right determines its applicability, to the detriment of the most elementary logic. This results in a kind of circular reasoning, which is by its very nature unsatisfactory: Union law is applicable because a national judgment breaches it, and yet Union law can only be breached as a consequence of matters falling within its scope of application"¹⁷. Looking beyond this "confusion between applicability and violation of Union law"¹⁸, the interpretation adopted by the Court "also means that the new scope of application given to the concept of 'Union citizen' by the *Zambrano* judgment has, in the end, not stopped it from being impossible for non-mobile citizens to rely on Union law in order to thwart reverse discrimination"¹⁹. "[I]nstead of

providing a direct solution to [the] reverse discrimination [...] problem, the Court has chosen to - once again - broaden the scope of the Treaty provisions to include within it as many situations as possible and, thus, prevent the emergence of this type of differential treatment on a case-by-case basis [...]. Despite the fact that this might appear, at first glance, a rather satisfactory compromise between the need to maintain separate spheres of EU and national competence, on the one hand, and the need to respond in some way to the reverse discrimination conundrum, [...] it creates more problems than it solves. First, [...] this is not a wholesome solution to the problem of reverse discrimination but rather leaves it to the ECJ or the national courts to decide on a case-by-case basis whether a situation should be included within the scope of EU law [...]. [I]n addition [...], it makes it even harder to justify the differential treatment that arises in situations that continue being treated as purely internal"²⁰.

Be that as it may, "[t]he main substantial question [...] namely that of the applicability or otherwise of Union law to purely internal situations, given the issues of citizenship and fundamental rights [...], remains to be addressed upstream"²¹. "Considering the *Dereci* case, it is questionable if the Court takes EU citizenship rights seriously [...]. [Indeed,] to limit the substance of rights doctrine to merely protect EU citizens from expulsion from EU territory [...] is completely in conflict with [...] the relation between EU fundamental rights and EU citizenship [...]. [If] fundamental rights were not included in the list of citizenship rights in the Treaty of Maastricht [...] [the latter] and subsequent Treaty revisions always stated that '[c]itizens shall enjoy the rights conferred by this Treaty', thus removing the apparent exhaustive character of the list of citizenship rights explicitly mentioned [...]. Since in general one of the main objectives of establishing the status of citizenship is the protection of fundamental rights against abridgment by the [S]tate, recognising fundamental rights as EU citizenship rights would certainly give more meaning to European citizenship²². Such approach would also perfectly fit with the upgraded position of fundamental rights realized by the Treaty of Lisbon"²³.

"[T]hese elements are hardly satisfying, all the less so when we consider that an objection could be raised in relation to protection of the right to

respect for family life"²⁴. In this connection, while the Court's reference to "the respective scopes of application of the Charter and the ECHR is not, in itself, [...] irrelevant [...], the manner in which the Court draws a distinction is debatable. We can only be baffled by its [...] prevarication with respect to the national court in paragraph 72"²⁵. "Is it really up to the national court to define the scope of application of European Union law?"²⁶. Nothing could be less certain. "After all, it seems clear that [...] determination of the scope of application of European Union law [...] is one of the key problems in interpreting that law. As such, given its competences, we could legitimately have expected the Court itself to perform the delicate task of interpreting the provisions on European citizenship, combined with those on family reunification within the meaning of the Charter, instead of referring back to the national court for an interpretation"²⁷. "The underlying rationale of the restraint of the ECJ might be a compromise between diverging standpoints within the Grand Chamber on the sensitive issue of the scope and limits of the innovation in *Ruiz Zambrano*. Whereas the Court interprets [this] narrowly in *Dereci*, it does not formally exclude the possibility for the referring judge to apply the provisions of the TFEU on citizenship [...]. [Yet,] [t]o entrust the referring judge with such a task is [...] surprising, considering that the ECJ emphasized that the outcome reached in *Ruiz Zambrano* was exceptional and [...] that, [t]aking into account the warning contained in the Lisbon ruling of the German Constitutional Court, as well as the multiple shields in the Treaties against [...] competence creep [...], it seems difficult if not impossible to argue that a purely internal situation which does not satisfy [...] the 'genuine enjoyment' [test] nevertheless falls within the scope of the Charter [...]. On the latter point, [...] *Ruiz Zambrano* and *Dereci* epitomise a crucial difference between federalism in the European Union and in the United States, even after the entry into force of the Treaty of Lisbon and of the Charter. Both cases contrast with the closer nexus in the United States between federalism and the protection of fundamental rights through the 'incorporation' of virtually all civil liberties entailed by the US Bill of Rights into the due process clause of the Fourteenth Amendment [...] [which] [t]he US Supreme Court interprets as affording protection against state action irrespective of inter-state

movements²⁸²⁹. This shows the importance that the Court attaches to respect for the scope of application of Union law, in terms of protection of fundamental rights. "Incidentally, the *Dereci* judgment saw the ECJ address an issue with constitutional significance. Given that the Charter of Fundamental Rights is legally binding, many expect EU fundamental rights to have a unifying effect, similar to that of Germany's Basic Law, which will narrow national margins of appreciation and transfer decision-making to Luxembourg [...]. With the *Dereci* judgment, the Grand Chamber has highlighted that it takes the limits set out in Article 51 of the Charter seriously. [...] EU fundamental rights are only valid within the scope of application of Union law (including protection of core rights). Otherwise, fundamental rights are protected by national law and the ECHR"³⁰.

The Court's chosen solution is also problematic in scenarios where "the matter definitely does not fall within the scope of application of Union law [...]. [W]hile it is clear that the Member States, all of which are bound by the ECHR, would then have sole responsibility for deciding the issue, it is far more difficult to understand in what capacity and on what basis the ECJ takes it upon itself to issue instructions to the national court, telling it that it must resolve the dispute [...] while taking account of the provisions of the ECHR"³¹. In the view of some commentators, the Court's response is "not more opportune as it considerably lengthens proceedings by requiring that all national remedies be exhausted"³². "[While] the Court is here recognizing the fact of intertwined legal orders [...] [and] effecting a pluralist understanding of contemporary constitutional obligations, which stem from different legal orders at both State and transnational levels"³³, "[t]he safeguards that it [...] [offers], relying on Article 8 ECHR, are simply not adequate [...] [as] [t]he European Court of Human Rights has always [...] narrowly interpreted the right to family life"³⁴. By adopting this approach, the Court ends up giving "the impression of placing fundamental rights outside of the material and procedural scope of Union law by referring the citizen to another legal order. [But] why not create synergies with it through consistent, complementary interpretations, like in the *M.S.S.*³⁵ and *N.S.*³⁶ [...] asylum cases? If this is not done, fundamental rights will no longer

constitute a 'crossing point between the legal systems coexisting in the European legal space'³⁷ [and may] risk becoming a breaking point instead"³⁸.

When all is said and done, the *Dereci* judgment "clarifies the principles set down by the Court's case law in the *Zambrano* and *McCarthy* judgments"³⁹. "The Court's judgment [...] can be regarded as a further step in the disentanglement of the Union's citizenship puzzle⁴⁰ [...] [imposing] limits on the interpretation of the rather vague principle that 'national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' are not in compliance with art. 20 TFEU"⁴¹. However, the Court's approach is not without raising a number of questions. "[W]ith this judgment, [the European Court of Justice] misjudges the possibility of intervening in national margins of appreciation, which are problematic in terms of the right to respect for family life and in terms of non-discrimination on grounds of nationality, thus contributing to an update of the Member State's restrictive migration policy."⁴² "Following a major step forwards for which we would struggle to find a legal basis (*Zambrano*), and a major step backwards which is, legally speaking, even more questionable [...] and harmful (*McCarthy*), we have ended up with a judgment [...] [that] clumsily attempts to reconcile the two, but employs such a minimalist interpretation of the former that we have to ask ourselves how useful it is"⁴³. "The Court's caution [...] is understandable given the State's intense reactions to the *Ruiz Zambrano* judgment [...], [which saw] [s]ome [...], like Belgium, amend their legislation on family reunification with respect to nationals"⁴⁴. "A flexible interpretation of the *Ruiz Zambrano* criterion that national measures cannot undermine the genuine enjoyment of EU citizenship rights could significantly undermine the regulatory autonomy of the Member States [...]. Despite the absence of an explicit reference to this [...] argument in *Dereci*, respect for the balance of the competences between the European Union and its Member States may be regarded as the crucial factor underlying the Court's approach"⁴⁵. "Relating as it does to both citizenship and migration policy, the issue is [indeed] a sensitive one"⁴⁶. "It is a

question of arriving at an idea of citizenship that gives a tangible meaning to the Court's case law, which aims to make it the 'fundamental status of nationals of the Member States', while allaying the States' fears of losing control over their migration policy [...]. [While] the underlying political and human issues [...] are [significant], it is not underestimating [...] [these] issues to remember that the European Union is a 'Union under the rule of law' and that its power is, first and foremost, legal power. Consequently, any liberty taken with the law virtually constitutes a weakening of this power [...]. [F]rom that point of view, abusing the scope of application of European Union law, enlarging it or restricting it as required, regardless of the objectives pursued, inevitably means undermining the foundations of the Union's legal order [...] and calling into question the balance governing the overlap between European Union law and national law"⁴⁷.

In any case, this constitutes "unpleasantly casuistic case law"⁴⁸. "[Whereas] in determining the scope of application of EU law, fundamental rights considerations [...] have an increasingly important role to play"⁴⁹, "[t]he case law has become so individualistic, so facts-specific, as to raise accusations of arbitrariness [...] . It may be a rudimentary yardstick, but when an area of law becomes almost impossible to explain [...] then something is seriously wrong. EU citizenship falls into that category at present. Few constitutional courts get, or take, 'three goes' to work out fundamental concepts in the way we have seen in [...] *Ruiz Zambrano*, *McCarthy* and *Dereci* [...] , and most certainly not in one year [...] . [T]he Court has emphasized the speedy delivery of judgments as a strategic priority in recent years. But if the recent trilogy of rushed attempts is the result of that ambition, it should revert to taking its time."

[PC] [WINDIJO]

NOTES

¹ Kelsen, H., *Théorie Pure du Droit*, translated by Eisenmann, C., Dalloz, Paris, 1962, p. 13 and following

² Judgments of 8 March 2011, C-34/09, and 5 May 2011, C-434/09, not yet published. See also "EU citizenship and purely internal situations", *Reflète no. 2/2011*, p. 43.

³ C-256/11, not yet published.

⁴ Platon, S., "Le champ d'application des droits du citoyen européen après les arrêts *Zambrano*, *McCarthy* et *Dereci*", *RTDE*, 2012, p. 23.

⁵ Aubert, M., Broussy, E. and Donnat, F., Chronique de jurisprudence de la CJUE "Citoyenneté de l'Union et situations purement internes", *AJDA*, 2012, p. 306.

⁶ Brière, C., "Libre circulation des personnes - Arrêt *MuratDereci*", *RDUE*, 4/2011, p. 731.

⁷ Clement-Wilz, L., Chronique de droit administratif et droit de l'Union européenne "L'individu", *RFDA*, 2012, pp. 377-385.

⁸ Adam, S. and Van Elsuwege, P., "Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*", *E.L.Rev.*, 2012, p. 176.

⁹ Brière, C., cit. supra, note 6, p. 734.

¹⁰ Aubert, M., Broussy, E. and Donnat, F., cit. supra, note 5, p. 307.

¹¹ Martin, D., "De *Zambrano* a *Dereci*: Le citoyen européen, un être déprimé à la recherche de son identité", *Revue de droit du travail*, 2012, pp. 339-346.

¹² Judgment of 2 March 2010, C-135/08, ECR p. I-1449.

¹³ Carlier, J.-Y., Chronique "La libre circulation des personnes dans et vers l'Union européenne", *JDE*, 3/2012, pp. 85-90.

¹⁴ Adam, S. and Van Elsuwege, P., cit. supra, note 8, p. 181.

¹⁵ Rigaux, A., "Rapprochement familial et citoyenneté de l'Union", *Europe*, January 2012, comm. 7.

¹⁶ Brière, C., cit. supra, note 6, p. 735

¹⁷ Platon, S., cit. supra, note 4, pp. 23 and 33.

¹⁸ Carlier, J.-Y., cit. supra, note 13, p. 90.

¹⁹ Martin, D., cit. supra, note 11, p. 346.

²⁰ Tryfonidou, A., "Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* trilogy", *E.P.L.*, 2012, pp. 493-494 and 521-522.

²¹ Carlier, J.-Y., cit. supra, note 13, p. 90.

²² O'Leary, S., "The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law", *C.M.L.Rev.*, 1995, pp. 519-540.

²³ Van Den Brink, M., "EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?", *L.I.E.I.*, 2012, pp. 273 and 280-283.

²⁴ Brière, C., cit. supra, note 6, p. 735.

²⁵ Rigaux, A., cit. supra, note 15.

²⁶ Benoît-Rohmer, F., "Les droits liés à la citoyenneté, notamment le droit de se déplacer et de séjourner sur le territoire des États membres", *RTDE*, 2012, pp. 398-400.

²⁷ Rigaux, cit. supra, note 15.

²⁸ See, in particular, *Gitlow v. New York* 268 US 652 (1925). For a more global view, see also Wermiel, S.J., "Rights in the Modern Era: Applying the Bill of Rights to the States", *William and Mary Bill of Rights Journal*, 1992, p. 121.

²⁹ Adam, S. and Van Elsuwege, P., P., cit. supra, note 8,

pp. 184-185.

³⁰ Thym, D., "Aufenthaltsrechtliche Wirkungen der Unionsbürgerschaft - *Dereci* u.a.", *NVwZ*, 2012, p.104.

³¹ Rigaux, A., cit. supra, note 15.

³² Carlier, J.-Y., cit. supra, note 13, p. 91.

³³ Nic Shuibne, N., "(Some of) The Kids Are All Right", *C.M.L.Rev.*, 2012, pp. 349-377.

³⁴ Van Den Brink, M., cit. supra, note 23, p. 285.

³⁵ Judgment of the European Court of Human Rights of 21 January 2011, *M.S.S. v. Belgium and Greece*, application no. 30696/09, Reports of Judgments and Decisions 2011.

³⁶ Judgment of 21 December 2011, *N.S.*, C-411/10 and C-493/10, not yet published.

³⁷ Dubout, E., "Du jeu des présomptions dans un espace normatif pluraliste", *La semaine juridique*, 2011, pp. 760-761.

³⁸ Carlier, J.-Y., cit. supra, note 13, p. 91.

³⁹ Benoît-Rohmer, F., cit. supra, note 26, p. 399.

⁴⁰ Wiesbrock, A., "Disentangling the 'Union citizenship puzzle'? The *McCarthy* case", *E.L.Rev.*, 2011, p. 861.

⁴¹ Adam, S. and Van Elsuwege, P., cit. supra, note 8, p. 189.

⁴² Doblhoff-Dier, R., "Von der Unionsbürger_innenschaft und ihrem winzigen Kernbestand", *juridikum*, 2012, p. 156.

⁴³ Martin, D., cit. supra, note 11, pp. 339 and 346.

⁴⁴ Carlier, J.-Y., cit. supra, note 13, p. 91.

⁴⁵ Adam, S. and Van Elsuwege, P., cit. supra, note 8, p. 177.

⁴⁶ Carlier, J.-Y., cit. supra, note 13, p. 91.

⁴⁷ Platon, S., cit. supra, note 4, pp. 40-41.

⁴⁸ Rigaux, A., cit. supra, note 15.

⁴⁹ O'Leary, S., "The past, present and future of the purely internal rule in EU Law", *The Irish Jurist*, 2009, pp. 13-27.

⁵⁰ Nic Shuibne, N., cit. supra, note 33, pp. 378-379.

E. Brief summaries

* *Germany*: Hearing a dispute on age-based discrimination, the Bundesgerichtshof (German Federal Court of Justice) applied the Allgemeines Gleichbehandlungsgesetz (Anti-Discrimination Act, hereinafter referred to as "the AGG") to the case of a manager of a limited-liability company for the first time. The AGG transposes a number of directives on protection from discrimination, notably including Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

Until August 2009, when his five-year contract expired, the appellant was a medical manager for the defendant, a company operating municipal clinics in Cologne. In October 2008, the company's supervisory board decided not to renew the contract of the appellant, who would be 62 when it expired, as the appellant wished, and instead selected another candidate, aged 41, to fill the position.

The Bundesgerichtshof ruled that the appellant had suffered discrimination on grounds of his age. It found that the AGG was applicable in the case in point because the decision not to renew the appellant's contract concerned access to employment.

The Bundesgerichtshof then applied Article 22 of the AGG, which stipulates that if a party uncovers circumstances indicating that discrimination has taken place, the other party must prove that there has been no such discrimination. In the case in point, the chairman of the supervisory board had told the press that the contract had not been renewed because of the appellant's age. In view of the major upheavals in the healthcare sector, he said, the company needed a manager who would be able to tackle the challenges faced by the company in the long term. The Bundesgerichtshof considered that this was the inverse of the burden of proof provided for in Article 22 AGG. The defendant did not submit any evidence to contest this.

As there were no grounds to justify the discrimination, the Bundesgerichtshof ruled that the appellant was entitled to compensation in respect of the pecuniary and non-pecuniary

damage he had sustained. The Bundesgerichtshof referred the case back to the lower court for it to determine the amount of compensation payable to the appellant.

Bundesgerichtshof, judgment of 23 April 2012, II ZR 163/10, www.bundesgerichtshof.de

IA/33243-A

[TLA]

The Bundesverfassungsgericht approved the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and the Treaty establishing the European Stability Mechanism. When reviewing the constitutionality of the two treaties, the court based its reasoning on the right to vote enshrined in Article 38 of the Basic Law and the principle of democracy, as in its judgment of 7 September 2011 on measures relating to aid for Greece and the euro rescue plan (*Reflets no. 2/2011*, p. 7). The right to vote may not be deprived of its content through limitation of the Bundestag's powers such that it loses control over its budgetary decisions. For that reason, the Bundestag must always be consulted if loans and guarantees are to exceed the amount currently provided for (around €190 million).

Bundesverfassungsgericht, judgment of 12 September 2012, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, www.bundesverfassungsgericht.de

IA/ 33238-A

[AGT]

* *Spain*: In its judgment of 19 June 2012, the Tribunal Supremo ruled that a notarised deed drawn up in Germany was valid for the registration in the relevant Spanish land register of the sale of a Spanish real estate property.

Recognition of this validity is based on the rules of private international law and the requirements resulting from the freedom to provide services within the European Union. Making the involvement of a Spanish notary compulsory would, in the case in point, be considered a restriction of the freedom to provide services, as recognised by Articles 59 and 60 TFEU, and

more specifically, free transmission of goods, which could not be justified within the current framework of the Spanish and European Union legal orders.

However, in the view of the judges who filed a dissenting opinion, a Spanish notary should be involved in order to ensure compliance with the fundamental rules of the national legal system, in view of the differences between the German and Spanish systems in terms of transferring property rights to real estate.

Tribunal Supremo, Sala de lo Civil, judgment no. 998/2011 of 19 June 2012, www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=6455323&links=998/2011&optimize=20120801&publicinterface=true www.poderjudicial.es/

IA/33325-A

[NUNEZMA]

The Tribunal Constitucional, ruling as a plenary assembly, upheld the appeal against the enforcement order for the decision by the special chamber of the Tribunal Supremo that declared the formation of the political party Sortu unlawful on the grounds that it was considered the successor to the political party Batasuna. The latter political party had been declared illegal and dissolved by the Tribunal Supremo as it was a political branch of the terrorist group ETA.

Consequently, and by virtue of the freedom of association and creation of political parties established by the Spanish constitution, the Tribunal Constitucional authorised the formation and registration of the political party Sortu.

This judgment shows a clear divergence between the Tribunal Constitucional and the Tribunal Supremo in a case that was very sensitive from a political and social viewpoint, leading three dissenting judges to state that the Tribunal Constitucional had assumed powers going beyond those conferred on it by the Spanish constitution.

Tribunal Constitucional, Pleno, Sentencia no. 138/2012 of 20 June 2012 (Spanish Official Gazette no. 163 of 9 July 2012),

www.tribunalconstitucional.es/fr/jurisprudencia/Pages/Sentencia.aspx?cod=16626
www.tribunalconstitucional.es

IA/33326-A

[NUNEZMA]

* *France*: The Cour de Cassation handed down two judgments on the enforcement of a European arrest warrant. In its judgment of 8 August 2012, it declared that "enforcement of a European arrest warrant shall be refused if the offences for which it was issued fall within the jurisdiction of the French courts and if the prescription of public prosecution or a penalty is based on French legislation". In the judgment of 24 August 2012, the Cour de Cassation found that where there were several arrest warrants, its prosecuting chambers could not attach conditions to their decision to transfer the individual in detention to one of the judicial authorities that issued a warrant: the prosecuting chambers must choose which mandate they will enforce and may not attach to their decision the condition of postponed surrender of the detainee to a foreign authority.

Cour de Cassation, Criminal Chamber, judgments of 8 August 2012 and 24 August 2012, appeals no. 12-84.760 and no. 12-85.244, www.legifrance.gouv.fr

IA/32964-A

IA/32965-A

[ANBD]

In a judgment handed down on 3 July 2012, the Cour de Cassation ruled on the compatibility with Council Directive 2000/78/EC on equal treatment in employment and occupation with a provision of the Civil Aviation Code requiring airline pilots to stop work at the age of sixty. In its judgment, the Cour de Cassation confirmed the judgment of the Court of Appeal, which found that it was discriminatory to terminate a pilot's employment contract on the basis of that provision of the Civil Aviation Code and determined that the termination was invalid by virtue of Council Directive 2000/78/EC. This judgment is noteworthy in that it applies a directive directly to a dispute between individuals, rather than attempting to find a

compatible interpretation (European Court of Justice judgment of 24 January 2012, Maribel Dominguez, C-282/10, not yet published in the European Court Reports) or referring to a general principle of European Union law (European Court of Justice judgment of 19 January 2010, Seda Küçükdeveci, C-555/07, ECR 2010, p. I-00365). Moreover, the heading of the case in the Cour de Cassation court reports explicitly states: "European Union – Employment – Employee – Principle of non-discrimination – Council Directive 2000/78/EC of 27 November 2000 – Direct application – Direct application to relationships between individuals – Scope", as with similar judgments in the past (see, in particular, the judgment handed down by the Civil Chamber of the Cour de Cassation on 11 May 2010, no. 08-45307)

Cour de Cassation, Chamber for Social and Labour Matters, 3 July 2012, no. 11-13.795, www.legifrance.gouv.fr

IA/32971-A

[MEYERRA]

The brief summary from the Netherlands (p. 47 of this edition of Reflets) also deals with Council Directive 2000/78/EC.

In a judgment handed down on 9 August 2012, the Conseil Constitutionnel found that the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, which was signed in Brussels on 2 March 2012, did not require prior constitutional review.

The court considered that since the new provisions of the treaty essentially echoed and strengthened requirements that had already been imposed on the Member States in terms of budgetary equilibrium, compliance with these provisions did not infringe upon the essential conditions of exercise of national sovereignty. None of the commitments made in the treaty entailed a transfer of powers with regard to economic or budgetary policy.

However, the Conseil Constitutionnel highlighted that the fact that the treaty was not contrary to the French constitution depended

entirely on the French State's decision to use non-binding provisions to ensure compliance with the rules on budgetary equilibrium. Had the State decided otherwise, it would have been necessary to amend the constitution, specifically the provisions on the government's and parliament's prerogative to draw up and adopt laws on finance and financing social security.

Consequently, the treaty's compatibility with the French constitution is conditional upon the choice of non-binding provisions to ensure compliance with the rules on balancing public finances.

Conseil Constitutionnel, judgment of 9 August 2012, no. 2012-653 DC, www.legifrance.gouv.fr

IA/32966-A

[MESSIFR]

On 17 July 2012, the Conseil d'État referred a priority question on constitutionality suggested by the companies Canal Plus Group and Vivandi Universal to the Conseil Constitutionnel. The question related to the consistency of Articles L. 430-8.IV, L. 461-1.II, L. 461-3 and L. 462-5.III of the Commercial Code with the rights and freedoms guaranteed by the constitution, specifically the freedom to do business and the principles of court independence and impartiality.

The contested provisions relate to the French Competition Authority's power to impose penalties on companies failing to comply with the conditions attached to authorisation of mergers, as well as the provisions on the Authority's composition, the rules governing its deliberations and the ways of bringing a case before it.

Ruling on the matter on 12 October 2012, the Conseil Constitutionnel found that the Competition Authority's power to impose penalties did not constitute an unjustified and disproportionate violation of the freedom to do business, given that it aimed to preserve public policy in the economic sphere.

The Conseil Constitutionnel also found that the provisions on the Authority's composition, the rules governing its deliberations and the ways of bringing a case before it respected the principles of independence and impartiality arising from Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen. In that connection, the court found that a decision by which the Authority authorises a merger is not of the same nature of a decision by which it imposes penalties, and that the contested provisions set down a functional separation between the Authority's prosecution and investigation role and its role passing judgments.

Consequently, the Conseil Constitutionnel ruled that all of the provisions of the Commercial Code that it had been asked to evaluate were consistent with the constitution.

Conseil Constitutionnel, judgment of 12 October 2012, no. 2012-280 QPC,
www.legifrance.gouv.fr

IA/32967-A

[MESSIFR]

With a judgment handed down on 27 July 2012, the Conseil d'État overturned a decision by the National Court for the Right of Asylum denying refugee status to a person who applied for that status on the grounds of sexual orientation. The Conseil d'État based its judgment on Article 1A of the Geneva Convention of 28 July 1951, read in conjunction with Article 10(1)(d) of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection.

The Conseil d'État considered that the National Court for the Right of Asylum had committed two errors of law by not granting refugee status to the appellant. In the view of the court, the granting of refugee status, within the meaning of the aforementioned provisions, should not be dependent upon public demonstration by the person applying for refugee status of his or her sexual orientation. Instead, it should be determined whether the conditions in the country of which the person is a national allow the

assimilation of people of that person's sexual orientation to a social group, given the views held on such people by the country's society or institutions, and it should be ascertained whether members of the group have a justified fear of being persecuted because they belong to that group.

Furthermore, the fact that belonging to that social group is not subject to a repressive criminal provision is irrelevant for determining whether persecution exists as it does not preclude the abusive application of provisions of ordinary law to members of that group.

Conseil d'État, judgment of 27 July 2012, no. 349824,
www.legifrance.gouv.fr

IA/32968-A

[MESSIFR]

* *Italy*: The "liberalisation decree" (*decreto liberalizzazioni*) adopted on 24 January 2012 and mentioned in *Reflets no. 2/2012*, introduced, among other things, direct company funding of the Italian Competition Authority (hereinafter referred to as "the AGCM"). A compulsory contribution of €0.08 per €1,000 was established for companies with a turnover of over €50 million, with the minimum contribution being set at €4,000 and the maximum at €400,000. At the same time, the contributions paid when submitting forms providing notification of mergers were abolished. Moreover, the number of mergers for which notification must be provided is set to decrease, as the two conditions linked to the turnover thresholds for the group and the target company have become cumulative. This new legislative measure should bring the AGCM an additional €96 million in revenue during its first year of application alone, thus giving it the third-highest budget of the world's competition authorities.

Decree-law no. 1 of 24 January 2012 on urgent provisions for competition, infrastructure development and competitiveness,
"Liberalisation decree", www.dejure.giuffre.it

[MSU]

Decree-law no. 201 of 6 December 2011 and law no. 14 of 24 February 2012 reformed the Italian social security and pension system. The key points of the reform are: i) confirmation of the contribution method as the only method of calculating pensions; ii) harmonisation of retirement systems, which used to be different for men and women in terms of the number of years worked before retiring (42 years and 1 month for men and 41 years and 1 month for women, to be increased by one month in 2013 and one month in 2014 – in 2018, the retirement age for both men and women will be 66); iii) the option of continuing to work until the age of 70, with a certain degree of flexibility; iv) the option of taking early retirement, entailing the loss of a certain percentage of the retirement pension for every year short of the statutory retirement age. Specific rules were drawn up with regard to people meeting the criteria for retirement before 31 December 2017 to ensure that they would not be subject to the penalty provided for in case of early retirement. There have been problems with the law's application in connection with people who met the criteria for retirement before the reform came into force but who will have a lower coefficient than provided for applied to the contributions they paid.

Decree-law no. 201 of 6 December 2011 on urgent provisions for growth, fairness and consolidation of the public budget, and law no. 14 of 24 February 2012,
www.dejure.giuffre.it

[MSU]

With its judgment of 24 April 2012, the plenary assembly of the Consiglio di Stato clarified the conditions for having *locus standi* to bring an appeal in the case of a refusal to grant access to the administrative documents of the society SIAE (Italian society for the development of art, culture and the performing arts).

The appeal was lodged against the Ministry of Cultural Activities and Assets and SIAE by Codacons (a consumer protection association), some members of SIAE and an association tasked with protecting users in the information sector.

The request for access was made in respect of documents on the financial situation of SIAE, the losses it had sustained following the collapse of Lehman Brothers and the Board of Directors' decisions on the investments made.

The Consiglio di Stato found that only the members of SIAE had *locus standi* given their clear interest in knowing about the status and management of the assets of the society in question, to which they contribute. It is important to check the impact of the document to which access is requested on the rights of the member lodging the appeal. In this connection, access must be granted if access to the document is necessary for protecting the member's right.

However, the Consiglio di Stato did not grant the other associations the right to access the documents on the grounds that the undifferentiated group of consumers they represented could not be harmed by financial losses incurred by SIAE, nor benefit from collection of principal were this to take place.

Consiglio di Stato, Ad. Pl., judgment of 24 April 2012, no. 7, www.lexitalia.it.

IA/32885-A

[VBAR]

For the first time ever, the Corte di Cassazione ruled on whether it was possible to bring an appeal against a refusal to issue a European arrest warrant (hereinafter referred to as "EAW").

The court was asked to annul the refusal to issue an EAW for an Italian citizen living in France who was already

The Corte di Cassazione first analysed Articles 28 and subsequent of law no. 69/2005, "provisions transposing framework decision 2002/584/JHA", which govern the proceedings for surrender.

Based on its analysis, the court determined that the articles in question and the decision itself did not provide for any means of appealing against a refusal to issue an EAW, and that that omission was due to the EAW's nature as an ancillary

measure, which is not autonomous compared to national protective measures.

More specifically, the court declared that since the EAW is an instrument for the enforcement in Member States of provisional or final judicial decisions made in other Member States, it does not constitute a new measure that is different from the measure establishing the coercive protective measure.

Consequently, Article 28 of the aforementioned law makes issuance of a warrant almost automatic. A court simply has to determine whether there is an instrument applying the protective measure and check that the subject of the warrant is in another Member State.

In view of the above, the Corte di Cassazione concluded that even if there were no formal grounds for appeal, the contested act, namely the refusal to issue an EAW, could be compared to the case of the issuance of an "abnormal act" (*atto anormale*) because it was adopted outside of the limits provided for by the procedural system, making an appeal, or better, a cassation complaint, possible.

Corte di Cassazione, sez. VI Penale, judgment of 4 June 2012, no. 21470

IA/32884-A

[GLA]

Within the meaning of Article 19(2)(c) of legislative decree no. 286 of 25 July 1998 setting out regulations on immigration and standards on alien status (GURI 18 August 1998, no. 191, SO), an alien may not be expelled if he or she lives with family members or a spouse with Italian nationality.

In its order of 10 July 2012, no. 11593, the Corte di Cassazione overturned the magistrate's decree confirming the prefect's decree expelling from Italy an alien whose residence permit had expired, who had lived for several years with his father (who had acquired Italian nationality) and who had been put in prison following his conviction for a criminal offence, upon which his parents had asked for him not to serve his sentence in the family home.

The Corte di Cassazione found that the condition of being in a "family unit", as set by Article 19(2)(c) of legislative decree no. 286 of 1998, was still met even if the alien no longer lived with his family because he was in prison and even if, when the expulsion decree was adopted, his poor relationship with his family meant he could not return to the family home.

In the view of the court, imprisonment is not a reason to rule out the existence of family ties between the alien and people with Italian nationality, living in Italy, whose home he has shared. It also found that the fact that the parents would not allow their son into their home when the expulsion decree was adopted was irrelevant for determining whether such family ties existed.

Corte di Cassazione, order of 10 July 2012, no. 11593, www.leggiditalia.it

IA/32894-A

[CI]

* *Latvia*: Hearing a case on employees' claims in respect of insolvent employers, the Augstākās tiesas Senāts (Court of Cassation) found that such employees were entitled to bring appeals before a court.

Under the administrative system for dealing with such applications, which was created by the law on insolvency and the law on the protection of employees in the event of the insolvency of their employer, employees must lodge any claims with the liquidator appointed by the competent court. The liquidator was named the sole authority competent for passing on employees' claims to the guarantee institution and the only authority that could hear appeals in the event of a dismissal of these claims.

In its judgment of 22 June 2012, the Augstākās tiesas Senāts acknowledged that its case law up to that point had not been entirely correct. Referring to Directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the insolvency of their employer, and especially the requirements set out in the third recital, the court applied a new interpretation to national legislation. In the words of the third recital, "[i]t is necessary to provide for the protection of employees in the event of the insolvency of their

employer and to ensure a minimum degree of protection, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community". The Augstākās tiesas Senāts noted that the directive did not set out procedural rules relating to employees' claims. Furthermore, national legislation did not require the liquidator to contest claim dismissals by the competent public authority. Consequently, the Augstākās tiesas Senāts declared that if the guarantee institution dismissed their claims, employees had a subjective public right to lodge an appeal to a higher authority or a judicial appeal.

Augstākās tiesas Senāts, judgment of 22 June 2012, no. SKA-630/2012, www.tiesas.lv

IA/33329-A

[AZN]

* *Netherlands*: In a judgment handed down on 13 July 2012 on the requirement that airline pilots working for Koninklijke Luchtvaart Maatschappij NV (hereinafter referred to as "KLM") retire at the age of 56, the Hoge Raad found that the requirement did not contravene the prohibition on discrimination on grounds of age established by the law on equal treatment, regardless of age, in employment matters, transposing Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

In the view of the Hoge Raad, an exception to the prohibition on discrimination on grounds of age would, in the case in point, be justified by legitimate objectives, namely the need for a strong influx of young pilots and for regular, predictable promotion of pilots: KLM needs to have suitably qualified airline pilots at acceptable salary costs and must be able to guarantee career prospects to new pilots, with the option of making contributions for a comfortable retirement.

Hoge Raad, 13 July 2012, Eisers v. Koninklijke Luchtvaart Maatschappij N.V., www.rechtspraak.nl LJN BW3367

IA/33167-A

[SJN]

* *Czech Republic*: The Nejvyšší soud (Supreme Court) ruled on the concept of known creditors who have their habitual residences, domiciles or registered offices in the other Member States, within the meaning of Article 40 of Council Regulation (EC) No. 1346/2000 on insolvency proceedings. In the case in point, the appellant, who was domiciled in Germany, felt that his rights as a creditor had been infringed upon as he had not been informed that insolvency proceedings had been opened in the Czech Republic against his debtor and the competent court did not invite him to lodge his claim. The competent court subsequently dismissed his claim due to late submission.

This approach was approved by the court of appeal, which found that the courts only have to inform creditors in other Member States of insolvency proceedings if the existence of these creditors came to light when looking at the files for the proceedings, or if their existence came to the court's attention, through some other means, during the proceedings. However, this obligation to provide information would be time-limited, with the deadline being the same as that for submitting claims, so as to provide enough time to address the linguistic problems that creditors in other Member States could encounter during such proceedings.

By contrast, the Nejvyšší soud, which heard the case in cassation, observed that awareness of creditors' existence could not only come about as a result of the information contained in the files for the proceedings, but could also derive from other sources available to the court or the appointed liquidator, such as the debtor's accounts or other reports showing the composition of its assets. In that connection, the Nejvyšší soud took into account that in such cases, protection of the interests of foreign creditors largely depended on the extent to which the debtor fulfilled its accounting (or similar) obligations, or the obligations falling to it as a result of its insolvency, namely identification of its creditors. The court added that the purpose of Article 40 of Council Regulation (EC) No. 1346/2000 was to remedy the difficult position of creditors in other Member States given their ignorance or limited knowledge of the provisions governing insolvency proceedings. Consequently, when the existence of a creditor in another Member State comes to

light during proceedings, even if the requisite timeframe has passed, the competent court is still required to inform such creditors of the insolvency proceedings and invite them to submit their claims.

Nejvyšší soud, judgment of 31 May 2012, 29 NSCR 13/2010-P48-17, www.nsoud.cz

IA/ 33085-A

[KUSTEDI]

* *United Kingdom*: In a judgment handed down on 25 April 2012, the Supreme Court ruled that a law firm was entitled to include in employment contracts for its partners a clause providing for automatic retirement at the age of 65. In its judgment, the court found that although it constituted direct discrimination against people aged over 65, the measure was justified in that it facilitated workforce planning by giving young lawyers the hope of being made partners and avoided the need to expel partners for inadequate performance, which could be humiliating.

Supreme Court, judgment of 25 April 2012, Seldon v Clarkson Wright & Jakes [2012] 2 CMLR 50, www.bailii.org

IA/33406-A

[PE]

With its judgment of 27 June 2012, the Supreme Court found in favour of Oracle, an American IT company, in interim proceedings aiming to stop the parallel import of its products by M-Tech, a computer equipment supplier, which had imported a number of Oracle-branded disk drives from the United States. Invoking its right to control first marketing of its products in the European Economic Area, as conferred upon it by Council Directive 89/104/EEC, Oracle brought a trade mark infringement action against M-Tech. For its part, M-Tech argued that the resale market had been harmed by the fact that resellers could not know whether the goods had already been sold on the EEA market, which would mean they could be freely sold within the EEA. It also contended that Oracle forced distributors and resellers to use its own distribution network, which damaged free competition on the market, based on Articles 34 to 36 TFEU. The Supreme Court declined to

submit a reference for a preliminary ruling to the European Court of Justice, finding that it followed from the principles established by the *Levi Strauss* (ECJ judgment of 20 November 2001, C-414/99 to C-416/99) and *van Doren* (ECJ judgment of 8 April 2003, C-244/00) cases that M-Tech could not use Oracle's allegedly unlawful behaviour as an argument in its own defence in proceedings brought by Oracle in order to protect its legitimate right to control first marketing of its products in the EEA.

Supreme Court, judgment of 27 June 2012, Oracle America Inc (formerly Sun Microsystems) v M-Tech Data Ltd [2012] 2 CMLR 28, www.bailii.org

IA/ 33405-A

[PE]

* *Slovakia*: In a judgment issued on 27 March 2012, the Najvyšší súd (Supreme Court of the Slovak Republic) ruled on the interpretation of Article 1D of the 1951 Geneva Convention relating to the Status of Refugees (hereinafter referred to as "the Convention") and Article 12(1)(a) of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereinafter referred to as "the directive").

In the case in point, the Migration Agency of the Ministry of the Interior of the Slovak Republic refused to grant subsidiary protection to a national of Palestine (hereinafter referred to as "the appellant") who no longer benefited from protection from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as "UNRWA"). The appellant appealed this decision before the Bratislava Regional Court, arguing that he should have been granted subsidiary protection automatically by virtue of the wording of the end of Article 1D of the Convention and Article 12(1)(a) of the directive respectively: "[...] these persons shall ipso facto be entitled to the benefits of this Convention" and "[...] these persons shall ipso facto be entitled to the benefits of this Directive".

However, the Najvyšší súd, confirming the Regional Court's judgment, concluded that the provisions in question could not be interpreted as meaning that if a person who was registered with UNRWA no longer benefits from that body's protection, the Member States (or the State parties to the Convention) should automatically grant that person subsidiary protection. Such a person is only entitled to apply for the benefit of protection, as provided for by the Convention and the directive, and protection may only be granted if the person meets the requirements outlined therein.

Najvyšší súd, judgment of 27 March 2012, ISza 5/2012, www.supcourt.gov.sk/rozhodnutia/

IA/33087-A

[VMAG] [MREKAEV]

* *Slovenia*: On 17 July 2012, the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia, hereinafter referred to as "the Vrhovno sodišče") ruled on a case concerning the applicability of Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks to a situation that arose before the Republic of Slovenia joined the European Union and the rights of a trade mark proprietor to prohibit counterfeiting of the trade mark when the products in question are in transit.

The case related to the seizure, by a decision of the customs office of the port of Koper (Slovenia) on 24 May 2002, of cigarettes on the grounds that they were counterfeit. The proprietor of the trade mark in question subsequently brought an action for trade mark infringement, asking the court to confirm the customs office's decision and have the products destroyed. Both the court of first instance and the court of appeal dismissed the action on the grounds that the products were not marketed in the Republic of Slovenia.

Hearing the appeal in cassation, the Vrhovno sodišče, referring to the European Court of Justice's judgment in the Ynos case (10 January 2006, C-302/04, ECR p. I-371), found that all the events in the case in point had taken place before the Republic of Slovenia joined the European Union, so the substantive

provisions of the Slovenian law on industrial property that were in force on the date of the seizure should be applied. Article 47(1) of the law in question refers to "trade", which, according to the trade mark proprietor, is a far broader concept than "offering for sale" or "sale", as used in the case law of the European Court of Justice.

However, the Vrhovno sodišče dismissed this argument, finding that the two concepts were similar and that, in the case in point, it was a permanent feature that the products in question did not penetrate the Slovenian market. Furthermore, despite the fact that it did not have to apply European Union law in this particular situation, the Vrhovno sodišče referred to the European Court of Justice's judgments in the Montex Holdings (9 November 2006, C-281/05 ECR p. I-10881) and -Class International (18 October 2005, C-405/03, ECR p. I-8735) cases. It found that under Article 5(1) of Council Directive 89/104/EEC, the proprietor of the trade mark in question was not authorised to prohibit the transit of goods unless they were "offered for sale" or "sold" in the Republic of Slovenia, which was not the case here. The Vrhovno sodišče also stated that the burden of proof in this respect lay with the trade mark proprietor.

The Vrhovno sodišče therefore confirmed the judgment handed down by the court of appeal.

Vrhovno sodišče Republike Slovenije, judgment and order of 17 July 2012, Sodba in sklep III Ips 66/2001, www.sodisce.si

IA/33330-A

[SAS]

Notice

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

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

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

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