Directorate-General
of the Library,
Research and Documentation

Translation funded by the
Justice programme of the
European Union

N° 1/2014

REFLETS

Legal developments
of interest to the European Union

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* Citations of the European Convention on Human Rights and Fundamental Liberties, as well as the European Court of Human Rights are as follows: the "ECHR" and the "ECtHR". The Charter of Fundamental Rights of the European Union is cited as follows: the "Charter".

Preface

In this issue of the *Reflets* Bulletin, there are two new features to point out in terms of presentation. First of all, the table of contents has been redesigned to highlight more clearly the rulings made by the various national and international jurisdictions that are the subject of an analysis. This more detailed table is designed to enable readers to consult the content of previous issues more easily and to locate decisions of particular interest. Second, each issue of *Reflets* will be accompanied by a brief preface mentioning the most interesting or most current rulings.

In this latter regard, in issue *n° 1/2014*, we should point out in particular a ruling by the ECtHR (pp. 8-9), as well as the Doctrinal Echoes (pp. 54-60), which both deal with the freezing of funds. Next, a ruling by the Bundesverfassungsgericht invalidating a minimum threshold clause of 3% for the allocation of seats during European elections may be of interest to readers (pp. 12-14). We should also mention the two decisions by the Council of State in France, made in plenary session on the issue of asylum (pp. 25-26). Elsewhere, the Tribunal Constitucional in Spain handed down the ruling being considered following the preliminary ruling dated the Court in the matter C-399/11 Melloni (pp. 21-22). Finally, this issue will make an unpublished reference to a ruling by the Final Appeal Court in Hong Kong regarding the entitlement to social benefits for nationals from continental China (p. 46).

We should also point out that since 2013, the *Reflets* Bulletin has been temporarily available in the "What's New" section of the Court of Justice intranet, as well as, permanently, at the Curia website (www.curia.europa.eu/jcms/jcms/Jo2_7063).

A. Case law

I. European and international jurisdictions

European Court of Human Rights

ECtHR – Right to the respect of privacy and family life – The Hague Convention on the civil aspects of the international kidnapping of children – Best interests of the child

In its Grand Chamber ruling, the ECtHR ruled that there was a breach of article 8 (right to the respect of privacy and family life) of the ECHR in a matter concerning the proceedings to return a child, removed from Australia to Latvia by its mother, an Australian and Latvian national. The courts in Latvia, with reference to an application to return the child pursuant to The Hague Convention of 25th October 1980 on the civil aspects of the abduction of children, were of the opinion that the expelling of the child was illegal and consequently ordered the return of the child to Australia, considering that the allegations of the applicant as to the existence of a risk of psychological traumatism for the child were not substantiated and, in any event, did not fall under its jurisdiction, because they related to the substance of the matter.
Initially, the ECtHR noted the existence of interference in the right to the respect of privacy and family life of the applicant. Even though this interference was provided for under the law and was for a legitimate purpose, i.e. the protection of the rights and liberties of the father and the child, the Court ruled that the criterion of "necessity in a democratic society" was not fulfilled. After reiterating the need for the "combined and harmonious application of international texts" (paragraph 94), the Court noted the existence of a "broad consensus – including in international law – around the idea that in all of the rulings made concerning children, their best interests must take precedence" (paragraph 96). The ECtHR stressed that in the context of an application for return under The Hague Convention, the notion of best interests of the child must be considered in the light of the exceptions provided by the convention in articles 12, 13, a) and 13, b) regarding, in particular, its terms of application, the passage of time and the existence of a serious risk. Consequently, the ECtHR ruled that the Latvian courts had breached their procedural obligations imposed by article 8 of the ECHR, which requires "that a defensible allegation of 'serious risk' for the child in the event of return be the subject of an actual examination, which would come under the heading of a 'reasoned decision' (paragraph 115). In this regard, the Court based itself on article 13, b) of The Hague Convention, emphasising that the courts to which the application for return was made were not required to rule in favour when the person opposing the return could establish "that there is a serious risk that the return of the child will expose it to physical or psychological danger (…)".

In any event, it should be pointed out that the ECtHR highlighted that the Union, in the context of the Brussels II B regulations, based on the principle of mutual trust, supports the philosophy of the prevalence of the best interests of the child, also taking into account article 24, paragraph 2, of the Charter.

European Court of Human Rights, Ruling dated 26.11.13, X. / Latvia (application nº 27853/09),
www.echr.coe.int

IA/34004-A

[IGLESSA]

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ECHR – Ban on inhuman or degrading treatment – Right to an effective remedy – Responsibility of the State – Protection of children from sexual abuse in a school environment – Positive obligation – Breach of articles 3 and 13 of the ECHR

In its Grand Chamber ruling, handed down on 28th January 2014, the ECtHR reached a decision on the liability of the Irish State for sexual abuse committed by a teacher on a pupil and agreed that article 3 (ban on torture and inhuman or degrading treatment) and article 13 (right to an effect remedy) of the ECHR had been breached.

In 1973, the applicant was the victim of sexual abuse on a number of occasions committed by the principal of the national school where she was a registered child. In Ireland, national schools are primary schools funded by the State, although they can come under religious administration and patronage. The applicant repressed these events and only became aware of them again twenty years later on the occasion of the criminal trial of the teacher, accused of 386 counts of sexual abuse against 21 pupils. She asserted that the legislative framework put in place by the Irish State in the primary education system did not enable the pupils to be protected against the risks of such physical cruelty, that the State did not conduct any enquiry into her allegations of mistreatment and that she did not have any internal recourse to expose these failings.

The ECtHR was of the opinion that, since the 1970s, the State has been bound by a positive obligation to protect children against mistreatment and sexual abuse, as dealt with in article 3 of the ECHR. The Court noted that this obligation was particularly important in the context of primary education in view of the vulnerability of young children, and that the State could not be exonerated from its liability when it delegates this public service to private organisations. The content of this obligation is understood to mean the implementation of effective criminal legislation, backed by appropriate preventative measures, in particular mechanisms for the detection and reporting of mistreatment by and at an organisation controlled by the State.

In this particular case, the Court ruled that in 1973, the Irish State was aware, or should have been aware of the risk of sexual abuse existing in national schools in view on particular of the number of criminal cases brought for similar offences. However, it failed to adopt a specific public control mechanism designed to prevent the perpetration of such abuse. From that time forward, it failed in its positive obligation to protect the applicant under article 3 of the ECHR.

In addition, according to the ECtHR, the State did not demonstrate the effectiveness of any of the remedies against the State raised by it (action for vicarious liability, action for direct negligence and action for damages for breach of its obligations under the Constitution). Consequently, there was also a breach of article 13 of the ECHR.

Finally, the ECtHR agreed unanimously on the non-violation of article 3 of the ECHR as to the investigation conducted into the applicant's complaints concerning the sexual abuse suffered. In fact, the Irish authorities reacted as soon as they were made aware.

It must be stressed that the first two points raised important questions and the ECtHR only ruled by 11 votes to 6. The six judges who disagreed presented opinions that dissented in full or in part. According to them, it is a matter of the retrospective application of the understanding and current standards on sexual abuse committed against minors in a school environment. On the one hand, the Irish authorities could not reasonably predict this type of behaviour at the time and, on the other, such an obligation of protection does not emanate from the case law of the ECtHR. According to the judges who disagreed, the scope of this obligation is broad – so much so that it loses all notion of predictability and requires constant vigilance. Also, the ECtHR appears to rule on an ideological model implying that an education system with strong State involvement offers the best protection to children.

European Court of Human Rights, Ruling dated 28.01.14, O'Keeffe / Ireland (application n° 35810/09),
www.echr.coe.int/echr

IA/34009-A

[NICOLLO] [DUBOCPA]

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ECHR - Protection of property – Austerity measures to reduce public spending – Greek law reducing the salaries and pensions of public servants, as well as other allowances and benefits - Violation of article 1 of Protocol n° 1 - Absence

On 7th May 2013, the ECtHR handed down its ruling in the Koufaki matter and Adedy / Greece matter concerning a series of austerity measures, adopted in Greece in 2010, thereby reducing the remuneration and retirement pensions of public servants with a view to cleaning up Greece's public finances. The ECtHR ruled that there was no breach of the right to property of article 1 of Protocol n° 1 of the ECtHR by rejecting as inadmissible the grievances raised by the applicants.

Specifically, the applicants, two Greek public servants, alleged that after laws nº 3833/2010, 3845/2010 and 3847/2010 came into effect, they had to cope with, on the one hand, significant reductions to their pay and retirement pensions and, on the other, with reductions and then the removal of their allowances, bonuses and special benefits. According to the applicants, the introduction of these measures, with their constant and permanent character, constituted deprivation of property, contrary to the right to respect property, provided for in article 1 of Protocol n° 1. More particularly, they asserted that despite the fact that their pay had been reduced on a permanent basis, they had received no indemnity or compensation in any form whatsoever for this deprivation of property. As a result, their financial situation and standard of living were seriously affected.

In this regard, the ECtHR pointed out that the States party to the ECHR enjoy a wide margin of discretion as to determining their social and economic policy since their authorities are better placed than an international tribunal when it comes to choosing the appropriate resources and setting the priorities with regard to allocating the limited resources of the State. Hence there is a case for granting particular importance to the role of the national legislator.

Given that the priorities mentioned above come under the notion of "public interest", as dealt with in article 1 of Protocol n° 1, the political and social choices made by the States are respected by the ECtHR, except where they are manifestly devoid of a reasonable base and if the interferences that they cause are not proportionate to the legitimate purpose pursued.

By analysing the criterion of the legitimacy of the aim sought and its necessity, the ECtHR affirmed the existence of an "exceptional crisis without precedent in the recent history of Greece", committing it to "succeed in purging its budget, with targets and according to a specific timetable". As part of a broad programme to adjust the public finances and implement structural reform to the economy, designed to meet the country's urgent funding needs, the ECtHR was of the opinion that there was no reason to doubt that the austerity measures in question were serving a cause in the public interest, the aim of which is the general interest. Provided the limits of the margin of appreciation open to the Greek legislator are not exceeded, the ECtHR need not rule on the choices of said legislator to deal with the problem or exercise its powers differently.

In examining the question of maintaining a fair balance between the general interest requirements of the community and the imperatives of safeguarding the fundamental rights of individuals, the ECtHR was of the opinion that the reduction in the remuneration

of the applicants was not sufficiently significant to degrade their standard of living and expose them to difficulties of subsistence that are incompatible with article 1 of Protocol n° 1. Hence the interference at dispute could not be considered as excessive to the applicants, a fair balance being achieved.

European Court of Human Rights, ruling dated 07.05.13, Koufaki and Adedy / Greece (applications n° 57657/12 and 57665/12), *www.echr.coe.int*

IA/34010-A

[GANI]

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ECHR – Right to a fair trial – Freezing of the applicant's funds following the adoption by the UN Security Council of resolutions aimed at imposing a general embargo on Iraq – Breach of article 6, paragraph 1, of the ECHR

In its ruling dated 26th November 2013, Al-Dulimi e.a. / Switzerland, the Grand Chamber of the ECtHR ruled that there had been a breach of article 6, paragraph 1, of the ECHR with regard to freezing the funds of Mr Al-Dulimi, the person responsible for the finances of the Iraqi secret services under the regime of Saddam Hussein, and of the company of which he was a director.

After the invasion of Kuwait by Iraq in 1990, the UN Security Council (referred to below as the "Security Council") imposed a general embargo against Iraq. It also imposed (by way of resolutions) a freeze on the funds and economic resources of individuals and groups linked to the regime of Saddam Hussein, as well as the transfer of these funds to the Iraq development fund (referred to below as the "disputed measures"). Under the instructions of the Swiss Federal Council, aimed at implementing these resolutions by the Security Council, the applicants were registered on the list of individuals and groups affected by the disputed measures on 18th May 2004. With the aim of lodging an application to cancel the measures to the UN sanctions committee, the first applicant petitioned the Swiss Federal Department for the Economy (referred to below as the "Swiss government") to suspend the proceedings to confiscate his assets. In view of the failure of talks between the applicant and the sanctions committee, the Swiss government proceeded, on 16th November 2006, with the confiscation of the assets of the applicants and their transfer to the Iraq development fund. Following the creation of a procedure to cancel the lists by the Security Council pursuant to the Security Council's Resolution 1730 (2006), the applicants referred three appeals of administrative remedy to the Swiss federal court, requesting the cancellation of this decision by the Swiss government. The federal court refused to examine the basis of the applicants' grievances and declared itself incompetent to hear their applications for the cancellation of the confiscation of their assets.

Following the rejection of this appeal, in January 2008, the applicants petitioned the ECtHR for it to state that the confiscation of their assets had been ordered in breach of their right to a fair trial, as provided for in article 6, paragraph 1, of the ECHR. Basically, the applicants alleged a breach of their right to access a court.

In the first instance, the ECtHR dealt with a prior question on the coexistence of the guarantees of the ECHR and the obligations imposed on the States by Security Council resolutions. Although the ECHR does not prohibit the States from transferring sovereign powers to an international organisation, for the purposes of cooperation in certain areas of business, as is the case for the disputed measures, the ECtHR pointed out that the States nevertheless remain responsible vis-à-vis the ECHR for all acts and omissions by their bodies stemming from the need to observe international legal obligations. Hence, the ECtHR was of the opinion that this matter lent itself to an examination in the light of a criterion of equivalent protection guaranteed by the ECHR in order to justify the execution of an international legal obligation.

Consequently, it noted that the Swiss government had itself noted that the system in place did not offer protection equivalent to what is required by the ECHR. As a result, in the absence of a mechanism to check on the disputed measures, the ECtHR established a parallel with its reasoning in the Nada / Switzerland case (ruling dated 12th September 2012, application n° 10593/08) and arrived at the conclusion that the protection provided on an international level is not equivalent to that of the ECHR, and that these procedural failings were not effectively offset by internal human rights protection mechanisms since the Swiss federal court refused to check the sound basis of the disputed measures.

Secondly, the ECtHR examined the complaint of the applicants regarding access to the court. Although it accepted the Swiss government's argument, according to which the refusal to examine the basis of the applicants' complaints was prompted by a desire to respect Switzerland's international obligations, the court noted that the aim of adopting the disputed measures was not to respond to an imminent threat of terrorism, but to restore stability to democracy in Iraq. As a result, the ECtHR was of the opinion that more differentiated and targeted measures seemed to be more compatible with the effective implementation of the disputed measures. In closing, however, albeit avoiding making a ruling on the sound basis of the disputed measures, the ECtHR underlined that the applicants had the right to put their case before a court. In conclusion, the ECtHR was of the opinion that while there is no effective and independent judicial check at the level of the UN as to the legitimacy of the registration of individuals and entities on their lists, it is vital that they be able to request examination with the national courts. As the applicants had not benefited from such a check, the ECtHR arrived at the conclusion that their right to access a court had been adversely affected.

Two dissenting opinions from the Grand Chamber merit being mentioned. According to Judge Sajó, the matter was inadmissible given the primacy of Security Council resolutions and the fact that the disputed measures contained clear and precise directives and left no choice as to their application. This dissenting judge referred to the main proceedings and the matters of the ECtHR Al-Jedda / United Kingdom (Ruling dated 7th July 2001, n° 27021/08) and Nada / Suisse, mentioned above. Judge Lorenzen also gave a dissenting opinion, citing a lack of a breach of the provisions of article 6, paragraph 1, of the ECHR, with the basis of the decision of the Swiss federal court not to hear this matter bring correct. Yet when there is a conflict between an obligation arising from the Charter of the United Nations and one arising from the ECHR, the dissenting judge was of the opinion that the only solution would be to grant primacy to the former.

European Court of Human Rights, Ruling dated 26.11.13, Al-Dulimi et al / Switzerland (Application n° 5809/08),
www.echr.coe.int

IA/34003-A

[LOIZOMI]

**** Briefs (ECtHR)***

Through two rulings of inadmissibility dated 15th October 2013, the ECtHR declared manifestly inadmissible the applications by several male public servants wishing to benefit from a right to a seniority bonus for child (Ryon matter) and immediate early retirement with pension (Greneche matter). The national legislation that reserves these benefits to public servants who have interrupted their professional activity was established pursuant to two rulings by the Court of Justice (rulings of 29th November 2001, Griesmar, C-366/99, Rec. p. I-9383, and 13th December 2001, Mouflin, C-206/00, p. I-10201), according to which, the previous French legislation, reserving these benefits to female public servants, was ignoring the principle of the equality of women with regard to remuneration.

In the proceedings before the ECtHR, the applicants highlighted the fact (based on article 14 ECHR in relation with article 1 of Protocol nº 1) the new French legislation constitutes indirect discrimination based on gender, without objective and reasonable justification given that, before the introduction of parental leave in 1986, only women stopped working on account of the birth of children, which excluded *de facto* the disputed benefits for men. The ECtHR was of the opinion that the applicants could not assimilate their situation to that of female workers, precisely on account of the fact that they did not interrupt their profession due to the birth of their children, given that at the time they were not unable to interrupt their work since, at the very least, they could have presented a request for availability. The ECtHR also noted that the application regarding the refusal to put a question prejudicial to the Court of Justice should also be rejected as clearly lacking grounds in view of the fact that the applicants had not explicitly requested the national courts to ask such a question.

Greneche / France, ruling dated 15.10.13, (application nº 34538/08) and Ryon / France, ruling dated 15.10.13 (application nº 33014/08),
www.echr.coe.int

IA/34005-A
IA/34006-A

[IGLESSA]

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In a decision on 12th November 2013, the ECtHR ruled as inadmissible the appeal by Mr Occhetto, an Italian national and candidate in the 2004 elections to the European Parliament, based on article 3 of Protocol n° 1 of the ECtHR (right to free elections).

Mr Occhetto, having first of all relinquished his seat in the European Parliament in 2004, was replaced by Mr Donnici. Mr Occhetto then revoked his act of relinquishment in the light of an agreement reached with another member. The Consiglio di Stato was of the view that a relinquishment from an election could not be validly revoked. The Italian electoral office then proclaimed the election of Mr Donnici to the European Parliament. However, this institution of the Union, based on the act of 1976, declared Mr Donnici's mandate invalid. This decision by the European Parliament was subsequently overturned by the Court of Justice (joint matters Italy and Donnici / European Parliament, C-393/07 and C-9/08, Rec. p. I-3679), taking the view that the European Parliament was obliged to abide by the proclamation made by the Italian electoral office following the decision of the Consiglio di Stato.

In his appeal lodged before the ECtHR, Mr Occhetto noted that this decision by the Consiglio di Stato was a breach of article 3 of Protocol nº 1 of the ECHR (right to free elections). The ECtHR declared this appeal inadmissible (clear lack of grounds), taking the view that the States have a broad margin of discretion in terms of the "passive" aspect of the right to free elections. It was also of the opinion that "if a candidate is able to relinquish a parliamentary mandate and then revoke it at any time, there would be uncertainty as to the composition of the legislative body".

European Court of Human Rights, ruling dated 12.11.13, Occhetto / Italy (application nº 14507/07),
www.echr.coe.int/echr

IA/34012-A

[NICOLLO]

EFTA Court

European Economic Area – Action for annulment – State Aid – Lease contract – Failure to initiate a formal investigation procedure – Series doubts or difficulties – Private investor test in the market economy – Call for tenders

In the Mila ruling dated 27th January 2014, the EFTA Court had the opportunity to rule on the obligation to initiate a formal investigation procedure in the area of State Aid.

The Icelandic government had issued a call for tenders for the leasing of optical fibres by telecommunication infrastructure companies, with the contract being awarded to the most attractive bid. This was determined based on six weighted criteria, of which the encouragement of competition was by far the most important (40%), ahead of the amount for the annual lease (15%).

In response to a complaint for State Aid, the EFTA Security Authority (ESA) was of the opinion that aid was not involved and did not open a formal procedure.

Given that ESA had applied the private investor test in the market economy, the EFTA Court pointed out that:

"Where a public authority proceeds to sell an asset by way of an open, transparent and unconditional tender procedure, it may be presumed that the market price corresponds to the highest offer, provided that it is established that the offer is binding and credible, and that the consideration of economic factors other than the price cannot be justified".

In this particular case, the EFTA Court was of the opinion that:

"It is obvious that the tender procedure in question did not use price or leasing charges as the sole or main selection criteria. (…) Moreover, (…) the remaining selection criteria appear to reflect public policy or regulatory considerations. They do not appear to be criteria that a similarly situated private operator would consider relevant when tendering out a lease".

Given that the examination of the call for tenders by ESA was insufficient, the EFTA Court concluded that:

"It is apparent form the contested decision that ESA did not assess these circumstances and their consequences for the applicability of the private investor test.
It must therefore be held that ESA's examination of the tender procedure is insufficient. Consequently, ESA adopted the contested decision notwithstanding that the information and evidence it had at its disposal during the preliminary examination phase should, objectively, have raised doubts or serious difficulties as to whether the lease agreement conferred an economic advantage".

EFTA Court, Judgment of 27.01.14, in Case E-1/13, Míla ehf. / EFTA Surveillance Authority, *www.eftacourt.int*

IA/34008-A

[SIMONFL]

International Criminal Tribunal for the former Yugoslavia

Crimes against humanity – Liability for complicity in aiding and abetting – Component elements – Specific scope of the aid

On 23rd January 2014, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (referred to below as "ICTY") handed down its cassation ruling in the case of the Prosecutor / Šainović, Panković, Lazarević and Lukić.

The ruling was made following the introduction of an appeal against the ruling dated the Chamber of First Instance of ICTY, which handed down a verdict of guilty against the accused for crimes committed

against the Albanians in Kosovo during March and April 1999. The Chamber concluded that, following the NATO bombings of Kosovo on 24th March 1999, a campaign of violence was begun against the Albanian civilian population, during which many of them were forced to leave on account of the killings and sexual violence committed, as well as the intentional destruction of mosques. During the period in question, the accused occupied strategic positions in the administration and army of the Federal Republic of Yugoslavia and the Republic of Serbia. The Chamber of First Instance declared Messrs Šainović, Panković and Lukić guilty of committing crimes against humanity, including the violation of laws and customs in a period of war. Mr Lazarević was found guilty of aiding and abetting crimes against humanity. The accused lodged an appeal against their declarations of guilt and the sentences handed down. For its part, the Prosecutor not only disputed the acquittal of the accused on certain charges, but also the sentences imposed.

To contest the ruling dated the Chamber of First Instance, according to which the material and moral elements required to establish his aiding and abetting of the commission of the crimes had been provided, Mr Lazarević based his appeal on the Perišić ruling (see *Reflets n° 3/2013*, p. 10), in which the Appeals Chamber for ICTY was of the opinion that any aid provided must be specifically to facilitate the crimes in order to constitute aiding and abetting. The Appeals Chamber concluded that there was a divergence in the relevant case law. Faced with this divergence and for compelling reasons of justice, the majority of the Appeals Chamber ruled that the interpretation retained in the Perišić ruling should be set aside. Indeed, based on the case law of ICTY and the International Criminal Tribunal for Rwanda, as well as customary international law, it considered that the notion of "designing specifically" is not a required element of responsibility in terms of aiding and abetting. As a consequence, to set aside the reasoning of Mr Lazarević, the Appeals Court ruled that in evaluating the material elements of aiding and abetting, the Chamber of First Instance was not bound to determine whether the actions of Mr Lazarević were designed specifically to aid or abet the commission of the crimes in question.

The Prosecutor / Nikola Šainović e.a., IT-05-87-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 23.01.14,
www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf

IA/34007-A

[TCR] [MADDEMA]

II. National courts

1. Member States

Germany

European Parliament – Elections – German law setting a minimum level of 3% for allocating seats – Breach of the equality of votes and equal opportunity for political parties

In its ruling dated 26th February 2014, the Bundesverfassungsgericht (Federal Constitutional Court) declared null and void, on the grounds of a breach of the equality of votes and the equal opportunity of political parties guaranteed by the Grundgesetz (Basic Law), the German regulations providing for the application of a minimum level of 3% for the allocation of seats at the European elections. Following this incidence of unconstitutionality, no minimum level will apply in Germany at the forthcoming European elections in 2014.

The constitutional court thereby confirmed its ruling dated 9th November 2011, by which they had overturned a similar regulation providing for a minimum level of 5% (see *Reflections n° 2/2011,* p. 9).

The Bundesverfassungsgericht initially noted that there is no obligation to set a clause for a

minimum level under Union law, to check the constitutionality of such a clause coming under the full competence of national jurisdictions. Given that, according to the Bundesverfassungsgericht, the absence of such an obligation does not ensue unequivocally from article 3 of the act covering election of representatives to the European Parliament by universal suffrage, it was of the opinion that a referral for a preliminary ruling was not required.

The Bundesverfassungsgericht also noted that any clause for a minimum level was a breach, as a general rule, of the equality of citizens and the equal opportunity of political parties, principles demanding, and in particular that each vote should have the same influence on the composition of the Parliament.

For reasons stated previously in the ruling dated 9th November 2011, this breach could not be justified with regard to the European elections by arguments put forward by the German legislature. Indeed, in the view of the constitutional judges, neither the reduction of the level by 2 percentage points nor the existence of new *de facto* and legal conditions enabled them to set aside the conclusions stated in said decree.

Whereas the Bundesverfassungsgericht was of the opinion that protecting the proper operation of the European Parliament is, in principle, likely to require the setting of a minimum level, the existence of a concrete risk that would encumber the proper operation of the institution due to the abolition of the threshold was not established, in its view.

The European Parliament's methods of working, as well as its role in the institutional system of the Union would not, according to the Bundesverfassungsgericht, be comparable with the German parliament, with regard to which a minimum level clause of 5% was considered in line with the Grundgesetz. More specifically, the political groups in the Parliament would be capable of incorporating numerous small parties and ending up with secondary agreements as a result. Furthermore, unlike a national parliament, the European Parliament is not required to elect a government, which requires the support of a stable majority.

The Bundesverfassungsgericht did not deny that the setting of a minimum level clause could come in the future, on condition that the European Commission presents itself as a government dependent on continuous support by a parliamentary majority and that it should be faced with genuine parliamentary opposition. However, according to the constitutional judges, recent initiatives aimed at running a more specific and personalised campaign at the next European elections, i.e. the resolution of the European Parliament dated 22nd November 2012, encouraging the nomination of a leading candidate, do not assume that the operation of the Parliament might be compromised by a further increase in the number of small parties The general, abstract affirmation by which a greater number of small parties would prevent the formation of a political will in the European Parliament, could not justify breaching the principle of the equality of votes and the equal opportunity of political parties.

In any event, should there be a genuine obstacle to the proper operation of the Parliament, the German legislature could, according to the Bundesverfassungsgericht, take account of this by setting a new minimum level clause.

It should be noted that the decision was taken by 5 votes to 3, with Judge Müller casting a vote against. In his opinion, the assessment of any (future) risk regarding an obstacle to the proper operation of the Parliament comes under legislative competence and that it should not be subject to the judicial controls exercised by the Bundesverfassungsgericht.

Bundesverfassungsgericht, ruling dated 26.02.14, 2 BvE 2/13, 2 BvE 5/13, 2 BvE 6/13, 2 BvE 7/13, 2 BvE 8/13, 2 BvE 9/13, 2 BvE 10/13, 2 BvE 12/13, 2 BvR 2220/13, 2 BvR 2221/13, 2 BvR 2238/13, www.bundesverfassungsgericht.de

IA/33287-A

[BBER] [WENDELU]

**** Briefs (Germany)***

Hearing an appeal lodged by an accredited environmental defence association against a plan regarding air quality which, despite the difficulties encountered by the town of Darmstadt with regard to complying with maximum emissions of NO2, did not provide for the introduction of areas sheltered from congestion and pollution (Umweltzonen), the Bundesverwaltungsgericht (Federal Administrative Court) confirmed the existence of a sufficient interest to act by the association making the application resulting from the national regulations on atmospheric pollution.

Making reference to the rulings by the Court in the cases of Janecek (ruling dated 25th July 2008, C-237/07, Rec. p. I-6221) and Lesoochranárske zoskupenie (ruling dated 8th March 2011, C-240/09, Rec. p. I-1255), the Bundesverwaltungsgericht decided that in the light of directive 2008/50/EC regarding the quality of the ambient air and pure air for Europe, the Aarhus Convention and the principle of effectiveness stated in article 4, paragraph 3, TEU, which, in its opinion, imposes a broad-based recognition of access to justice in order to arrived at a decentralised application of Union law, an accredited association may apply compliance with the binding provisions relative to the quality of the air, aimed at protecting public health.

This decision strengthens the right of accredited environmental defence associations to dispute projects or documents that do not include an impact study, calling on the case law of the Court, which is favourable to collective appeals on matters relating to the environment, in particular the rulings in Trianel (ruling dated 12th May 2011, C-115/09, Rec. p. I-3673) and Gemeinde Altrip e.a. (Ruling dated 7th November 2013, C-72/12).

Bundesverwaltungsgericht, ruling dated 05.09.13, 7 C 21/12, www.bverwg.de

IA/33289-A

[KAUFMSV]

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The intermediary party purchasing a show-jumping horse benefiting from the right to deduct input VAT, claimed a right corresponding to a normal rate of taxation provided for by directive 2006/112/EC relative to the shared system of value added tax for a transaction of this kind. However, German law provides for the application of a reduced tax rate that is to the benefit of the party registered for VAT, i.e. the end-buyer, but in so doing, this reduces the right of the intermediary party making the purchase to make a deduction. The original court was of the opinion that non-compliance of the German regulations with Union law could not result in that law not being applied, taking into consideration in so doing the purpose of the provision of the Union law in question and believing that directive 2006/12/EC is only designed to protect the VAT taxpayer and not the intermediary party making the purchase or the general interest of collecting taxes, in line with Union law. The Bundesfinanzhof (Federal Finance Court) overturned the ruling and referred the case back to the trial court, taking the view that the principle of the primacy of Union law could not be submitted to an examination of the interests protected by the relevant provision under Union law, with the mere fact of a reduction in the applicant's tax debt resulting in the non-application of the incompatible national law.

Bundesfinanzhof, ruling dated 24.10.13, V R 17/13, www.bundesfinanzhof.de

IA/33290-A

[KAUFMSV]

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Hearing a dispute opposing two lawyers on the topic of unsolicited sales letters sent by one of them to the other's clients, the Bundesgerichtshof (Federal Court of Justice) ruled that an offer of legal advice corresponding to an actual need of a potential client could not be considered as illicit unsolicited sales in the sense of article 43b of the lawyers' statutes.

The Bundesgerichtshof noted in particular that German law must be interpreted in the light of article 24 of directive 2006/123/EC, which provides for the removal of all total bans covering commercial communications. In particular, according to the Bundesgerichtshof, this comes under the Court's ruling 5th April 2011 (national fiduciary chartered accountancy company, C-119/09, Rec. p. I-2551) that the principle of proportionality must be taken into account when assessing the unlawful nature of an unsolicited sales approach, considering the form, the content and the methods employed. From this principle flows the requirement to balance the aim of protecting consumers, on the one hand, and the right to the free provision of services, on the other.

Given that in this case the services offered by the lawyer in question were developed to meet a real and actual need on the part of the persons approached, the Bundesgerichtshof was of the opinion that an interpretation tending to qualify the letters in question as illicit unsolicited sales material and, as a result, unfair practice, would be contrary to Union law.

In so doing, the Bundesgerichtshof differed from its own previous case law, according to which the existence of an actual need for legal advice was considered as precisely indicating the unlawful exploitation of a vulnerable situation on the part of the consumer.

Bundesgerichtshof, ruling dated 13.11.13, I ZR 15/12,
www.bundesgerichtshof.de

IA/33288-A

[BBER]

Also see the French brief relative to commercial communication from regulated professions, p. 27 of this issue of *Reflections.*

Belgium

Controls on borders, asylum and immigration – Asylum policy – Procedure for granting and withdrawing the status of refugee in Member States – Directive 2005/85/EC – Right to effective judicial protection – National regulations allowing the relevant authorities to examine an application for asylum concerning nationals from a safe country of origin, in the context of an accelerated procedure – Application for annulment against such a ruling – Lack of hearing on merits – Inadmissibility

The law of 15th March 2012 amending certain provisions of the law of 15th December 1980 regarding access to the territory, residency, the establishment and expelling of foreigners (referred to below as the "law on foreigners"), provided for the fast processing by the Commissioner General for Refugees and Statelessness (CGRA) of applications for asylum from nationals from a "safe country of origin". These are countries that do not apply persecution in the sense of the Geneva Convention and where there is no serious reason to believe that the person applying for asylum runs a real risk of suffering a serious attack in the event of returning. As a result, nationals from Albania, Bosnia-Herzegovina, Macedonia, Kosovo, Serbia, Montenegro and India were finding it less easy to be granted asylum in Belgium once these countries were considered to be safe, thereby meaning that there is less need for protection.

To this effect, the law of 15th March 2012 provided, among other things, for an accelerated procedure regarding appeals submitted to the Aliens Litigation Council

(ALC, administrative court). Nationals from a "safe country of origin" whose application had been rejected by the CGRA could only appeal the ruling before the ALC by way of an appeal for annulment. Hence, contrary to applicants for asylum from countries other than "safe countries of origin", the law did not provide for cases to be treated on their merits.

The Constitutional Court stated that the right to an effective remedy recognised by article 47 of the Charter must, pursuant to article 52, paragraph 3 of the Charter, be defined by reference to the sense and scope conferred on it by the ECHR. The Court added that it now also assumes that the remedy is suspensive and that it allows a rigorous and full examination of the grievances of the applicants by an authority with the powers of full court. As a result, the Constitutional Court argued that the difference in treatment regarding the possibility of lodging an effective appeal against the ruling, thereby putting an end to the asylum proceedings based on the fact that a person applying for asylum originates from a safe country or not, is based on a criterion that is not permitted by directive 2005/85/EC relative to minimum standards concerning the procedure for granting and removing the status of refugee in Member States (the "procedure" directive).

In its ruling, the Constitutional Court made reference to the H.I.D. and B.A. case (ruling dated 31st January 2013, C-175/11), in with the Court of Justice stated that in order to avoid discrimination between applicants for asylum from another particular country from which applications would be the subject of a priority examination procedure and the nationals of other countries whose applications would be examined in accordance with the normal procedure, the priority procedure should not deprive applicants in the first category from the guarantees required by article 23 of the "procedure" directive, which are applied to all forms of procedure.

The Constitutional Court also cited the Samba Diouf case (ruling dated 28th July 2011, C-69/10), in which the Court was of the opinion that rulings where the application must have the right to appeal by virtue of article 39, paragraph 1, of directive 2005/85/EC are those rulings that imply a rejection of the application for asylum on substantive grounds or, where applicable, for reasons of form or procedure that exclude a decision on its merits.

Finally, in the event of an appeal for annulment, the ALC had to take a decision within a period reduced to one to two months instead of the usual period of three months. The Constitutional Court stated that the measure allowing solely for the introduction of an appeal for annulment is disproportionate to the aim of speeding up proceedings pursued by the legislator. According to the Constitutional Court, it would also be possible to achieve this objective by reducing the periods granted to lodge an appeal with full jurisdiction.

The Constitutional Court has now partially annulled the law of 15th March 2012.

Constitutional Court, ruling dated 16.01.14, n° 1/2014,
www.const-court.be
www.legalworld.be

IA/33715-A

[NICOLLO]

Also see the Irish legislation adopted following the ruling by the Court of Justice, p. 51 of this issue of *Reflets*.

Bulgaria

Union Law – Rights conferred on individuals – Violation by a Member State – Obligation to remedy the prejudice caused to individuals – Violation attributable to a supreme jurisdiction

In its ruling dated 3rd January 2014, the Sofiyski gradski sad (court of the city of Sofia) handed down its verdict, for the first time, in a liability case brought against Bulgaria for violation of Union law by a ruling dated Varhoven administrativen sad

(Supreme Administrative Court).

It should be pointed out that this case triggered significant discussion in legal circles as to its admissibility. It was argued that the liability of a Member State cannot be invoked for a violation of Union law that is attributable to a jurisdiction by invoking arguments drawn from the fundamental principle of the matter being heard (res judicata), of the principle of judicial security and the independence of the judicial power.

In this regard, it should be stated that Bulgarian law does not contain any rules as to an action for damages relative to the remedy of harm caused to individuals by the Union law arising from a decision by a jurisdiction making a final ruling. However, the Sofiyski gradski sad ruled that the appeal was admissible based on article 4, paragraph 3 of TEU, which requires in particular that the Member States abstain from any measure likely to imperil the Union's aims. The national jurisdiction also based itself on the case law of the Court of Justice by virtue of which each Member State is obliged to remedy harm caused to individuals by violations of Union law that are attributable to them and in particular when the violation derives from a decision by a jurisdiction making a final ruling (see ruling dated 30th September 2003, Köbler, C-224/01, Rec. p. I-10239, and ruling dated 19th November 1991, Francovich, C-6/90 and C-9/90, Rec. p. I-5357).

In this case, the applicant company "Pretsiz 2 EOOD" lodged an action for damages against the Varhoven administrativen sad, pursuant to prejudice suffered from the court's ruling refusing it the right to deduct VAT, pursuant to article 70, paragraph 5, of ZDDS (the national legislation on VAT).

In the context of this case, the applicant company used two methods. First, it argued that the ruling being disputed was contrary to the directly applicable provisions of Union law, as interpreted by the Court of Justice on the matter of VAT deductions. According to it, the Varhoven administrativen sad proceeded to erroneously apply articles 167 and 168b of directive 2006/112/EC relative to the common VAT system, in that it was of the opinion that the right to deduct VAT should be refused without taking account of whether this right was invoked fraudulently or abusively.

In this regard, the Sofiyski gradski sad ruled Varhoven administrativen sad to be correct when it referred to the case law of the Court of Justice (see ruling dated 27th September 2007, Collée, C-146/05, Rec. p. I-7861) relative to the interpretation of the articles of directive 2006/112/EC mentioned above, ruling that the right to make deductions could only be exercised on condition that the delivery was actually made and if there was no actual delivery, there was no reason to proceed with an additional appreciation of the circumstances of the case in order to determine whether the right to deduction was invoked fraudulently or abusively by the VAT payer.

Secondly, the applicant company argued that the Varhoven administrativen sad had not failed in its obligation to put questions of interpretation before the Court of Justice in the sense of article 267, paragraph 3 of TFEU.

Taking the interpretation of the Court of Justice in the Cilfit case (ruling dated 6th October 1982, C-283/81, Rec. p. I-3415) according to which the national court is only required to submit the question to the Court of Justice if there is a real difficulty of interpretation or validity.

The Sofiyski gradski sad concluded that the provisions of directive 2006/112/EC in question, relative to the right to make VAT deductions, having been interpreted on several occasions by the Court, are sufficiently clear and that as referral for a preliminary ruling by the supreme administrative to the Union court would be devoid of any value.

As a result, the Sofiyski gradski sad rejected the liability case lodged against Bulgaria, aimed at obtaining remedy for the supposed damaged suffered by the applicant company, judging the case to be without grounds.

Sofiyski gradski sad, ruling dated 03.01.14, Société Pretsiz 2 EOOD / Bulgarian State (judiciary), n° 1782/2013, www://legalacts.justice.bg/ShowAct.aspx?actId=4427749

IA/33624-A

[NTOD]

Croatia

European Union – Cooperation between the police and the judiciary on criminal matters – Framework decision relative to the European arrest and surrender procedures between Member States – Double criminality – Limitation of criminal prosecution

In January 2014, two judicial authorities reached different conclusions on the interpretation of articles 10 and 20, paragraph 2, point 7, of the law on judicial cooperation in criminal matters with Member States of the EU (referred to below as "the law"), transposing framework decision 2002/584/JAI relative to the European arrest warrant and the surrender procedures between Member States.

The two cases concerned requests for the execution of European arrest warrants issued against two individuals accused of having committed the same crime, as provided for by article 10, paragraph 14 of the law corresponding to "voluntary homicide" provided by article 2, paragraph 2, indent 14, of the framework ruling. In the two cases, the applicants were opposed to the execution of the warrants, arguing that criminal prosecution would be prescribed under Croatian law, the law in the State of execution of the warrants. They were taking advantage in this regard of article 20, paragraph 2, point 7 of the law corresponding to article 4, paragraph 1, point 4 of the framework ruling. The applicants proposed that the judicial authority should question the Court of Justice for a preliminary ruling on this point.

In the first of the two cases, the executing judicial authority (referred to below as the "Regional Court of Zagreb") had executed the European arrest warrant issued against the applicant, in the belief that it was not necessary to lodge an application for a preliminary ruling from the Court of Justice. In the authority's view, it was clear that at the time of deciding to execute the European arrest warrant in cases where double criminality has not be verified, the Croatian judicial executing authority did not have to examine whether the criminal proceedings were prescribed pursuant to national legislation. This conclusion could be deduced in particular from the case law of the Court of Justice, which does not require national jurisdictions to examine the prescription in the case of offences under article 4, paragraph 1, point 4 of the framework decision. In addition, the Court of Justice would not have jurisdiction to rule whether there was a need to examine the prescription of the criminal proceedings in cases where double criminality has not been verified once it is a matter, specifically of a question of interpretation of the law and not of Union law.

This decision by the Regional Court of Zagreb was confirmed by a ruling made on 17th January 2014 by the Supreme Court, whose own ruling was itself confirmed by the ruling dated 24th January 2014 of the Constitutional Court (Ustavni sud Republike Hrvatske).

In the second matter, the Croatian judicial executing authority (referred to below as "the Regional Court of Velika Gorica") had rejected the execution of the European arrest warrant, considering that, according to the framework decision, prescription of the criminal proceedings was a procedural obstacle to the execution of the arrest warrant, the existence of which can examined by the judicial executing authority, even if the matter is in relation to an offence for which double criminality has not been verified. The Court decided, without giving reasons, not to ask the Court of Justice for a preliminary ruling.

This ruling was the subject of an appeal by the descendants of the victim of the crime. The Regional Court of Velika Gorica rejected the appeal, taking the view that the descendants did not have the right to lodge such an appeal given that the guilt of a person is not brought into question in the procedure to execute a European arrest warrant. The Supreme Court overturned the ruling by the Regional Court of Velika Gorica through its order of 6th March 2014, invoking article 11 of directive 2012/29/EU, establishing minimum standards regarding the rights, support and protection of victims of crime (right of the victim to request the re-examination of a decision not to prosecute).

Recalling the principle of interpretation in compliance with national law, the Supreme Court was of the opinion that even if the period for the transposition of directive 2012/29 into law had not yet expired, the decision to reject the execution of the European arrest warrant had the same effect for the descendants of the victim of the crime. As a result, the Court submitted the case to the Regional Court of Velika Gorica so that it could rule again.

Županijski sud u Zagrebu, ruling dated 08.01.14, KV-EUN-2/14, www://sudovi.pravosudje.hr/zszg/index.php?linkID=25&type=L,

IA/33903-A

Vrhovni sud Republike Hrvatske, ruling dated 17.01.14, VSRH Kž eun 2/14-5, www.vsrh.hr,

IA/33904-A

Ustavni sud Republike Hrvatske, decision of 24.01.14, U-III-351/2014, www://sljeme.usud.hr/usud/praksaw.nsf/Novosti/C12570D30061CE54C1257C6E004F7C4F?OpenDocument,

IA/33905-A
Županijski sud u Velikoj Gorici, ruling dated 09.01.14, Kv-eun-1/14-7, www://sudovi.pravosudje.hr/zsvg/index.php?linkID=88,

IA/33906-A

Županijski sud u Velikoj Gorici, ruling dated15.01.14, Kv-eun-1/14-12, www//sudovi.pravosudje.hr/zsvg/index.php?linkID=90,

IA/33907-A

Vrhovni sud Republike Hrvatske, ruling dated 06.03.14, VSRH Kž eun 5/14-4 and Kž eun 14/4-4,
www.vsrh.hr,

IA/33908-A

[GRCICAN]

**** Briefs (Croatia)***

In its communication of 14th November 2013, the Croatian Constitutional Court (Ustavni sud Republike Hrvatske) gave its ruling on the legality of the referendum regarding the constitutional definition of marriage and the possibility to regulate, by a legislative act, the rights of partners of the same gender.

This communication was published in the context of a call for referendum organised following a civil initiative entitled "In the name of the family", which seeks to have the Constitution revised by inserting the definition of marriage as the union between a man and a woman, a definition that was not, until that time, present in family law.

With a duty to ensure the responsibility of guarantee compliance with the Constitution and control of the legality of the State referendum provided for under the Constitution, the Court examined the need for a referendum, given that the definition of marriage already existed in family law, albeit without ruling on the unconstitutionality of the question asked in the context of the referendum.

Nevertheless, the Court was of the opinion that the revision of the Constitution should not have any impact on the future development of

a judicial context on the non-marital union of individuals of different genders and the union of individuals of the same gender, underlining that in Croatia, each person has the right to respect and the legal protection of his or her private and family life and of his or her human dignity.
In 1st December 2013, the Constitution was revised and in it, marriage was defined as the union of a man and a woman.

Ustavni sud Republike Hrvatske, Priopćenje o narodnom ustavotvornom referendumu o definiciji braka, communication of 14.11.13, SuS-1/13, www://sljeme.usud.hr/usud/praksaw.nsf/Novosti/C12570D30061CE54C1257C230044DB5D?OpenDocument,

[GRCICAN]

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In its ruling dated 20th December 2013, the Croatian Constitutional Court (Ustavni sud Republike Hrvatske) examined several provision of the law on road safety concerning "young drivers", i.e. drivers younger than 24 years of age.

These provisions included a ban on driving at night unless under the supervision of an older person, the driving of vehicles with an engine power exceeding 80 kW, and driving in excess of a certain speed. In the belief that the provisions in question constituted indirect discrimination based on age with regard to professional drivers, the Court overturned them saying that the measures concerned these drivers and considering that they limited their constitutional right to employment in a disproportionate manner.

As for non-professional young drivers, the Court ruled that the provisions being disputed were constitutional prima facie. However, the Court expressed doubt in this regard given membership of the European Union and the fact that this provision applies to all citizens in the Union, instructing the Interior Ministry to present a report on the topic by 1st January 2015.

Ustavni sud Republike Hrvatske, decision of 20.12.13, U-I-323/2009 et al., www://sljeme.usud.hr/usud/praksaw.nsf/Novosti/C12570D30061CE54C1257C470045AC1E?OpenDocument,

IA/33909-A

[GRCICAN]

Spain

Fundamental rights – Right of residency of a national from another State who is an ascendant of a child with Spanish nationality – Effective enjoyment of the right to free movement and residency within the national territory – Best interests of the child – Absence of violation – Right to family life – Non-justiciable by way of action to guarantee fundamental rights

In this ruling, the Constitutional Court rejected an appeal to guarantee fundamental rights lodged by an Argentine national residing illegally in Spain, mother of a child of Spanish nationality. The applicant had based her claims on articles 18 (right to family privacy) and 19 (right to free movement and residency on national territory) of the Spanish Constitution.

With regard to article 19 of the Constitution, the Constitutional Court was of the opinion that, in principle, an administrative resolution ordering the expulsion of the mother would not prevent the child from maintaining residency in Spain. However, in view of the fact that it was an underage child, the Constitutional Court was of the opinion that it was necessary to adjust this assessment based on two elements. First of all, it took into consideration the principle of the protection of children, stated in article 39, paragraph 4, of the Constitution, in relation with article 3, paragraph 1, of the United Nations Convention on the rights of children.

Secondly, it made reference to the Court's ruling in the Ruiz Zambrano case (ruling dated 8th March 2011, C-34/09, Rec. p. I-1177). Following the logic of this ruling, the Constitutional Court stated that the expulsion of the mother, even if it was not imposed on the child, a Spanish national, any legal obligation to leave the territory of Spain would constitute an infringement of her fundamental right to remain in Spain, in the hypothesis that the best interests of the child would require that the child accompany this parent to another country. However, in view of the fact that the father was a Spanish national and that the grandparents of the child lived in Spain, the Constitutional Court concluded that the implementation of the decision to expel the mother "would not deprive the child of the effective enjoyment of freedoms which, as a Spanish national, were conferred on her by article 19 of the Constitution".

In addition, the Constitutional Court stressed that the right to family life, as set out in article 8, paragraph 1, of the ECHR and in article 7 of the Charter, was not included in the protection granted by the fundamental right to family privacy, recognised by article 18, paragraph 1 of the Constitution. On the other hand, this dimension of right to family life is part of the framework of constitutional principles of the free development of the personality, social, economic and judicial protection of the family and children (stated in articles 10, paragraph 1, and 39, paragraphs 1 and 4, of the Spanish Constitution). However, these principles are not justiciable by way of a case to guarantee fundament rights before the Constitutional Court.

Tribunal Constitucional, Sala Segunda, Sentencia núm. 186/2013, of 04.11.13 (Recurso nº 2022/2012), *www.boe.es/diario_boe/txt.php?id=BOE-A-2013-12724*

IA/33391-A

[IGLESSA]

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Fundamental rights – Charter – Level of protection - European arrest warrant issued for the purpose of executing a sentence handed down by default – Breach of the right to a fair trial and the rights of defence guaranteed by the national Constitution – Absence

In its ruling dated 13th February 2014, the Constitutional Court the case to guarantee fundamental rights used in the Melloni case, a case relating to the European arrest warrant and a sentence handed down by default, during which this jurisdiction had asked the Court of Justice, for the first time, for a preliminary ruling.

First of all, the plenary session of the Constitutional Court, after taking into consideration the Court's ruling dated 26th February 2013, Melloni (C-399/11), was of the opinion that it was necessary to "supplement" in reference to its own jurisprudential doctrine set in its declaration 1/2004 of 13th December 2004. Thus, the Constitutional Court reiterated that the control of the validity of Union acts was incumbent, regardless, on the Court of Justice which, by way of the preliminary ruling procedure, has the opportunity to guarantee and ensure, in an effective manner, a high level of protection for the Union's fundamental rights. Nevertheless, "in the case that is difficult to conceive of European Union law developing in such a way that it would render European law incompatible with the Spanish Constitution, if the ordinary procedures provided for by the treaty were unable to remedy the hypothetical excess of European law, the Tribunal Constitucional of Spain could always examine the problems raised (…)" (DTC 1/2004, commented on in *Reflections nº 1/2005*).

The Constitutional Court then proceeded with the revision of its case law regarding the interpretation of the right to a fair trial, which subjected individuals sentenced by default to the condition that the sentence may be reviewed in the State making the request. As a result, the Constitutional Court concluded that the ruling by the Audiencia Nacional

authorising Mr Melloni to be handed over to the Italian authorities to submit to the sentence handed down by default by the Tribunale di Ferrara in the context of a European arrest warrant, did not constitute an indirect violation of the right to a fair trial, given that the accused had been represented and that he had voluntarily decided not to appear in person at the trial.

This jurisprudential reversal is based both on the ECHR and the Charter, as international agreements, as well as on the case law of the ECtHR and the Court of Justice, acting as "guarantee bodies". These elements have the same value as "hermeneutical criteria" by the Constitutional Court.

Three magistrates formulated concurrent individual opinions. More specifically, Judge Asua Batarrita was of the opinion that the ruling by the Constitutional Court did not broach the important questions concerning the implications of the interpretation of the Court of Justice, of article 53 of the Charter and those relative to relations between internal judicial order and Union law. Along the same lines, Judge Roca Trìas disputed the treatment of "international law" that the ruling by the Constitutional Court gave to Union law, as well as its consideration that is comparable to that of the ECHR. In addition, the reinterpretation of the level of protection of constitutional law to a fair trial giving rise to a single applicable solution, both in the context of the European arrest warrant and in the context of extradition to other countries giving rise to a single applicable solution was neither necessary or convincing. This latter point also reflected the dissenting opinion of Judge Ollero Tassara.

Tribunal Constitucional, Pleno, Sentencia de 13.02.14 (Recurso nº 6922-2008), www.tribunalconstitucional.es

QP/07223-P1

[IGLESSA]

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Union law – Principles – Equality of treatment – Minor children born in another State under a surrogacy contract – Legislation of the Member State of origin of the non-biological parents forbidding this type of contract – Refusal by the Supreme Court to respond favourably to the request for registration of the minor child as a child of the non-biological applicants

The Spanish Supreme Court, ruling for the first time on "surrogacy", rejected the registration in the civil register of two children born in California following a surrogacy contract signed by a same-sex married couple.

The Supreme Court rejected the existence of discrimination on account of gender or sexual orientation. The reason for refusing to register the parentage was not due to the fact that the application made came from a homosexual married couple, but was due to the fact that the contract in question was a surrogacy contract, which is forbidden under Spanish law (article 10 of law 14/2006 of 26th May 2006, relative to the techniques of assisted reproduction). The Supreme Court was of the opinion that to ensure the protection of the interests of the child, the social values in the principles that inspire national legislation and international conventions have to be taken into consideration. Hence, this protection of best interests, like those of the child, cannot be based on the existence of a surrogacy contract, nor on parentage in favour of the parents, as provided for by Californian regulations. On the contrary, there is a need to note the severing of the links of children with the woman who brought them into the world, with the current existence of a family made up of the children and biological paternity of one of the applicants.

This ruling, handed down by a small majority, demonstrates that this is a controversial issue. For those magistrates who were in the majority, the rights of minors are already well protected through the action to acknowledge paternity in favour of the biological parent and the adoption procedure opened for the other,

non-biological parent. Nevertheless, a dissenting opinion supporting the priority of protecting the interests of underage children was issued by four magistrates, who noted the existence of this social reality and suggested its recognition under the law.

In fact, these magistrates were of the opinion that article 10 of law 14/2006, mentioned above, did not apply in this case, given that the parentage was already established by a foreign authority. Hence the question to be resolved was to know whether this decision was, or not, contrary to international public order, an argument used in other Member States, where this type of contract is forbidden under domestic law. That said, public order in this context must be assessed from the perspective of protecting the best interests of the minor child, in the same way as the procedures in place for international adoptions.

Those magistrates in the minority were of the opinion that it is necessary to recognise a current trend in law in terms of falling in line with and becoming more flexible regarding these situations, which have become more common and which have already been recognised by a number of Spanish courts with responsibility for social matters. The right to non-discrimination with regard to parentage is, per se, a principle of public order and "the unlawful nature of parentage cannot justify treatment of a different kind" by public authorities or private institutions (ruling by the Madrid social tribunal of 13th March 2013). The best interests of the minor child are worthy of protection both before and after pregnancy. Ignoring that reality, they state, without providing solutions that are favourable to the children, will result in the non-recognition of a fait accompli such as the existence of an underage child in a family that is acting as such as which acted under the law in terms of foreign regulations. This situation may cause the abandonment of these children, depriving them of their identity and their family, in breach of international regulations that require the protection of the interests of the minor, as has already been flagged by the Court of Justice (ruling dated 2nd October 2003, García Avello, C-148/02, Rec. p. I-7639 and ruling dated 14th October 2008, Grunkin and Paul, C-353/06, Rec. p. I-11613).

Tribunal Supremo, Sala de lo Civil, Sentencia nº 835/2013, of 06.02.14, (Recurso nº 245/2012),
www.poderjudicial.es

IA/33388-A

[NUNEZMA]

**** Briefs (Spain)***

Through its ruling dated 7th October 2013, the Constitutional Court ruled in favour of a petition guaranteeing fundamental rights, lodged by the mother of a child against the initial court ruling that admitted the application of the father, aimed at recognising the parentage of the child and affecting the order of the child's names. In this case, the parents of the child were not married, with the father only recognising paternity of the child, who was born in 2004, in 2008. During this period of four years, the child, who was already at school, had always used the mother's name. The initial ruling, recognising the father's application for parentage, resulted in a change to the order of the child's names, pursuant to the rules provided for in the Spanish Civil Code which state that if there is no agreement between the parents, it is the father's name that must be given first. Drawing on the Sayn-Witgenstein case (ruling dated 22nd December 2010, C-208/09, Rec. p. I-13693), the Constitutional Court found in favour of the petition lodged by the mother and ruled that the right to a name is part of the right of the child in his own image, as stated in article 18, paragraph 1, of the Spanish Constitution.

Tribunal Constitucional, Sala Segunda, Sentencia núm. 167/2013, of 07.10.13 (Recurso nº 614/2010),
www.boe.es/diario_boe/txt.php?id=BOE-A-2013-11678

IA/33392-A

[IGLESSA]

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The Superior Court of Justice for the Basque Country heard an appeal against a ruling in which the trial judge had considered lawful an administrative decision refusing to grant a long-term residency permit on account of the existence of a criminal conviction for sexual violence. The Court ruled that, under article 6, paragraph 1 of directive 2003/109/EC, relative to the status of nationals of other countries who are long-term residents, such a decision may only be imposed when other factors are taken into consideration, such as the length of residency and the existence of links with the country of residence. In this regard, even though crimes of sexual violence are particularly serious, the Court highlighted the fact that the applicant was the father of a child of Spanish nationality suffering from a serious illness. As a result and in line with the case law of the ECtHR and the Court of Justice relative to the right to family life, the Court was of the opinion that an administrative decision refusing to grant a long-term residency permit on the sole grounds of criminal convictions breached the fundamental right recognised in article 24, paragraph 3 of the Charter, which states that the child has the right to maintaining regular contacts with both parents. More particularly, the Court took into consideration the rulings made by the Court in the cases of Orfanopoulos and Oliveri (ruling dated 29th April 2004, C-482/01 and C-493/01, Rec. p. I-5257) and O and S (ruling dated 6th December 2012, C-356/11 and C-357/11).

Tribunal Superior de Justicia del País Vasco. Sala de lo Contencioso Administrativo. Sentencia núm. 622/2013, ruling dated 30.10.13 (Recurso nº 251/2011), www.poderjudicial.es

IA/33393-A

[IGLESSA]

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The Spanish Constitutional Court modified, in plenary session, its case law regarding the conditions of the non-admissibility of the petition guaranteeing fundamental rights. Indeed, it stated that the condition of exhausting previous avenues of appeal is met when it is proved that the "the judicial bodies have had the opportunity to rule on the fundamental rights being invoked during the petition to guarantee fundamental rights before the Constitutional Court".

In this way, the introduction of the appeal for the annulment of the procedure against the ruling preceding the introduction of the application for the guarantee of fundamental rights, in terms of being a condition for admissibility, is only required when the breach of the substantive fundamental right or procedural right occurred in this ruling.

Tribunal Constitucional, Sentencia nº 216/2013, of 19.12.13 (BOE núm. 15 de 17 de enero de 2014), www.tribunalconstitucional.es

IA/33389-A

[NUNEZMA]

Estonia

Agriculture – Common Agricultural Policy – Funding by FEAGA and FEADER – Support of rural development – Aid for the development of micro-enterprises – Unjust enrichment of a public authority – Beneficiary of aid demanding the payment of interest on an amount overpaid – Admissibility

On 20th February 2014, the administrative chamber of the Supreme Court handed down a ruling in a case regarding investment aid in the farming sector, find in favour of the appeal of a beneficiary of aid.

The applicant, a private individual, benefited from investment aid from the Centre of farming registers and information (referred to below as "PRIA"), which is funded by FEAGA and FEADER. Under an ex post decision by

this body, the applicant was required to refund part of the aid granted. This decision was then overturned by a court ruling in the context of another matter and PRIA paid back to the applicant the part of the aid that he had refunded.

The main dispute related to the question of knowing whether, in this situation, it was possible to ask PRIA to pay interest on the amount received by this body for no legal reason, on the grounds that it had undertaken to pay this amount to the applicant in the context of the investment aid granted.

The courts of first and second instance had rejected the petitions lodged before them, aimed at obtaining such a payment. The courts were of the opinion that it was not possible to request the payment of interest of any kind because the payment of such interest was not provided for either by Union law or by the national law relating to the payment of agricultural aid, stating in addition, that the law applicable at the time of the events provided neither for the applicable interest rate nor the source of funding for such a payment.

The applicant then lodged an appeal in cassation to the Supreme Court.

In the ruling handed own in the context of this appeal, the Court noted in the first place that the lower courts had correctly noted that the law applicable at the time of the event did not provide for the payment of late interest in a situation where the aid granted was paid late. The Court stated in this regard that in this case, the defendant had not made late payment of the aid granted.

Secondly, the Supreme Court was of the opinion that national law provided for the possibility of requesting the payment of interest on the amount overpaid. It also observed that the payment of interest, in order to eliminate the unjust enrichment of the public authority, did not affect trade between Member States, nor did it give the beneficiary any advantage in the marketplace in relation to its competitors. The Supreme Court of Estonia also noted that the payment of interest could not be refused on the grounds that, in this situation, the marginal rate authorised for State aid would be exceeded. Finally, it also stated that an interest payment could not be refused on the grounds that the applicable law does not provide for the measures needed for implementation in this situation or that it would come under any budget of the public authority.

As a consequence, the Supreme Court ruled that the petition was admissible, overruled the decision being disputed and sent the case back to the court of first instance to be examined again, in particular so that this court could verify whether the amount of interest being demanded was justified.

Supreme Court, administrative chamber, ruling dated 20.02.14, case n° 3-3-1-81-13, published at the website of the Supreme Court, www.riigikohus.ee

IA/33387-A

[TOPKIJA]

France

Area of freedom, security and justice – Policy on asylum – Status of refugee – Fear of persecution – New application for asylum in another Member State – Minimum reception conditions – Transfer of the refugee – Period – Powers of the French Office for the Protection of Refugees and the Stateless (OFRA) – Procedure for priority or accelerated hearing

In two rulings dated 13th November 2013 and 30th December 2013, the Council of State made some interesting statements with regard to the Union law on asylum.

The first case concerned a Russian national of Chechen origin who had been granted refugee status by Poland, but who claimed he was being threatened there, which for him justified the lodging of a new application in France.

Although articles 25 and 26 of directive 2005/85/EC relative to the minimum standards regarding the procedure to grant and withdraw the status of refugee in the Member States provide for the possibility of considering as inadmissible any application from an individual who has already been granted refugee status by another country, France had not passed legislation on this point. The Council of State ruled for the first time on this matter. The disputes committee was of the opinion that, in principle, the granting of the status of refugee by a State that is party to the Geneva Convention presented an obstacle to making a new application with another State.

However, it is different if it can be established that the protection of the refugee is no longer being effectively provided in the first country of reception. If that is the case, the new application must be examined. The Council of State also said that the Member States of the Union are presumed to provide effective protection for refugees, with proof to the contrary being presented by any means. Also, this presumption lapses if a Member State has taken measures contrary to the obligations provided by the ECHR or when it is the subject of measures of prevention or sanction under article 7 TEU.

In the second matter, the Council of State ruled on the compliance, with regard to Union law, of the circular from the Interior Minister dated 1st April 2011 relative to the right of asylum, the application of regulation (EC) n° 343/2003, known as the "Dublin regulation", and the implementation of priority procedures to examine certain applications for asylum provided for in article L. 741-1 of the Code of Entry and Residency of Foreigners and the right of asylum.

It censured the circular in that it provided for the suspension of the benefit of minimum reception conditions for individuals applying for asylum who have not travelled to, within the period set by the French authorities, the country to which their readmission has been ruled. The Council of State deemed this provision to be contrary to directive 2003/09/EC relative to the minimum standards for the reception of asylum-seekers in Member States, as interpreted by the Court of Justice in the case of Cimade and GISTI (ruling dated 27th September 2012, C-179/11). Hence, the obligation to provide minimum reception conditions only comes to an end with the effective transfer of the applicant.

By contrast, the Council of State was of the opinion that the provisions of paragraph 1 of article 4 of directive 2005/85/EC, designating for all procedures an authority responsible for proceeding with an appropriate examination of applications for asylum, do not imply that this authority also be responsible for determining the procedure by which applications are examined. Also, should OFRA, which has exclusive powers to rule on applications for asylum relating to France, not have the power to determine the priority or accelerated examination procedure for these applications, this is not contrary to said directive.

Council of State, Assemblée, ruling dated 13.11.13, n° 349735, 349736,
www.legifrance.gouv.fr

IA/33631-A
Council of State, 9th and 10th sub-sections combined, ruling dated 30.12.13, n° 350193,
www.legifrance.gouv.fr

IA/33632-A

[SIMONFL] [DUBOCPA]

**** Briefs (France)***

Through its ruling dated 17th December 2013, the Court of Cassation in particular reiterated the principle of absence of the direct horizontal effect in the context of a lack of transposition, into French law, of article 7, paragraph 6 of directive 2001/23/EC, regarding the Approximation of the legislations of Member States relative to the maintenance of workers' rights in the event of the transfer of businesses. In the absence of staff representatives, this provision deals with the obligation the employer to inform employees in advance of

the transfer of the business.

The Court of Cassation noted that as the directive had not been transposed into domestic law, this obligation to inform could not be made the responsibility of the employer. The Court then reiterated that in the event of a dispute between individuals, directive 2001/23/EC could not set aside the effects of a provision in national law under the guise of interpretation.

While the ruling does cover a classic solution, it must however by placed in perspective in view of the recent ruling handed down by the Court in the area of informing workers, is the case of Association de Médiation Sociale (ruling dated 15th January 2014, C-176/12). Indeed, in this ruling, the Court for the first time stated its views, in a dispute between private individuals, on the justiciability of article 27 of the Charter relative to the right to information and the consultation of workers. As to the contrary conclusions of the Attorney General, Cruz Villalón, the Court, meeting in a Grand Chamber session, was of the belief that this article was not sufficient on its own to confer a justiciable subjective right on private individuals, as such, in order to leave a national provision that is contrary to Union law unapplied. Hence in this case, the applicant could not have invoked article 27 of the Charter successfully.

Court of Cassation, social chamber, ruling dated 17.12.13, n° 12-13.503,
www.legifrance.gouv.fr
IA/33625-A

[CZUBIAN]

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Through a ruling dated 13th December 2013, the Council of State, hearing a petition submitted by a lawyer on misuse of power, overturned the decision by which the Minister of Justice rejected an application to revoke the provisions forbidding individuals exercising regulated profession to resort to unsolicited selling or the personalised offering of services, as well as the promotion of legal services through advertising published in the media. In fact, these restrictions were deemed incompatible with the articles relative to commercial communication by regulated professions (articles 4 and 24 of directive 2006/123/EC), as interpreted by the Court of Justice in the case of Société Fiduciaire Nationale d'Expertise Comptable (ruling dated 5th April 2011, C-119/09, Rec. p. I-2551). On the other hand, in this petition, the Council of State was of the belief that a regulatory provision stating solely that advertising may not contain material that is contrary to the law, is not incompatible with this directive.

Through a ruling dated 26th December 2013, the Council of State, in the context of another petition for misuse of power lodged by lawyers, was of the opinion that the rules relative to the ethics of this profession, were not incompatible with article 24, paragraph 2, of directive 2006/123/EC. According to the Council of State, this provision, which is designed solely to define the conditions under which the States may regulate the commercial communication of regulated professions, is not designed to define in restrictive fashion the rules of ethics that apply to these professions.

Council of State, 6th and 1st sub-sections combined, ruling dated 13.12.13, n° 361593,

IA/33626-A

Council of State, 6th sub-section combined, ruling dated 26.12.13, n° 363310,
www.legifrance.gouv.fr

IA/33627-A

[WAGNELO]

Also see the German brief relative to the commercial communication of regulated professions, p. 15 of this issue of *Reflets*.

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In this matter, the Court of Cassation heard an appeal lodged by the applicant for the cancellation of a ruling sentencing him to a suspended prison term for obstructing the proper operation of a regulated market, in the knowledge that the same events had resulted in the handing down of a fine for price rigging, a sanction imposed by the Financial Markets Authority, which has responsibility to regulate the financial markets in France. The applicant based his case on a breach of principle of *ne bis in idem* contained in article 50 of the Charter.

However, the Court of Cassation was of the opinion that this article did not oppose the combining of sanctions because two conditions were met: on the one hand, combining them guarantees the effective, proportionate and dissuasive nature of the sanction in the sense of article 14-1 of directive 2003/6/EC designed to ensure the integrity of community financial markets and to strengthen the confidence of investors and, on the other hand, the overall amount of the fines likely to be imposed does not exceed the ceiling for the highest sanction incurred.

Without being mentioned specifically, the interpretation of this article by the Court of Cassation is fully in line with the ruling by the Court of Justice in the case of Åkerberg Fransson (ruling dated 26th February 2013, C-617/10) by which the Court had left the States with the option of imposing, in that case on a matter of VAT, a combined tax and criminal sanction, insofar as the first of these was not a criminal sanction.

Court of Cassation, criminal chamber, ruling dated 22.01.14, n° 12-83579,
www.legifrance.gouv.fr

IA/33623-A

[DELMANI]

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In a ruling on 21st January 2014, the Court of Cassation gave its views on the question of the rules relating to the forfeiting of the rights of the holder of a community trademark. In the first instance, the Court ruled, classically, that the court of appeal had been wrong in the judgement being appealed to retain the date of the summons as the reference date for calculating the period of three months relative to the commencement or resumption a genuineness of use, in application of the provisions of article 51 of regulation (EC) n° 207/2009 on community trademarks. Whereas, to justify its decision, the appeals court had ruled that the applicant knew that she was liable, on service of the summons for counterfeiting, to be the subject of a counterclaim for revocation, the Court of Cassation was of the opinion that the appeals court should simply have taken into consideration the date on which the counterclaim had been made by the defendant in the matter for counterfeiting, in the defence statements lodged in first instance.

Secondly, the Court of Cassation applied case law that has now become classic as to the territory on which the genuineness of use of the trademark is required. Indeed, the Court ruled that the condition of genuineness of use of the community trademark on the territory of the European Union could be construed as "disregarding the borders of the territory of Member States" and that under certain circumstances, the assessment of this usage could "result from the use of the trademark on the territory of a single Member State", in this instance, confectionery products on the territory of the United Kingdom.

Court of Cassation, commercial chamber, ruling dated 21.01.14, appeal n° 13-12501,
www.legifrance.gouv.fr

IA/33633-A

[ANBD]

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Through its ruling dated 16th December 2013, the Council of State heard an appeal lodged by an Iranian national regarding the refusal to issue a long-term residency permit. This refusal was on the ground of insufficient own

resources on the part of the applicant. In this context, the Council of State interpreted article 314-8 of the code for the entry and residency of foreigners and the right to asylum, which determines the conditions for issuing a long-term residency permit, to be in accordance with the objectives of directive 2003/109/EC, relative to the status of nationals of other countries who are long-term residents. Article 5 of this directive requires Member States to ensure that the applicant has "stable, regular and sufficient resources to meet his own needs and those of the members of his family, without calling on the social aid system of the Member State in question".

On this basis, the Council of State was of the opinion that to assess the resources available to the applicant for a residency permit bearing the words "EU long-term resident", Member State may not take into account any social aid that the applicant may be receiving. Hence, apart from the social benefits specifically excluded from the assessment of resources by article 314-8 of the code for the entry and residency of foreigners and the right to asylum, the allocation of support to the elderly and the allocation of support to handicapped adults received by the applicant of Iranian origin, could not be taken into account in the assessment of his own resources. As a result the relevant administrative authority rightly did not include these benefits in assessing the applicant's own resources.

Council of State, 7th and 2nd sub-sections combined, 16.12.13, n° 366722,
www.legifrance.gouv.fr

IA/33628-A

[WAGNELO]

Hungary

Consumer protection – Unfair clauses in contracts signed with consumers – Directive 93/13/EEC – Consumer credit contract drawn up in foreign currency – Unfair clause in the sense of article 3 of the directive – Clause determining the exchange rate

Powers of the national court ruling on the invalidity of certain contractual provisions

The Hungarian Supreme Court recently adopted a decision of general application regarding consumer credit contracts. Ruling nº 6/2013, entitled "Ruling in the interest of the unification of case law", is of a restrictive nature for lower jurisdictions.

The particular point at issue was if contracts under the terms of which the loan, although drawn up in foreign currency, has to be paid by the consumer exclusively in the national currency. As a result, there is an exchange risk. If these contracts, or some of their clauses, were to be judged illegal, in such a way that consumers could not be bound by them, the incidence on the Hungarian banking system would be considerable.

These contracts are also the subject of a case pending before the Court of Justice, Kásler and Káslerné Rábai (C-26/13). In this matter, the Court of Justice is not examining directly whether the whole of the disputed practice is compatible with Union law. Indeed, it is only invited to rule on the compatibility of the contractual clauses that determining the rates applicable to the release and repayment of the loan.

On the other hand, the decision by the Hungarian Supreme Court relates to the contracts in question in a more general manner.

Thus, in its overall ruling, the Hungarian Supreme Court first of all assessed the validity of these loan contracts in relation to the applicable national rules. In this context, it stated that these contracts, to which there is an inherent exchange rate risk, could not be declared null and void on these grounds only. In fact, any reasons for invalidity have to be evaluated at the time the contract is entered into, with the contractual structure in question

not being considered as unlawful, or contrary to accepted standards of good behaviour, or of a usurious nature or non-executable or fictitious.

With regard to the abusive nature of the contract, insofar as the interpretation of directive 93/13/EEC comes under the jurisdiction of the Court of Justice, which was making a preliminary ruling in the matter, the Supreme Court deemed that this aspect of the problem could not be ruled on in its decision. For the same reason, with regard to the requirement for clarity in the contractual provision, enabling the borrower to modify certain clauses unilaterally, the Supreme Court refused to give a response.

The Hungarian Supreme Court then underlined the fact that the obligation to provide information, incumbent on the credit establishment, covers the possibility that the exchange rate may be subject to modifications, but that it does not include a forecast of future changes in the exchange rate.

The Supreme Court also gave a number of details regarding questions, also raised in the preliminary ruling mentioned above, relative to the powers of the national court when it establishes the invalidity of certain contractual provisions. The Supreme Court stressed the importance of guaranteeing effective protection for consumers, which requires that the court attempt, insofar as it is possible, to "save" the contract. With regard to the possibility of the court reviewing the contents of the abusive clause without which the contract could not exist, the Supreme Court, referring to the matter pending before the Court of Justice, refused to give a response.

Finally, the Supreme Court emphasised that the subsequent modification of a contract by a court is not an appropriate legal instrument for providing general solutions to problems of a social nature, because it comes under the jurisdiction of the legislative powers.

It should be mentioned in this regard that on 17th March 2014, the Hungarian Constitutional Court handed down a ruling on contracts drawn up in foreign currency. In this ruling, the Court did not exclude the possibility of the State intervening, through legislation, in private contracts under exceptional circumstances. Indeed, if such an intervention meets the requirements of the principle of *clausula rebus sic stantibus,* it may be judged to comply with the Constitution and compatible with the principle of legal certainty.

Kúria, ruling dated 16.12.13, n° 6/2013, www.lb.hu/hu/joghat/62013-szamu-pje-hatarozat

IA/33910-A

[VARGAZS]

Also see, for consumer contracts, the ruling dated the Czech Supreme Court, pp. 45-47 of *Reflections n° 3/2013.*

**** Briefs (Hungary)***

In two individual rulings, the Hungarian Supreme Court assessed the scope of the restrictive effect of preliminary rulings made by the Court of Justice.
In an initial matter, it was required to rule on an appeal in cassation against a judgment by the Hungarian regional court regarding a ruling by the Court of Justice, Sió-Eckes (ruling dated 25th February 2010, C-25/09, Rec. 2010 p. I-1409). In its ruling, the Hungarian Supreme Court emphasised that the national jurisdiction is required to apply the provisions of Union regulations, with a direct effect, in line with the interpretation given by the Court of Justice. This means that the referring court is bound by the interpretation of the provisions and acts of the Union made by the Court of Justice in its preliminary ruling. Because the Hungarian regional court did not comply with this

obligation in this case, the Supreme Court quashed its ruling on appeal.

Kúria, ruling dated 01.10.13, Kfv.IV.35.680/2012/12, www.lb.hu/sites/default/files/hirlevel/hirlevel-1311.pdf
QP/06291-P2

[VARGAZS]

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In a second matter, the Supreme Court had to rule on an appeal in cassation against a judgment handed down by a Hungarian civil court. Appearing before this court, a private individual was demanding damages for claimed losses suffered in a procedure negotiated as part of the awarding of a public procurement contract. The legal appeal lodged by this individual against the decision of the adjudicating power was rejected by the administrative tribunal. In the meantime, in the ruling on Hochtief and Linde-Kca-Dresden (ruling dated 15th October 2009, C-138/08, Rec. p. I-9889), the Court of Justice handed down its interpretation in a case based on the same national provisions and certain provisions of directive 93/37/EEC.

First of all, the Supreme Court underlined that the interpretation by the Court of Justice of the legal provisions derived from the Union bind the national jurisdiction. Nevertheless, by its nature, the preliminary ruling cannot itself take the place of an administrative ruling or of a ruling by the administrative tribunal that is legally valid, by which the unlawfulness of the procedure for awarding a public procurement contract is established. As an individual decision is required first on which to argue a claim for damages before the court, the preliminary ruling cannot be used as a legal base for such a claim.

Kúria, ruling dated 30.09.13, Gfv.VII.30.047/2013/8, www.lb.hu/sites/default/files/hirlevel/hirlevel-1310.pdf

IA/33911-A

[VARGAZS]

Italy

Expelling of an imam by the American secret services in collaboration with the Italian secret services ("Extraordinary renditions") – Criminal trial with regard to agents of the secret services – Opposition by national defence secrets against information regarding relations between the secret services – Extent of national defence secrets - Conflict of duties between the various powers of the State – Prerogatives of the President of the Council of Ministers – Primacy of the State's security interests, integrity and independence

In its ruling dated 10th February 2014, the Constitutional Court ruled on the conflict of duties between the various powers of the State in a case of "extraordinary renditions". This expression designates the extrajudicial transfer of a person from the jurisdiction or territory of one State to that of another State for the purposes of detention and interrogation outside the ordinary legal system.

The case at the origin of this ruling concerns the removal, in 2003, of an imam (Osama Mostafa Hassan Nasr, alias Abu Omar) suspected of terrorism, carried out in Milan by the American secret in collaboration with the Italian secret services. In the wake of this incident, several trials were conducted before the Italian courts in order to determine the criminal liability of the secret agents in the context of this kidnapping. During these trials, the accused invoked national defence secrets ("segreto di Stato") on certain documents and information concerning, among other things, relations between the Italian secret services and the American secret services.

The handling of this complex case began in 2007. Initially, the acquittal of some of the defendants was ruled by the Milan Court and confirmed by a ruling by the Milan Court of Appeal. Hearing an appeal against this ruling, the Court of Cassation then overturned this

ruling and sent the matter back to the Court of Appeal, which this time found the defendants guilty.

Despite the fact that in the rulings mentioned above, the courts came to different conclusions, the main issue of the trial still remained the same: the scope of national defence secrets and the jurisdiction of State powers in that regard.

Consequently, the President of the Council of Ministers put the matter before the Constitutional Court, citing a conflict of jurisdiction regarding the Court of Cassation and Court of Appeal in Milan.

In its ruling, the Constitutional Court recognised that the Court of Cassation had not complied with the extent of the secret established between the President of the Council of Ministers in the case and that it had itself decided that certain information was not covered by secrecy and hence could be admitted as elements of proof.

The Constitutional Court pointed out that the allocation of the power to oppose secrecy is a prerogative of the President of the Council of Ministers, who benefits from extensive discretionary powers in this regard. As a result, exercising this prerogative cannot be subject to judicial controls.

The Court also stressed that the regulations on national defence secrets are based on the need to protect the supreme interest of the integrity and independence of the State.

As a result, the Constitutional Court overturned the rulings being disputed, taking the view that national security interests take precedence over jurisdictional requirements and, in particular, over the interest of establishing the existence of the possible perpetration of a crime committed by agents of the State on Italian territory.

Following this ruling, on 24th February 2014, the Court of Cassation ruled definitively on the matter by acquitting the agents of the Italian secret services.

As a result, the "Abu Omar" case was closed definitively.

Corte Costituzionale, ruling dated 10.02.14, n° 24,
www.cortecostituzionale.it

IA/34002-A

[BITTOGI] [CAGNOFR]

**** Brief (Italy)***

The Council of State, meeting in plenary session, handed down it ruling on article 37, paragraph 13, of the code of public procurement contracts, a provision that requires tenderers that are part of a temporary association, to carry out their work in proportion to their level of participation in that association.

The Council of State noted that the aim of the obligation of there being correspondence between the share in the participation of the association and the share in providing the services met the interests of the public authorities to facilitate and accelerate its duties of control and verification.

The Council concluded that it is not in the spirit of the provision in question to protect the values under the system of public procurement contracts, the general principles arising from TFEU or the directives relative to public procurement contracts.

The Italian Supreme Court also stated that an interlocutory appeal need not be examined prior to the main appeal when the former calls into question the assessments made by the adjudicating power in the context of the call for tenders, based on the assumption of the regular nature of the main applicant's participation in the procedure.

In this regard, in the Fastweb case, the Court of Justice (ruling dated 4th July 2013, C-100/12) ruled that Union law is opposed to the main appeal being declared inadmissible following

the prior examination of the exception of inadmissibility, raised in the context of an interlocutory appeal, without the question of compliance with the technical specifications of the bid made by the successful bidder and the tenderer, as the main applicant, having been decided on.

Consiglio di Stato, Adunanza Plenaria, ruling dated 30.01.14, n. 7,
www.giustizia-amministrativa.it/

IA/34001-A

[GLA] [CAGNOFR]

Latvia

Approximation of legislations – Car third-party insurance - Directives 72/166/EEC and 84/5/EEC – Traffic accident – Death of the parents of an underage applicant – Right to child benefits – National legislation providing for maximum amounts of compensation lower than the minimum guarantee amounts provided for under – Inadmissibility – Application to the Constitutional Court

In a ruling handed down on 18th December 2013, the Latvian Augstākās tiesas Senāts (Senate of the Supreme Court) decided to defer a ruling and lodge a request for a preliminary ruling from the Constitutional Court.

The matter in question related to an application lodged against an insurance company for a payment of 200 000 lats in relation to the pain and loss suffered by a minor whose parents died in a traffic accident involving a vehicle insured by this company. This application and the appeal lodged by the guardian of the underage child having been rejected, on the grounds in particular of article 7 of decree n° 331 of the Council of Ministers relative to the amount and the method of calculation of the insurance indemnity for the pain and suffering caused to individuals (decree of the Council of Ministers), which provides for a ceiling of 100 lats for psychological pain and suffering, she lodged an appeal in cassation before the Senate of the Supreme Court.

The Augstākās tiesas Senāts put some preliminary questions to the Court of Justice in this matter. This latter court ruled (ruling dated 24th October 2013, Drozdovs, C-277/12), stating that articles 3, paragraph 1, of directive 72/166/EEC and 1, paragraphs 1 and 2, of the second directive 84/5/EEC have to be interpreted in this way as they are contrary to the notional provisions under which mandatory third-party insurance resulting from the movement of vehicles only covers the payment of compensation for pain and suffering, according to the national law on third-party insurance, caused by the death of members of the immediate family in a traffic accident, up to a maximum amount that is less than the amounts set in article 1, paragraph 2 of the second directive 84/5/EEC.

Following the ruling by the Court of Justice, the Augstākās tiesas Senāts expressed doubts as to the compatibility of article 7 of decree n° 331 of the Council of Ministers with article 15, paragraph 1, under 1, of the law relative to the mandatory third-party insurance of owners of land vehicles, which provides for insurance liability limits for personal damages of up to 250 000 lats, and with article 92, paragraph 3, of the Satversme (Latvian Constitution), which provides for the right to appropriate compensation. In its application, the Augstākās tiesas Senāts analysed the national regulations in the light of Union law and the case law of the Court of Justice, concluding that article 15 of the national law, mentioned above, must be interpreted in compliance with the directives transposed by this law and that the national provisions governing compensation for claims resulting from vehicle traffic cannot deprive the directives mentioned above of their effectiveness. The Augstākās tiesas Senāts, not having the power to rescind the provisions of the decree of the Council of Ministers,

decided to submit an application to the Constitutional Court regarding their compatibility with higher national provisions.

Augstākās tiesas Senāts, ruling dated 18.12.13, SKC-3/2013 (C04330607) (unpublished)

IA/33399-A

[BORKOMA]

**** Brief (Latvia)***

In a ruling dated 4th December 2013, the Latvian Augstākās tiesas Senāts (Senate of the Supreme Court) applied regulation (EC) n° 44/2001 regarding the jurisdiction, recognition and implementation of rulings on civil and commercial matters. This matter concerned the recognition and implementation of an order from the United Kingdom's High Court of Justice under which all moveable and immoveable property of the defendant was the subject of a restraint order in order to prevent any sale. The defendant maintained that recognition of the order was contrary to Latvian public order public in that the High Court of Justice had not defined precisely which items of property could not be disposed of. Hence the Latvian Supreme Court verified whether this order was contrary to the basic principles of Latvia arising from article 1 of the Satversme (Constitution) and the principal values of society. The Augstākās tiesas Senāts ruled that in order for it to be executed, the order had to be adjusted to the Latvian legal system because the practical execution of the order came under the powers of the Member State carrying out the order. As a result, it detailed which items of property could not be disposed of.

Augstākās tiesas Senāts, ruling dated 04.12.13, SKC-2021/2013,
www.at.gov.lv

IA/33398-A

[BORKOMA]

Lithuania

European Union – Membership of new member States – Act of membership – Undertakings by Lithuania resulting from its joining the European Union – National central bank's power to issue currency

In a ruling dated 23rd January 2014, the Konstitucinis Teismas (Constitutional Court), replying to a request from the Parliament, ruled on the validity of a law amending article 125 of the Constitution and removing the monopoly of the Bank of Lithuania to issue currency. Specifically, the Konstitucinis Teismas reiterated the importance of the Republic of Lithuania becoming a Member of the Union, as well as the resulting undertakings.

The Konstitucinis Teismas first stated that in view of the fact that the constitutional law on Lithuania's membership of the Union implemented the will of the citizens of Lithuania, as expressed in the referendum held in 2003 on the subject of Lithuania becoming a Member of the Union, abiding by the undertakings of this membership was a constitutional imperative. It declared that Lithuania had a constitutional obligation to participate in the economic and monetary Union by adopting its common currency, the euro, and by delegating to the Union exclusive powers on monetary matters.

The Konstitucinis Teismas also observed that the Constitution did not make provision for the exclusive right of the central bank with regard to the issue of currency.

Emphasising that the provisions of the constitutional law could only be amended or cancelled by way of a referendum, it also stated that while the constitutional grounds for joining the Union had not been revoked by referendum, it was impossible to make amendments to the Constitution that might be contrary to Lithuania's undertakings arising

from its membership.

This interpretation could be of great importance in the context of the referendum on banning the sale of land to non-Lithuanian nationals. Indeed, whereas Lithuania had undertaken to authorise such sales at the time it joined the Union, with a transitional period expiring in May 2014, holding a national referendum was proposed in order to adopt any constitutional amendments to enable the ban on sales to remain in effect permanently.

Lietuvos Respublikos Konstitucinis Teismas, ruling dated 24.01.14, n° KT2-N1/2014,

www.lrkt.lt
IA/33902-A

[URMONIR]

Netherlands

Free movement of capital – Restrictions – Fiscal legislation – Taxation of dividends – National legislation providing for a right of recovery of taxes on dividends for companies exempted from company tax - Exclusion of a foreign mutual fund exempted from company tax in its State of origin – Compatibility with article 63 of TFEU

In its ruling dated 15th November 2013, the Dutch Supreme Court ruled that the refusal by the Dutch tax authorities to return to a Finnish mutual fund the tax deducted at source in the Netherlands on the dividends paid out by a Dutch company did not constitute a restriction in the sense of article 63 of TFEU, even though this mutual fund cannot deduct said tax on dividends deducted at source from company tax, said fund being exempt from company tax in Finland.

Initially, the court in Breda had rejected the application by the Finnish mutual fund aimed at overturning the decision to refuse on the grounds of article 63 of TFEU and article 10, paragraph 1, of the Dutch law relative to the taxation of dividends, which states that a company established in the Netherlands that is not subject to company tax has the right to the total reimbursement of the tax paid on dividends.

However, on appeal, it was ruled that the refusal to reimburse to this mutual fund the tax deducted at source on dividends constituted a disguised restriction to the free movement of capital, as defined in article 63 of TFEU. This was a restriction that could not be justified on the grounds of overriding public interest.

Contrary to the Court of Appeal, the Supreme Court ruled that the situation of this Finnish mutual fund could not be compared objectively to that of a company established in the Netherlands under article 10, paragraph 1 of the Dutch law mentioned above. In making reference in particular to the rulings of the Court in the matter of Centro di Musicologia Walter Stauffer (ruling dated 14th September 2006, C-386/04, Rec. p. I-8203) and Persche (ruling dated 27th January 2009, C-318/07, Rec. p. I-359), the Supreme Court stated that Union law does not require Member States to act in such a way that foreign organisations that benefit from tax breaks in their Member State of origin should automatically benefit from the same tax breaks on their territory. As a result, the circumstances under which the Finnish mutual fund is exempted from company tax in Finland does not automatically mean, according to the Supreme Court, that the mutual fund is comparable to a Dutch company that is not subject to the payment of company tax. However, the mutual fund in question, were it to be established in the Netherlands, would not come under the scope of application of article 10, paragraph 1 of the Dutch law mentioned above and would be subject to company tax. As a result, the mutual fund in question must be compared to a Dutch company not benefiting from an exemption from company tax and hence not being

entitled to the reimbursement of the tax on dividends paid in the Netherlands pursuant to article 10, paragraph 1 of the Dutch law relative to the tax on dividends.

The Supreme Court therefore overturned the ruling by the Court of Appeal and confirmed the ruling by the court of first instance.

Hoge Raad, ruling dated 15.11.13, 12/01866
www.rechtspraak.nl

IA/33713-A

[SJN]

**** Brief (Netherlands)***

Controls on borders, asylum and immigration – Policy on asylum – Criteria and mechanisms of determination used by the Member State responsible for examining an application for asylum – Regulation (EC nº 343/2003 – Transfer of an asylum-seeker to the Member State responsible for examining the application

In a matter relating to the rejection of an application for asylum by an Iraqi national by the relevant Dutch authorities on the grounds that said national had lodged an application for asylum in Poland, the State responsible for examining the application for asylum by the asylum-seeker by virtue of regulation (EC) n° 343/2003 establishing the criteria and mechanisms of determination used by the Member State responsible for examining an application for asylum lodged in one of the Member States by the national of another country (Dublin II), the referrals judge at the court of first instance in The Hague ruled that, notwithstanding the fact that Polish legislation does not exclude the possibility of expelling of third-country nationals before they have had the opportunity to lodge an appeal to the courts against the rejection of their application for asylum, there was nothing in the matter to indicate that Poland was in this case breaching its obligations under the Geneva Convention relative to the status of refugees and the ECHR. In fact, according to the referrals judge, of the 9000 first applications for asylum lodged in the previous year in Poland, there were only two cases known in which nationals from other countries had been removed before they had had the opportunity to contest the rejection of their application for asylum. In the view of the referrals judge, there was nothing to indicate that these two cases were comparable to the case of the Iraqi national in question.

Rechtbank den Haag, ruling dated 11.09.13, 13/17306 and 13/17305,
www.rechtspraak.nl

IA/33714-A

[SJN]

Poland

Approximation of legislations – Information procedure in the area of standards and technical regulations and the rules relative to the services of the information society – Directive 98/34/EC – Law on games of chance limiting the operation of automated games with limited winnings other than in casinos and gaming rooms – Lack of prior notification – Applicability of a provision of the criminal tax code punishing breaches of said law

In the joint matters of Fortuna sp. z.o.o. e.a., (ruling dated 19th July 2012, C-213/11, C-214/11 et C-217/11), the Court of Justice ruled that in the sense of article 1, point 11 of directive 98/34/EC, providing for an information procedure in the area of the standards and technical regulations relative to the services of the information society, any national provisions, such as those in the Polish law on games of chance, that might have the effect of limiting the operation of automated games with limited winnings, are likely to constitute "technical rules". The drafts of such provisions must be communicated to the Commission in cases where such provisions constitute conditions that might have a significant influence on the nature or commercialisation of the product in question.

The question of the applicability of the provisions of the Polish law on games of chances was raised recently in the context of criminal proceedings. In these proceedings, the question was asked about the legality of the provision, introduced by said law into the criminal tax code and setting the sanctions for breaches of this law, i.e. a fine or prison sentence of up to three years.

A regional court questioned the Supreme Court to find out whether it was admissible to impose a sanction for a breach of the provisions of this law, the draft of which has not been notified and which, as a result, is not compatible with directive 98/34/EC, mentioned above.

In its statement of 28th November 2013, the Supreme Court refused to answer this question. It took the view that the obligation to give notification of the technical rules was part of the legislative procedure governed by the Constitution and that consequently, the question of the applicability of the provisions in question actually concerned the compatibility of national law with the Constitution.

Consequently, any national jurisdiction which considers that the draft provisions in question should have been notified as technical rules would be required to petition the Constitutional Court, which could repeal it. Such a solution would guarantee legal certainty. In this regard, the Supreme Court remarked that there were divergences in the case law of administrative courts with regard to the applicability of the provisions of the law in question and emphasised that it was necessary to avoid such divergences among criminal jurisdictions.

Elsewhere, the Supreme Court took the same approach in its ruling dated 8th January 2014 by which it overturned the judgment of a regional court which, on account of the non-notification of the law on games of chance, had acquitted a person accused who had been ordered by the district court, based on this, to pay a fine for breach of the provision of the criminal tax code mentioned above.

Sąd Najwyższy, order of 28.11.13, I KZP 15/13,
www.sn.pl/sites/orzecznictwo/Orzeczenia3/I%20KZP%2015-13.pdf

IA/33394-A

Sąd Najwyższy, ruling dated 08.01.14, IV KK 183/13,
www.sn.pl/sites/orzecznictwo/Orzeczenia3/IV%20KK%20183-13.pdf

IA/33395-A

[BOZEKKA]

**** Brief (Poland)***

Pursuant to article 12, paragraph 1 of regulation (EC) nº 883/2004, relating to the coordination of social security systems, "any person exercising a salaried activity in a Member State on behalf of an employer conducting its business in the State in a normal manner, and whom this employer sends on secondment to work on its behalf in another Member State, remains subject to the legislation of the first Member State, on condition that the foreseeable period of this work does not exceed twenty-four months and that this person is not sent to replace another person also working on secondment".

In the rulings of 6th August (II UK 116/13) and 2nd October 2013 (II UK 170/13), the Supreme Court ruled that pursuant to said provision of regulation (EC) nº 883/2004, a salaried person sent on secondment only remains subject to Polish legislation on condition that he or she is covered by Polish social security insurance during the months prior to his or her secondment. By these rulings, the Supreme Court rejected the appeals against the decision to refuse the issue of certificates of the applicable legislation confirming that the salaried worked seconded to work in France came under Polish legislation. The Court explained that the fact of being covered by social security insurance involved the submission of a person to insurance of different types, such as sickness insurance, even if, at the same time, he or she was covered by other types of insurance, such as pension cover.

Sąd Najwyższy, ruling dated 06.08.13, II UK 116/13
www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20UK%20116-13-1.pdf

IA/33396-A
Sąd Najwyższy, ruling dated 02.10.13, II UK 170/13,
www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20UK%20170-13-1.pdf

IA/33397-A

[BOZEKKA]

Portugal

Approximation of legislations – Payment services in the internal markets – Directive 2007/64/EC – Obligations of the service-provider and the user – IT security of online payment services – "Pharming" practices – Liability for the risks arising from failures in computer systems

The Supremo Tribunal de Justiça (the Supreme Court, referred to below as the "STJ"), hearing an appeal cassation lodged by a bank providing online payment services (homebanking), ruled for the first time in a ruling handed down on 18th December 2013, that the liability for risks arising from failures in computer systems due to the practice of pharming is incumbent on the provider of the payment services when the user of these services has acted with the diligence and care of an informed user.
By this ruling, the STJ clarified a number of questions regarding homebanking contracts and the fraudulent access to online payment services raised by lower courts, thereby setting aside the risk that different decisions might be made on this topic.

In this case, the STJ initially raised the point that contrary to what the court of appeal had stated in the ruling under appeal, any IT fraud of which the user of the IT services had been the victim was indeed due to pharming and not phishing.

It stated in this regard that the practice of pharming consisted of the manipulation by computer pirates (hackers) of website addresses, usually banking institutions, in order to direct users of their services to a fraudulent site, without the users being aware, and extracting their access codes to payment services under false pretences. By contrast, phishing is a form of Internet fraud that seeks to steal confidential information, such as the numbers of credit cards and/or bank accounts, identifiers and/or passwords, usually through e-mails claiming to have been sent by the banking institutions themselves.

However, in this case, the user of the payment services had not received any e-mails and had not provided secret banking information, in particular access codes to homebanking, by e-mail. The user had accessed the fraudulent website directly while trying to access the site of the banking institution concerned.

Notwithstanding the few differences in the modus operandi, the STJ stated that these two practices of computer fraud led to the same results in terms of attributing liability due to the risk of failures in the computer system used by the banking institutions, as well as the fact that these systems received cyber attacks.

The determining factor with regard to attributing this liability is whether or not there is a fault on the part of the user of the services in question. This liability is incumbent on the banking institutions when the user of the services acts with the diligence and care of an informed user, i.e. when he or she has not compromised the security of the system by any means, in a voluntary, inept or negligent

manner, in particularly by breaching the requirement not to disclose his or her access codes.

This decision is based on article 796, paragraph 1 of the civil code and the national legislation transposing directive 2007/64/EC, regarding payment services in the internal market, in particular article 57, paragraph 1, under a), according to which the payment service-provider issuing a payment instrument is obliged to ensure that the personalised security devices for such an instrument cannot be accessed by parties other than the user of the services authorised to use this instrument, without prejudice to the obligations incumbent upon said user.

In the digital age, this ruling is of great interest for customers who are users of online payment services, insofar as it establishes that liability for the risks associated with computer hacking, specifically the fraudulent practice of pharming, are, in principle, attributable to the provider of the payment services.

Supremo Tribunal de Justiça, ruling dated 18.12.13 available at:
www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/0feb7fef778a3b6780257c46003d2073?OpenDocument
IA/33901-A
[MHC] [RAMIRAN]

Czech Republic

Judicial cooperation on criminal matters – Framework decision relative to the European arrest warrant and the surrender procedures between Member States - Detention after surrender for other offences committed previously – Rule of speciality – Violation

In its ruling dated 28th November 2013, the Ústavní soud (Constitutional Court), hearing a complaint lodged by an imprisoned individual, ruled that the existence of a violation of the plaintiff's right to freedom on account of ignorance of the rule of speciality with regard to the European arrest warrant. In fact, the plaintiff, who was handed over at the end of 2010 to the Czech authorities for the purpose of a criminal prosecution relating to offences committed between 2005 and 2007, immediately after being handed over was placed in detention in the context of the application of a prison sentence handed down against him for offences other than those for which he had been surrendered and committed prior to said offences.

The Ústavní soud said that the rule of speciality, as formulated in article 27 of framework decision 2002/584/JAI relative to the European arrest warrant and surrender procedures among Member States applies to relations between Member States. Nevertheless, non-compliance with this rule leads to a violation of the human rights affected by the arrest mandate. Hence, if the arrest warrant issued against the plaintiff did not cover the offences for which he had been sentenced previously without have served his sentence in full, execution of this warrant could not take place. In fact, at the time the plaintiff was handed over, the judgment of conviction for the previous offences lost its enforceability.

According to the Constitutional Court, the court with jurisdiction should have acted as soon as it was informed of the plaintiff's placement in detention and requested the consent of the authorities in the Member State executing the warrant of the extension of the warrant for the purpose of carrying out the sentence handed down previously. Failing this, the application of this sentence without the power of enforceability constituted a violation of his fundamental right to freedom in the sense of the Czech charter of fundamental rights. Nonetheless, the Constitutional Court stated that subsequent consent from the authorities in the Member State executing the warrant could produce retroactive effects enabling it to regularise the non-conformity of the execution of the sentence being disputed with the provisions of the criminal proceedings code transposing framework decision

2002/584/JAI in the Czech legal order.

Ústavní soud, ruling dated 28.11.13, I.ÚS 111/12,
www://nalus.usoud.cz

IA/33630-A

[KUSTEDI]

**** Brief (Czech Republic)***

In its ruling dated 20th November 2013, the Nejvyšší soud (Supreme Court) interpreted the notion tort, delict or quasi-delict in the sense of article 5, paragraph 3 of regulation (EC) n° 44/2001 regarding jurisdiction, the recognition and execution of rulings in civil and commercial matters. The case brought before it opposed two Czech nationals married to one another, joint-owners of a property located in the Czech Republic, to another joint-owner of this property with regard to the non-payment by this latter joint-owner of his contribution to the communal maintenance charges. The applicants, sole owners of the land on which the building was situated, were also claiming from the defendant payment of rent for leasing this land. According to them, the non-payment of the sums being claimed constituted an unjustified enrichment of the defendant.

As the defendant was domiciled in Germany, the lower courts rejected the applicants' case, ruling that the Czech courts did not have jurisdiction. However, the Nejvyšší soud found in favour of the appeal in cassation, ruling that the Czech courts had special jurisdiction in quasi-delict in this matter. In this regard, it pointed out first of all that the notion of tort, delict or quasi-delict is an autonomous notion of Union law, subject as an exception to the general competence of jurisdiction, to strict interpretation. Insofar as this notion was interpreted by the Court of Justice as including any request aimed at invoking the liability of a defendant and which is not attached to the contractual matter in the sense of article 5, paragraph 1 of regulation (EC) n° 44/2001, the Nejvyšší soud deduced from it that any application for harm to be remedied, not linked to a contract, comes under delict. As for quasi-delict, for liability to be invoked, it is not necessary for a tort to be committed, as in the case of unjustified enrichment. The Nejvyšší soud concluded that the Czech courts had the powers to hear the case, with the actual court with jurisdiction being the one where the event took place.

Nejvyšší soud, ruling dated 20.11.13, 28 Cdo 797/2013,
www.nsoud.cz

IA/33629-A

[KUSTEDI]

United Kingdom

Union law – Direct effect – Primacy – Hierarchical position of the European Communities Act 1972 in the constitutional order of the United Kingdom

In the context of a matter regarding the HS2 project, the aim of which is to build a high-speed rail link between London and the north of England, the Supreme Court, on its own initiative and by way of indication, as *obiter dicta*, examined the primacy of Union law over national law and, more broadly, the constitutional order of the United Kingdom. These questions were raised in the context of an examination of the compliance of the legislative procedure relative to the authorisation of the HS2 project under the procedural requirements provided for by directive 2011/92/EU, regarding the assessment of the effects of certain public and private projects on the environment.

With regard to the primacy of Union law over national law, the Supreme Court examined the question of the extent to which the European Communities Act 1972, (referred to below as "ECA 1972"), the instrument by which the

United Kingdom joined the European Union, qualifies or abrogates national constitutional instruments or principles. The Supreme Court was of the opinion that this question cannot be resolved by applying case law on the primacy of Union law, as stated by the Court of Justice. In fact, the application of the Court's case law depends on ECA 1972. More specifically, the Supreme Court ruled that the Factortame ruling (ruling dated 19th June 1990, C-213/89, Rec. p. I-2433) did not apply to the case in question in view of the fact that this ruling did not concern the compatibility of the legislative procedure before Parliament with regard to Union law. In this context, it referred to article 9 of the Bill of Rights 1689, which excludes the calling into doubt or questioning of parliamentary debates and procedure before a court of law.

Finally, the Supreme Court ruled, on the one hand, that the courts of the United Kingdom have sole jurisdiction to resolve a conflict between Union law and a constitutional instrument, such as the Bill of Rights 1689, and, on the other hand, that it is certainly possible that there are constitutional instruments or principles that take precedence over Union law.

With regard to the constitutional order of the United Kingdom, further to a request to the Court of Justice for a preliminary ruling in the Factortame case mentioned above, the House of Lords had recognised that community law (now Union law) obliges the courts in the United Kingdom to set aside any rule of national law deemed incompatible with a rule under community law that has a direct effect (R / Secretary of State for Transport Ex p. Factortame Ltd (No.2), [1991] 1 A.C. 603). A subsequent decision by the High Court regarding the relationship between national law and Union law concluded that there is a hierarchy of the acts of Parliament and that a distinction must be made between "ordinary" acts and "constitutional" acts, with the latter being of a higher rank (Thoburn / Sunderland City Council [2002] EWHC 195 (Admin)). The High Court had confirmed that ECA 1972 enjoys constitutional status, which means that this law cannot be abrogated implicitly. The Supreme Court in the *obiter dictum* of the HS2 ruling went further by stating that some constitutional instruments or principles have greater importance than others. However, the Supreme Court did not rule on the question of whether the Bill of Rights 1689 takes precedence over ECA 1972, nor on the latter's hierarchical position in the constitutional order of the United Kingdom.

Supreme Court, ruling dated 22.01.14, R (HS2 Action Alliance Ltd) / The Secretary of State for Transport & Anor & linked cases, [2014] UKSC 3,

www.supremecourt.gov.uk

IA/33716-A

[HANLEVI]

**** Briefs (United Kingdom)***

In the three joint cases lodged in relation to the validity of the various European arrest warrants, the Supreme Court examined the question of whether a Ministry of Justice met the definition of a judicial authority in the sense of article 6 of framework ruling 2002/584/JAI relative to the European arrest warrant and the procedures for surrendering prisoners between Member States and the first section of the Extradition Act 2003. The Court ruled that a Ministry of Justice met this definition insofar as it issues an arrest warrant at the request of and on behalf of either a court that decides on the sentence, or another person or organisation duly considered to be a competent judicial authority to be able to issue said warrant. On the other hand, the Supreme Court confirmed that a Ministry of Justice that automatically issues an arrest warrant, or at the request of a non-judicial authority does not meet this definition.

Consequently, the Supreme Court ruled that the warrant issued by the Lithuanian Ministry of Justice at the request of the first district court in Vilnius had been issued validly. On the other hand, the warrant issued by this same Ministry at the request of the Lithuanian prison administration had not been validly issued.

As was confirmed by the Supreme Court's decision in the case of Assange / The Swedish Prosecution Authority [2012] UKSC 22, the framework decision does not fall within the scope of the European Communities Act 1972. From this it can be said that the obligation of consistent interpretation is not required. However, the first section of the extradition act of 2003 is considered as implementing the international obligations incumbent on the United Kingdom and, as a result, the Supreme Court was of the opinion that with the interpretation of the framework decision, there was a need to take account of the principles arising from Union law.

Supreme Court, ruling dated 20.11.13, Bucnys / Ministry of Justice & other cases, [2013] UKSC 71,

www.supremecourt.gov.uk

IA/33717-A

[HANLEVI]

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On 29th November 2013, the Court of Appeal confirmed on appeal that the United Kingdom's regulations apply to the assessment of the compensation paid to individuals injured as the result of a traffic accident that occurs on the territory of another Member State. In this case, the accident occurred in Lithuania and was the fault of an uninsured resident driver, whereas the United Kingdom was the State of residence of the victims. Directive 2009/103/EC, the sixth directive on car insurance, provides for the compensation of individuals injured by the fault of an uninsured driver. This directive has been transposed into law in the United Kingdom by the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, referred to below as the Regulations 2003. In this regard, Regulation 13, paragraph 2, under b, of the Regulations 2003 states that the compensation organisation (Motor Insurers' Bureau, MIB), i.e. the defending party, is required to compensate the injured person if the accident occurs in Great Britain. On the other hand, under the agreement between the European compensation organisations of 29th April 2002, provided for by the sixth directive, the MIB is required to assess the compensation by observing Lithuanian regulations. However, given that this agreement is a private one, the Court of Appeal ruled that the regulations in the United Kingdom apply only to the assessment of compensation. The result is that the MIB cannot receiver from the Lithuanian organisation the full amount of the compensation paid to the injured individuals. Finally, the Court of Appeal was of the opinion that it was not necessary to lodge a request for a preliminary ruling from the Court of Justice.

Court Of Appeal (Civil Division), ruling dated 29.11.13, Bloy & Ireson / Motor Insurers' Bureau, [2013] EWCA Civ 1543,

www.bailii.org

IA/33718-A

[MADDEMA]

Slovenia

Preliminary questions – Submission of the Court of Justice – Court of last instance – Obligation of referral – Article 267, paragraph 3, TFEU – Exceptions – Conditions – Requirement for adequate grounds for the decision rejecting the submission of the Court of Justice – Absence – Violation of the right of access to a court

By its ruling dated 21st November 2013, the Constitutional Court ruled for the first time on the requirement of grounds with regard to a decision by the Supreme Court rejecting the submission of the Court of Justice.

The Constitutional Court first of all underlined that in accordance with article 23 of the Constitution, the parties have right of access to an impartial, independent tribunal established by the law, including the Court of Justice. Then, rulings made by the court of last instance refusing submission to the Court of Justice must have sufficient grounds for the Constitutional Court to be able to verify compliance with the requirements under said article 23. As part of these checks, it is the task of the Constitutional Court to assess whether Union law applies to the main proceedings and if there is any relevant case law in this regard. In this context, the Constitutional Court stated that the court of last instance is entitled to refuse submission to the Court of Justice and to rule on the matter itself when there is case law that applies to the facts of the case or when Union law does not apply. That said, any refusal of submission to the Court of Justice must be justified adequately so that the Constitutional Court is able to verify compatibility with article 23 of the Constitution. In the context of this verification, if the Constitutional Court finds that this justification is lacking or deems it to be insufficient, it will record a breach of said article and overturn the ruling in question.

On the other hand, if the court of last instance believes that there is not relevant case law from the Court of Justice that applies to the main proceedings, it is obliged to petition the CoJ by way of an application for a preliminary ruling.

In this case, while the Supreme Court had been of the opinion in its ruling refusing submission to the Court of Justice that the main proceedings did indeed relate to the application of Union law, or at least to questions linked to the Union law on valued-added tax, it has nevertheless considered that the rulings invoked from the Court of Justice were not applicable to the facts of the main proceedings. As a result, it had refused submission to the Court of Justice. In these conditions, the Constitutional Court was of the opinion that it was not impossible that a new question of Union law was involved. Hence the lack of submission to the Court of Justice must be deemed to be a breach of article 23 of the Constitution. As a result, the Constitutional Court overturned the ruling by the Supreme Court and referred the case back to it for re-examination.

Ustavno sodišče Republike Slovenije, ruling dated 21.11.13, Up-1056/11,
www.us-rs.si/

IA/33400-A

[SAS]

**** Brief (Sweden)***

In two rulings handed down in plenary session, the Supreme Court (Högsta domstolen) and the Supreme Administrative Court (Högsta förvaltnings-domstolen) interpreted Swedish law according to the criteria set by the Court of Justice in the case of Åkerberg Fransson (ruling dated 26th February 2013, C-617/10). This matter, stemming from a Swedish court of first instance was about the compatibility of the national system imposing sanctions for tax fraud with article 50 of the Charter. This article grants the right not to be tried or punished by a criminal court twice for the same offence.

The Court of Justice was of the opinion that this principle of *ne bis in idem* does not exclude the imposition of a criminal punishment, as well as a tax penalty for the same offence insofar as this latter sanction has become final and is not criminal in nature, which it is up to the Member State to assess.

In a reversal of their previous case law, the two Swedish courts were of the opinion that the increase in tax imposed by the tax authorities (Skatteverket) was of such a criminal nature.

The Högsta förvaltningsdomstolen went further than the interpretation given by the Court of article 50 of the Charter in the Åkerberg

Fransson ruling, which only concerns final criminal rulings, given that it is sufficient for a person to be accused of a criminal offence to prevent the Skatteverket from imposing an increase in tax. This principle of *lis pendens* was confirmed by the Högsta domstolen should the order of the proceedings be reversed. Thus, a ruling by the Skatteverket to impose an increase in tax means that it is not possible to commence criminal proceedings for the same offence.

Högsta domstolen, ruling dated 11.06.13, Mål nr B 4946-12,
www.domstol.se

IA/33386-A
Högsta förvaltningsdomstolen, ruling dated 29.10.13, Mål nr 658-660-13,
www.hogstaforvaltningsdomstolen.se

IA/33912-A
[HANLEVI] [STORGSU]

Also see *Reflections n° 1/2013*, p. 26, concerning an order by the Högsta Domstolen du 29.06.11, prior to the Åkerberg Fransson ruling.

2. Other countries

**** Brief (Australia)***
In its ruling dated 13th December 2013, the High Court of Australia annulled the law extending to marriages of same-sex couples (Marriage Equality (Same Sex) Act), adopted by the Legislative Assembly of the Australian Capital Territory). The Court ruled that under article 51 (xxi) of the Constitution, the Federal Parliament alone had the power to legislate in the matter and that regulations being disputed could not exist at the same time as the Federal Marriage Act 1961, which does not provide for the recognition of marriage between partners of the same sex.

Nevertheless, the Court ruled that "the marriage" mentioned in article 51 (xx) of the Constitution refers to a "consensual union formed between natural persons, in accordance with legal requirements, which is not only the union recognised by the law, but also any union to which the law associates the application of reciprocal rights and obligations". According to the Court, this marriage, as written in the Constitution, includes marriages between persons of the same sex.

High Court of Australia, ruling dated 12.12.13, The Commonwealth of Australia / the Australian Capital Territory, [2013] HCA 55,
www.austlii.edu.au/au/cases/cth/HCA/2013/55.html,
IA/34013-A
[GRCICAN]

United States

United States Supreme Court – International private law – Extraterritorial application of the Aliens Tort Statute and the Torture Victim Protection Act – Inadmissibility

In its ruling dated 14th January 2014, Daimler AG / Bauman et al., the US Supreme Court stated that a public limited company established in another country, with a branch in the United States, cannot be prosecuted for injuries caused entirely outside the United States by that company.

The case concerned a group of residents in Argentina who prosecuted Daimler, the German company, before a federal district court in California, alleging that Mercedes-Benz Argentina (MB Argentina), a branch of Daimler, had collaborated with the security forces of the Argentine state during the period 1976 - 1983 to abduct, detain,

torture and kill workers of MB Argentina. The plaintiffs based their claims in particular on the Alien Tort Statute and the Torture Victim Protection Act. The *ratione personae* jurisdiction of the American courts was based, according to the plaintiffs, on the presence in the United States of Mercedes-Benz USA (MB USA), another branch of Daimler, registered in Delaware, with its decision-making centre in New Jersey. MB USA distributes Daimler vehicles manufactured by independent American dealers located in particular in California.

The Supreme Court ruled unanimously that the American courts did not have jurisdiction to hear the matter. According to the Court, Daimler could not be prosecuted in California for injuries allegedly caused by MB Argentina outside the United States, although Californian law, which recognises the *ratione personae* jurisdiction of domestic courts in the absence of legal grounds, is not incompatible with the Constitution of the United States. Even though California is the home of the MB USA branch, Daimler's links with California were not sufficient to subject it to the jurisdiction of the courts in that State, because the links of a foreign company with the State must be continuous and systematic for it to be considered as coming under the jurisdiction of said State.

Neither Daimler nor MB USA are established in California and neither has a decision-making centre there. If the business of Daimler in California were sufficient for this matter to be ruled on in this State of the United States, the same question could be raised in any other State where there were significant sales for MB USA. As a result, subjecting Daimler to the jurisdiction of the courts in California would not be in line with the procedural requirement of "fair-play" and "substantive justice".

U.S. Supreme Court, Daimler AG / Bauman et al., Opinion of the Court of 14.01.14, 571 U.S (2014),
www.supremecourt.gov/opinions/slipopinions.aspx,

IA/34014-A

[GRCICAN]

**** Brief (United States)***

In a ruling dated 5th March 2014, the Supreme Court of the United States applied article 12 of The Hague Convention on the civil aspects of the international abduction of children (The Hague Convention) in the light of US law. In particular, the Supreme Court verified whether the principle of "equitable tolling" can be used to extend the period of one year provided for by this article.

The case in question concerned the abduction of a three-year-old girl who was removed by her mother from their usual place of residence in London to New York. Sixteen months later, having discovered the location of the child, the father lodged an application before the judicial authorities in New York to obtain the return of his daughter to London under the provisions of The Hague Convention.

The Supreme Court began by reiterating that the principle of "equitable tolling" is designed to suspend a period of time set in the case where one party to a dispute has exercised its rights with due diligence, but an extraordinary circumstance prevents it from lodging an appeal within the time period provided. The Court then stated that with regard to the question of knowing whether the principle applies to international agreements, there is a need to determine the intention of the contracting parties in the light of the wording and the context of the document. Unlike US law, which assumes the application of the principle of "equitable tolling" to the time periods set, there is no general presumption as to its application to international agreements. In the view of the Supreme Court, the contracting parties to The Hague Convention had no intention to apply the principle

of "equitable tolling" to the period of one year established by article 12 of this agreement.

Supreme Court of the United States, Lozano / Montoya Alvarez, ruling dated 05.03.14 (No. 12-820),
www.supremecourt.gov/opinions/13pdf/12-820_3co3.pdf

IA/34016-A

[BORKOMA]

Hong Kong

Right to social benefits – Right of access to social aid – Prior condition – Requirement of seven years' residency – Inadmissibility

In its ruling dated 17th December 2013, the Hong Kong Court of Final Appeal ruled on the constitutionality of the requirement of seven years' residency in the territory provided for as a prior condition for obtaining social aid.

In 2005, the applicant, a Chinese national, obtained a residency permit for Hong Kong where her husband was living. After his death in 2006, she applied for social aid (non-statutory and non-contributory system of social security administered by the Ministry for Social Affairs). The aim of this aid is to provide a safety net so that individuals with few or no sources of earnings have sufficient funds to meet their basic needs.

This application was rejected on the ground of the requirement in place since 1st January 2004 that all applicants for aid must have resided on Hong Kong territory for at least seven years. Prior to 2004, the residency condition for accessing this aid was one year. The applicant contested the constitutionality of the residency condition of seven years. The Hong Kong Court of Final Appeal ruled unanimously that such a requirement was unconstitutional.

According to the Court, article 36 of the Basic Law provides for a right to social security benefits in the form of social aid subject to the power of the government to modify these benefits pursuant to measures taken in accordance with article 145 of said law. Although the government has a broad margin of appreciation regarding the definition of the conditions and benefit levels, as well as modifications to them, these changes are subject to a check on proportionality.

Whereas the government stated that it introduced the obligation of seven years of residency in the legitimate aim of making savings to ensure the long-term viability of the social security system, the Court was of the view that this did not constitute valid justification. It found that the residency condition was contrary to the policy of family union and the demographic policy aimed at making the population younger. The Court also noted that the savings made were minimal, which led it to the conclusion that the condition of seven years' residency had no rational link with the declared aim of ensuring the sustainable nature of the social security system.

The Hong Kong Court of Final Appeal, ruling dated 17.12.13, Kong Yunming / The Director of Social Welfare, FACV No. 2 of 2013,
www://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=90670&currpage=T,

IA/34015-A

[GRCICAN]

B. Practices of International Organisations

European Committee of Social Rights

European Committee of Social Rights – Right of collective bargaining – Right of migrant and seconded workers to protection and assistance – National legislation not favouring the institution of collective bargaining between Swedish unions and foreign employers with a view to regulating the employment conditions of workers seconded to Sweden – Breach of article 6, paragraphs 2 and 4, and of article 19, paragraph 4 of the European Social Charter

In its decision of 3rd July 2013, the European Committee of Social Rights recorded the breach by Sweden of its obligation to promote collective bargaining, as well as its breach of the rights of seconded workers and their families to protection and assistance, rights guaranteed by article 6, paragraphs 2 and 4, and article 19, paragraph 4 of the European Social Charter.

Through legislation in 2009 and 2010, Sweden made a series of modifications affecting, on the one hand, the law on the secondment of workers to other countries and, on the other, the law relating to foreign subsidiaries. According to the Swedish government, these modifications were deemed necessary not only in the aim of implementing directive 2006/123/EC, relative to services in the internal market, but also to bring Swedish legislation into line with the ruling handed down by the Court of Justice in the Laval case (ruling dated 18th December 2007, C-341/05, Rec. p. I-11767) on the free provision of services and non-discrimination (see *Reflections n° 1/2011*, pp. 45-46).

In the first instance, and with regard to its own powers, the Committee was of the opinion that it was up to it to assess the compliance of a national situation in relation to the European Social Charter, including in cases of transposition of a European Union directive on internal law and the modification made to the provisions of internal law in order to follow the preliminary rulings of the Court of Justice when these developments are likely to weigh down on the application of the Social Charter.

Secondly, the Committee was of the opinion that following the adoption of the modifications made to the national law concerning the secondment of workers to other countries and the law relative to foreign subsidiaries conducting their business in Sweden, a number of restrictions were imposed on seconded workers. These restrictions do not favour the institution of collective bargaining between employer organisations and unions regarding foreign employers that second workers in Sweden in the context of regulating their employment conditions by way of collective bargaining. In this sense, these national measures were deemed not to comply with article 6, paragraph 2, of the Social Charter.

In addition, the Committee underlined that by preventing *a priori* by way of internal law the exercise of collective actions in a State or by only authorising their exercise insofar as they become necessary to obtain minimum working standards, the national legislation in question would not comply with article 6, paragraph 4 of the Social Charter once such a regulation breached the fundamental right of workers and unions to resort to collective action in order to protect the economic and social interests of workers.

Third, the Committee said that by virtue of article 19, paragraph 4 of the Social Charter, regarding their remuneration, other conditions of employment and work, as well as other benefits offered by collective bargaining agreements, foreign workers seconded to Sweden are entitled to benefit from treatment no less favourable than that reserved for national workers in the host State throughout the entire period of their stay and the exercise of their

professional activity on the territory of that State. Foreign companies must also be treated on an equal footing when they provide services that involve seconded workers.

In addition, the Committee also judged that by denying foreign companies the right to collective bargaining and action in order to promote the free movement across borders of competitive services and benefits inside a common market area constitutes, in terms of the purpose and aims of the Social Charter, a form of discriminatory treatment on account of the nationality of the workers given that the protection and socio-economic rights of foreign workers seconded to the host State are less than the protection guaranteed to all other workers.

It should be noted that following the decision of the European Committee of Social Rights, the Swedish government lodged observations stating that it believed the decision in question breached the legality of the legitimate application of Union law by Sweden by giving the Social Charter a very broad assessment. As a result of this, unnecessary tension was created between, on the one hand, the obligation of Union Member States to respect Union law and, on the other, their obligation to respect the Social Charter, thereby producing a particularly delicate situation for the State. Also, the Swedish government again emphasised that the legislative modifications in question were deemed necessary to bring national legislation into line with Union law. Hence it stated that it disagreed with the conclusions of the European Committee and invited the Committee of the European Council of Ministers not to refer to them in order to criticise Sweden. It was proposed that a resolution drafted in neutral terms be formulated.

However, despite the concerned expressed by the Swedish government, the decision of the European Committee of Social Rights was adopted by resolution of the Committee of Ministers on 5th February 2014 by calling on Sweden to assess any development on the issue in question.

European Committee of Social Rights, decision of 03.07.13, General Confederation of Employment of Sweden and General Confederation of managers, public servants and employees / Sweden (application n° 85/2012),
Committee of Ministers, decision of 05.02.14,
www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_FR.asp
www://wcd.coe.int/ViewDoc.jsp?id=2157039&Site=COE

IA/34011-A

[GANI]

C. National legislations
Austria

Reform of the administrative judicial system – Law creating administrative courts in the "Länder"

The law of June 2012 creating administrative courts in the Länder is the result of a discussion going back a quarter of a century. The new came into effect in January 2014, introducing administrative courts to the Länder, as well as a federal administrative court and a federal finance court. The main contribution of this new law consists of the fact that decisions made by the administrative authorities can now be appealed before the new administrative courts instead of higher authorities. Prior to the reform, it was possible to lodge an appeal before the higher administrative authorities within a period of two weeks. It is now possible to lodge appeals before the administrative courts in a period of four weeks. In some cases, the rulings of the administrative courts can be appealed before the Verwaltungsgerichtshof (the administrative court).

Before this law reforming the administrative judicial system came into effect, there were numerous authorities for hearing administrative appeals. The unabhängige Verwaltungssenate (independent administrative chambers, "UVS") were the best known. The UVS were independent administrative appeal authorities and consisted of officials comparable to judges. The powers of the UVS covered appeals for administrative offences in particular, as well as appeals against prison sentences and the assessment of the conformity of public procurement contracts. The creation of the UVS in 1988 was necessary to ensure the lawfulness of the administration in the sense of article 6 of the ECHR.

The reform of the administrative judicial system introduced a two-speed administrative court system in Austria. Many of the authorities specialising in appeals were removed and this administrative jurisdiction ensures that the appeal system complies with the standards of international law and Union law. In the wake of the reforms, it became necessary to revise 800 different laws in federal areas and in the Länder.

Law n° 51/2012 du 05.06.12 relative to the reform of the administrative judicial system (Verwaltungs-gerichtsbarkeits-Novelle 2012) (Official Journal 51, dated 05.06.12), www.ris.bka.gv.at/Dokumente/BgblAuth/BGBL 2012_I_51/BGBLA_2012_I_51.pdf

[FUCHSMA]

Belgium

Reform of the Council of State

The law of 20th January 2014, reforming the powers, procedure and organisation of the Council of State, introduced a major reform of the highest administrative court in Belgium. The main aim was to facilitate access to it.

First of all, the law provides for a modification to the procedure for summary proceedings by which the Council of State rules on an application for adjournment and provides a provisional appeal solution by no longer requiring the party making the application to demonstrate the existence of a risk of serious harm that would be difficult to remedy. From now on, this criterion is replaced by the criterion of urgency.

Then, through a mechanism emanating from the Netherlands – called an "administrative loop" – the Council of State may, in the context of an application for annulment, give the opposing party the option, during the proceedings, to correct an irregularity that has been observed, hence avoiding an annulment. This procedure enables the authority to amend a minor illegality that does not justify the serious consequences of an annulment.

In its rulings on annulment, the Council of State may detail the measures that allow for the administrative authority to remedy an illegality. From now on, it may also order the authority to take a decision or not. In the event of failing to do so, a penalty may be imposed by the Council of State at the request of one of the parties.

In addition, the Council of State can now grant a procedural indemnity to the party winning the case. New proceedings before a judicial court in order to recover legal costs is no longer necessary.

To that is added the fact that access to mediation is extensively encouraged by the better connection between this procedure and the one in force before the Council of State. From now on, the party concerned will be able to go before a mediator to try and find a solution to a dispute with an administrative body. This submission suspends for four months the deadline for an application for annulment before the Council of State, which is sixty days. Hence, if at the end of the four months, mediation is complete, the Council of State will not be required to rule.

Until now, the mechanism for maintaining the effects of annulled proceedings only applied to applicable regulatory administrative cases. Now it also applies with regard to

individual proceedings, to strengthen the legal certainly of situations gained before the case.

Also, the Council of State may only make an annulment for irregularities if the applicant has a stake as to means, i.e. if irregularities established are likely to have had an influence over the direction of the decision taken, have deprived the interested parties of a guarantee, or affect the competence of the party bringing the proceedings.

Finally, the internal organisation of the Council of State has been revamped. For example, the function of counsellor of State may also be carried out by a lawyer.

Law of 20.01.14 reforming the powers, procedure and organisation of the Council of State, M. B., 03.02.14,
www.ejustice.just.fgov.be/loi/loi.htm

www.legalworld.be
www.justice-en-ligne.be

[NICOLLO]

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Law repealing exemption from VAT for legal services

Lawyers practising in Belgium and charging fees for their services are, in principle, subject to VAT. However, until 1st January 2014, this obligation to charge and pay VAT did not apply to them insofar as they benefited from on overall from value-added tax. In this regard, article 44, paragraph 1 of the VAT code stated generally that charges for services carried out by lawyers in the exercise of their usual activities were exempt from VAT. Yet, this exemption was repealed by article 60 of the law of 30th July 2013 covering a range of different provisions and coming into effect on 1st January 2014.

In order to simplify the transition to the new system, the Minister of Finance issued circular AGFisc 47/2013 confirming the main principles and detailing a number of points. As a result, a reminder was issued stating that all lawyers are, in principle, required to charge VAT for their services from the time this new rule came into effect. In this context, the general nature of being required to charge VAT, which applies in principle to all of the services provided by lawyers in the normal exercise of their profession, was also emphasised. Among the questions of detail broached in the circular were the transitional measures relating to the enforceability of the tax and the methods used for deducting the tax at the input stage, as well as the application of the new system on legal staff and law practice trainees, who can opt for a simplified system.

Law of 30.07.13 containing various provisions, M.B., 01.08.13 (second edition),
www.ejustice.just.fgov.be/loi/loi.htm

[EBN]

Spain

Law on universal justice

Organic Law nº 1/2014, amending Organic Law n° 6/1985 dealing with universal justice, introduced some major restrictions on the exercise of universal competence by Spanish courts. These restrictions were added to those introduced by Organic Law nº 1/2009. On the one hand, the new law adds new offences that Spanish courts have the competence to hear. On the other hand, it adds conditions regarding the specific links with Spain that must be fulfilled to make such competence possible. These conditions, applied either alternatively or cumulatively, vary depending on each offence. In particular, they include new harmonisation criteria regarding the Spanish nationality or residency in Spain of the offender, the fact that he or she is in Spain or the fact that his or her extradition has been rejected. In this regard, the sole criterion of Spanish nationality of the victim was maintained with respect to offences linked to terrorism.

In addition, the possibility of lodging proceedings by popular action was removed. Also, offences cannot be prosecuted in Spain in cases where proceedings have already been begun before an international court or in the State where the crime was committed or where the offender has nationality. The law applies to proceedings that were already pending at the time it came into effect.

Organic Law nº 1/2014, of 13.03.14, amending Organic Law 6/1985, regarding judicial powers, dealing with universal justice (Official Journal 63, dated 14.03.14, p. 23026), www.boe.es/boe/dias/2014/03/14/pdfs/BOE-A-2014-2709.pdf

[IGLESSA]

**** Brief (Ireland)***

The European Union (Subsidiary Protection) Regulations 2013 were adopted in November 2013 in order to transpose directive 2004/83/EC regarding the minimum standards relative to the conditions that national from other countries or stateless individuals are required to fulfil in order to claim refugee status, or persons who for other reasons need international protection, and relative to the content of these statuses. These regulations were adopted following the M.M. ruling (ruling dated 22nd November 2012, C-277/11), in which the Court of Justice stated that the Irish system breached the fundamental rights of applicants and in particular the right of being hear. These regulations made a number of modifications to the conditions for recognising the right to subsidiary protection, including in particular the establishment for the applicant of a right to be heard in support of his or her application, as well as a right of appeal against an unfavourable ruling in first instance against him or her. The Office of the Refugee Applications Commissioner replaced the Minister of Justice in his capacity of the authority responsible for the determination of the right to subsidiary protection, thereby enabling the harmonisation of that procedure with the one relative to the application to obtain the status of refugee.

European Union (Subsidiary Protection) Regulations 2013, S.I. 426/2013, www.irishstatutebook.ie/2013/en/si/0426.html

[TCR] [MADDEMA]

Luxembourg

Modification of the law relating to State financial aid for higher studies

Following the ruling by the Court of Justice handed down in the Giersch case (ruling dated 20th June 2013, C-20/12) on the interpretation of article 7, paragraph 2 of regulation (EC) n° 1612/68 relative to the free movement of workers inside the Community, the law of 22nd June 2000 regarding State financial aid for higher studies was amended.

In fact, the Court ruled that by subjecting the grant of financial aid for higher studies to a condition of residency by the student on national territory, Luxembourg legislation was exercising indirect discrimination, because it invoked an unjustified, disproportionate difference in treatment between the children of Luxembourg residents and those across the border conducting a business activity in Luxembourg.

The new law of 19th July 2013, enacted after this ruling, now states that students who are not resident in Luxembourg can also benefit from financial aid for their higher studies, on condition that they are the child of a salaried or self-employed worker who is a national of a Member State of the Union, another State that is a party to the Agreement on the European Economic Area or of the Swiss Confederation, and that this worker has been employed or had conducted his or her business in Luxembourg for an uninterrupted period of at least five years at the time of applying for the financial aid. Luxembourg has not included in its legislation a condition of the return of the

student to Luxembourg after completing his or her studies abroad, as suggested by the Commission.

Law of 19.07.13 amending the law of 22.06.00 relative to State financial aid for higher studies (Mémorial A, 25.07.13, p. 2724)

[IDU]

Romania

Reform of criminal legislation

On 1st February 2014, a new criminal code and new criminal proceedings code came into effect as part of the process of legislative reform begun in 2011 with the civil code and continued in 2013 with the civil proceedings code.

The new criminal code illustrates a change in criminal policy in that while reducing the limits on sentences for most offences, it strengthens the prevention of recidivism and concurrent offences. In addition, compensation for the damage done becomes, under certain conditions, an attenuating circumstance leading to a reduction of one-quarter of the sentence received.

A number of new features have been introduced in terms of sentences: criminal fines have been set based on a system of 'fine-days' and work in the public interest (community service) and these replace the obligation to pay a fine, which if not enforced is due to reasons not attributable to the person receiving the sentence. The option for the court to revoke the application of the fine or to suspend it is likely to facilitate the personalisation of the penalty.

With regard to minors, the emphasis has been placed on the educational role of the penalty. Subject to certain exceptions, the new code applies the principle of applying educational measures not involving a custodial sentence.

A number of modifications have also been made to special criminal law. New offences against property have now been criminalised, privacy is better protected and, reflecting current debate in Romania, "pressure against justice" is specifically punished.

The same modernisation desiderata were behind the changes made to the new criminal proceedings code. Added to the classic principles of procedure are the right to a fair trial within a reasonable period of time and the principle of prosecutorial discretion.

The code created two new institutions: the court of rights and freedoms and the pre-trial court. The former guarantees, during criminal prosecution, the respect of fundamental rights. Its aim is to rule on preventative measures, precautionary measures, provisional security measures, searches and special surveillance techniques. The latter monitors the legality of the criminal prosecution before the judicial phase begins.

The material competence of the courts has also undergone some major modifications. The magistrates' courts and the courts of first instance become the two initial-level courts whose rulings may be disputed before the courts of appeal. The High Court of Cassation and Justice will rule on appeals in cassation as exceptional avenues of appeal.

With regard to preventative measures depriving offenders of freedom, the modifications illustrate the concern with identifying alternative methods to provisional detention (pre-trial detention at home) and reinforce their exceptional nature.

In addition, special procedures make the criminal process more flexible. An agreement on the admission of guilt, established before the public ministry and approved by the court for certain offences, may be reached in cases of uncontested guilt. The possibility of contesting bogging down of a trial makes it possible to punish ignorance of the principle of

reasonable time period and, reflecting the provisions in the civil proceedings code, the referral for interpretation before the High Court of Cassation and Justice will contribute towards standardising case law.

The two new codes stem from the need to adapt the judicial in criminal matters to deal with new challenges. They reflect the requirements set by the case law of the ECtHR and constitute the main lines of a flexile judicial system, integrated as part of freedom, safety and justice within the European Union.

Lege nº 187/2012 pentru punerea în aplicare a Legii nº 286/2009 privind Codul penal
Lege nº 255/2013 pentru punerea în aplicare a Legii nº 135/2010 privind Codul de procedură penală şi pentru modificarea şi completarea unor acte normative care cuprind dispoziţii procesual penale,
www://legalis.ro

[CLU]

United Kingdom

A bilateral agreement between the United Kingdom and Belgium was signed on 3rd and 19th December 2013, authorising immigration officers in the UK to conduct checks of persons on board cross-Channel trains. The agreement amends a tripartite accord, signed on 15th December 1993, between Belgium, France and the United Kingdom authorising border checks extending to travellers aboard "non-stop" trains under the responsibility of the British and Belgian authorities. In fact, following the introduction of intermediate stops in Lille and Calais from 2001 onwards, the need became apparent to review the agreement to enable checks to be carried out on trains stopping at these stations. This problem was highlighted following a BBC report, broadcast in 2011, which demonstrated how a journalist, boarding the train in Brussels with a ticket for Lille, was able to continue his journey through to London without being checked.

In order to overcome this shortcoming, Belgium and the United Kingdom signed an administrative agreement in 2004 extending the 1993 agreement to trains stopping at Lille. However, in order to meet the wish expressed subsequently by Belgium to strengthen the legal context in the matter, the two States negotiated a bilateral agreement providing for a genuine legal base for the checks carried out by the relevant authorities of the United Kingdom on travellers heading for London. More specifically, the agreement stipulates that Belgium is required to readmit any person travelling to the United Kingdom who is refused admission or who will not submit to a check. In addition, the agreement states that it is "without prejudice" to the rights, obligations and responsibilities arising from Union law. In this regard, it was stated that the agreement does not apply to individuals travelling to a final destination inside the Schengen area.

Finally, the agreement provides for close cooperation between the United Kingdom and Belgium, in particular in the area of the exchange of information in order to fight against clandestine immigration.

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Belgium, concerning Immigration Controls on Rail Traffic between Belgium and the United Kingdom using the Channel Fixed Link,
www.gov.uk/government/publications/agreement-between-the-uk-and-belgium-concerning-immigration-controls-on-the-channel-tunnel
The Channel Tunnel (Miscellaneous Provisions) (Amendment) Order 2014 (SI 2014/409),
www.legislation.gov.uk

[PE]

D. Doctrinal Echoes

Judicial control of the legality of Union acts implementing resolutions by the United Nations Security Council – Comments on the ruling dated the Court of 18th July 2013 in joint matters C-584/10 P, C-593/10 P and C-595/10 P, Commission/Kadi

Absence of judicial immunity in favour of Union acts implementing Security Council resolutions

The ruling by the Grand Chamber in the Commission/Kadi case (referred to below as "Kadi II") was the subject of particular attention on the part of the doctrine, and led to a new rise in academic debate, still going on, about the ruling by the Court on 2nd September 2008, Kadi and Albarakaat International Foundation/Conseil and Commission (C-402/05 P and C-415/05 P, Rec. I-6351, referred to below as the "Kadi I ruling"). In this regard, the vast majority of doctrine is of the opinion that Kadi II confirms the position of the Court on Kadi I. Hence, for Schütze, "[t]he Court indeed confirmed Kadi I and sharply rejected the idea of a judicial 'immunity' of European legislation implementing United Nations resolutions."1[1] According to Martinico "[d]espite the different terminology employed, if one goes beyond form and looks at the substance one can see that the confirmation of the idea "in principle full review' confirms the strong claims of Kadi I."2[2] In this regard, Feinaugle also stresses that "the judgment seems to offer a useful concretisation of Kadi I and will facilitate the application of its principles in daily administrative practice."[3]

Nevertheless, Sarvarian maintains that "[t]he Kadi II judgments concerning standard of review did not address the legal problems concerning the formula for judicial review identified in Kadi I, including the problem of the CJEU constitutionalist approach for the relationship of the EU with the wider international legal order and the difficult distinction between reviewing EU targeted sanctions legislation while refusing to review the background UN Security Council resolution that directly prompts it."[4] In addition, part of the doctrine believes that in Kadi II, the Court goes back on itself compared with its ruling in Kadi I. Lavranos and Vatsov, for example, state that "in Kadi II the CJEU is backtracking from its Kadi I judgment, albeit within important limits",[5] since "when the CJEU held that the GC was wrong in saying that fundamental rights were breached when the Commission did not provide evidence that it did not even have, it de facto re-interpreted the paragraph in Kadi I discussing the importance of providing evidence."[6] Indeed, Lavranos and Vatsov highlight that the Court "started to crumble under the political pressure by lowering the threshold for the evidence necessary to be provided for blacklisting thereby giving significant margin of appreciation back to the Commission, Council, and, ultimately, to the UN Security Council."[7]

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[1] SCHÜTZE, R., Coda: *Kafka*, "*Kadi, Kant*", Foreign Affairs and the EU Constitution, Cambridge University Press, 2014 (prochainement disponible). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324574

[2] MARTINICO, G., "The autonomy of EU law. A joint celebration of Kadi II - Van Gend en Loos", AVBELJ, M., FONTANELLI, F. et MARTINICO, G., Kadi on Trial. A Multifaceted Analysis of the Kadi Judgment, Routledge, 2014, p. 157-171, p. 165

[3] FEINAUGLE, C. A., "Commission v. *Kadi*", American Journal of International Law 2013, vol. 107, nº 4, p. 878-884, p. 882.

[4] SARVARIAN, A., "Implications for judicial review of UN Security Council resolutions; The Kadi II judgment of the Court of Justice of the European Union", AVBELJ, FONTANELLI et MARTINICO, cit supra note 2, p. 95-107, p. 105.

[5] LAVRANOS, N. et VATSOV, M., "Backtracking from *Kadi I*; *Kadi II*", AVBELJ, FONTANELLI et MARTINICO, cit. supra note 2, p. 109-120, p. 109.

[6] Ibid. p. 115.

[7] Ibid. p. 119.

The relationship between the judicial order of the Union and international law

Yang observes that "[t]he issue of the relationship between the EU legal order and the UN is by now almost an old hat in the Kadi discourse but certainly one that has not come out of fashion yet.(…) Kadi II may appear like just another puzzling point to this maze."[8]

On the one hand, Kadi II triggered reactions that highlight the dual approach of Union law compared with international law. According to Mason, "[e]ven the Kadi judgments themselves, which are often seen as representing a form of hermetically sealed dualist approach to international law, are ultimately grounded on principles which form part of the EU system by virtue of their status in other, i.e. national, legal systems, and possibly also the international law itself."[9] Fontanelli focuses on the rejection by the Court of the first means of appeal, regarding judicial immunity, in so doing indicating that "[t]he CJEU [recalled] its own reasoning in Kadi I: the EU is a legal order based on the rule of law, in which the protection of fundamental rights is essential. (…) This brief remark represents the consecration of the dualist approach inaugurated in Kadi I; the safeguard of EU's constitutional values prevails over the risk of incurring international responsibility for breach of international obligations."[10] Gordillo Pérez and Martinico add that the autonomy of Union law compared with international law takes the form of a classic dualism that is not compatible with the international nature of the Union: "[l]a conclusión que cabe extraer de la saga Kadi es […] que el TJ ha considerado que el ordenamiento de la UE ha llegado a un nivel de madurez tal que ya no solo ha de proclamar su plena autonomía respecto de los ordenamientos de los Estados miembros, sino también respecto del Derecho internacional, operando una suerte de clásico dualismo, quizá poco compatible con la naturaleza internacional de la UE, tal y como suelen hacer en última instancia los tribunales constitucionales nacionales cuando han de preservar la esencia de sus respectivos ordenamientos."[11]

On the other hand, doctrine focuses on what has been called the "Solange" approach by raising the question of whether the Kadi saga has given rise a higher level of protection in international law. In the first instance, Feinaugle demonstrates that insofar as "(…) proper judicial protection against the imposition of sanctions is not available at the UN level […], it makes some sense for courts outside the United Nations, like the ECJ, to provide legal protection of listed individuals and to pressure the organization into further reforming the sanctions regime."[12] As a result, Schütze notes that "[i]t may well be the perfect task of a Union that was itself a creature of international law and whose aim as a committed 'normative power is to press for a better' international (rule of) law in the future."[13] In addition, De Wet adds that "(…) [by applying] a high level of scrutiny when reviewing EU measures that are aimed at implementing listings stemming directly from a UNSC sanctions committee [...], [i]t is fair to say that the warning signal sent by the CJEU has already yielded some results."[14] Sarvarian examines the potential effect of Kadi II, which could lead to the differentiation of the systems used by the United Nations and the European Union and consequently on the reduction of registrations to the EU if the Security Council

[8] YANG, N., "Constitutional dimension of administrative cooperation. Potential for reorientation in Kadi II", AVBELJ, FONTANELLI et MARTINICO, cit. supra note 2, p. 172-186, p. 175.

[9] MASON, L., "Kadi, Kafka, and the law's competing claims to authority; The intractably unknowable nature of law", AVBELJ, FONTANELLI et MARTINICO, cit. supra note 2, p. 77-91, p. 90.

[10] FONTANELLI, F., "Kadieu: connecting the dots - from Resolution 1267 to Judgment C-584/10 P: the coming of age of judicial review", AVBELJ, FONTANELLI et MARTINICO, cit. supra note 2, p. 7-21, p. 12

[11] GORDILLO PÉREZ , L. I. et MARTINICO, G., "La jurisprudencia federalizante y humanizadora del tribunal de justicia – un cuento desde el país de las hadas", Teoría y Realidad Constitucional, 2013, núm. 32, p. 429-478, p. 477.

[12] FEINAUGLE, cit. supra, note 3, p. 182-183.

[13] SCHÜTZE, cit. supra, note 1.

[14] DE WET E., "From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions", Chinese Journal of International Law, 2013, 12 (4), p. 787-808.

refused to reform the system of sanctions. Hence "(…) [t]he potential impotence of UN Security Council-targeted sanctions in the largest free-trade zone in the world [would provide] an important incentive for the Security Council to bring its procedures into harmony with EU standards."[15]

In the same way, Lentner notes that "(…) it seems that nothing short of full judicial review on the UN level will satisfy the high standard of review adopted in Kadi II (…) [and] [t]his standard provides for an appropriate balance between the right to effective judicial protection and those flowing from the security of the European Union and its Member States."[16] Indeed, this author observes that Kadi II "(…) reaffirms the Court's position regarding the relationship between UN and EU law. As its guardian, the [CJEU] has undoubtedly asserted primacy of law even with respect to obligations stemming from Security Council resolutions. The courts seem to be not willing to accept the disregard of fundamental human rights guarantees including even in the field of counter-terrorism."[17] In this regard, doctrine observes the dialogue of the Court with the ECtHR with a view to the "Solange" approach. Tzanakopoulos states that "(…) the [CJEU] not only explicitly endorses the ECtHR's decision in Nada, but also reiterates its Solange approach by intimating that it may tone down its intensity of review should even more robust procedures be adopted at UN level."[18] In this sense, Fabbrini and Larik note the influence between the various international players, stating that "(…) [r]ecasting the Luxembourg-New York standoff as a Strasbourg-Luxembourg-New York triangle reveals an interactive process."[19]

However, other parts of the doctrine have also criticised the "Solange" approach apparently taken by the Court. According to Sarvarian, "(…) on closer inspection [the] implications [of the CJEU's stance in Kadi] are limited and its Eurocentric analytical approach problematic."[20] In this regard, De Wet claims that "(…) the approach of the CJEU carries with it the risk of the devaluation of international human rights law, as well as of legal uncertainty. Its benchmarks for judicial protection are based purely on EU law and leave unanswered the question whether and to what extent the UNSC has to act in accordance with international human rights standards [and this exclusive reliance on EU law] can have a fragmentary effect on the unified system foreseen in the United Nations Charter for the maintenance of international peace and security."[21]

In addition, Feinaugle notes that "[t]he decision does not go far enough, however, in dealing with some important public international law aspects and the functioning of a UN sanctions regime in a multilevel system, and it should have devoted greater care to the relationship between the UN level and the EU level."[22] Tzanakopoulos also recommends that "(…) the most important aspect of the Solange argument (…), that of the legal characterisation of such a reaction, remains to be broached. This is because from the perspective of the international legal order the Solange argument employed by the EU courts in the Kadi cases is quite without formal significance or impact. It cannot, in and of itself legally 'justify' disobedience of SC [Security Council] decisions, even if it may well explain it. The Solange argument thus needs to be translated into a

[15] SARVARIAN, A., cit. supra, note 4, p. 106.

[16] LENTNER, G. M., "*Kadi II* before the ECJ - UN Targeted Sanctions and the European Legal Order", European Law Reporter, 2013, p. 202-205.

[17] Ibid.

[18] TZANAKOPOULOS, A.,, "*Kadi* showdown: substantive review of (UN) sanctions by the ECJ" www.ejiltalk.org.

[19] FABBRINI, F. et LARIK, J., Global counter-terrorism sanctions and European due process rules. The dialogue between the CJEU and the ECtHR", AVBELJ, FONTANELLI et MARTINICO, cit. supra note 2, p. 137-156, p. 138.

[20] SARVARIAN, A., cit. supra, note 4, p. 104.

[21] DE WET, cit. supra, note 14.

[22] FEINAUGLE, cit. supra, note 3, p. 882.

cognisable international legal argument if it is to offer any meaningful legal justification for disobeying the SC."[23] Elsewhere, Gradoni observes that the Court's approach could be perceived as a challenge to the authority of the Security Council: "[u]na postura 'solange' poco incline al compromesso che sarà forse percepita come una sfida all'autorità del Consiglio di sicurezza ancor più sfrontata della precedente." [24]

The harshest criticisms of the Court's ruling come from Lentner, who notes that Kadi II "(…) does not provide any added value in the international sphere. On the contrary [it] actually forces the EU Member States into non-compliance with their international obligations under international law (…) [and that] EU Member States are still under the obligation (…) to implement the Security Council resolutions. The factual problem lies therefore in [that they] are faced with the choice of either disobeying the EU courts or the Security Council, if they continue to justify their non-compliance under international law."[25] De Wet adds to this argument that "(…) [it] undoubtedly places EU member states (…) in a difficult position. They are forced to disobey either a decision of the CJEU or a UNSC resolution, which will trigger state responsibility under either the one or the other regime (…)."[26] In addition, Tzanakopoulos doubts the practical effect of Kadi II, because "(…) the Court knows that the effects of its decisions (…) is to force member states to disobey the SC, unless they adopt their own implementing measures complying with the SC decisions on the matter - a power that is questionable at any rate (…)."[27] As a result, Tzanakopoulos is of the opinion that the Court, through Kadi II, "(…) can be seen to have raised the bar extremely high for the UN and its SC […]: it seems that nothing short of a full-blown court procedure will be enough to solicit the EU courts deference in favour of review at UN level. No doubt the establishment of an international court to deal with issues of delisting of individuals targeted by the SC sanctions would be a welcome, if rather unrealistic, development. (…) [a]ll this pressure (…) is now sending the SC into regression and may end up being counterproductive."[28] In this sense, Feinaugle considers that "[a] practicable compromise could be to introduce the requirement of 'exhaustion of international remedies' in the sense that an action in the EU courts would necessarily have to be preceded by an unsuccessful petition to the ombudsperson at the UN level."[29]

Finally, "[l]a sentenza Kadi II della Corte di giustizia costituisce probabilmente un passo decisivo verso l'affermazione su scala globale di un modello accettabile - più equilibrato - di prevenzione del terrorismo internazionale: forma amministrativa e giurisdizionalità sostanziale devono coesistere, anche oltre lo Stato."[30] Taking everything into consideration, Yang concludes that "(…) although some loose ends remain, Kadi II holds potential for new beginnings. The saga is far from over. It just needs a new hero."[31]

The strengthening of the autonomous nature of Union law

The doctrine also highlights the impact of Kadi II on the concept of Union law as an autonomous judicial order. For Martinico, "Kadi II belongs to a new generation of decisions in which the CJEU does not merely proclaim EU law autonomy from both national and international law, but sets out to identify a constitutional core of principles whose violation justifies its intervention even in case of dubious

[23] TZANAKOPOULOS, A., "The Solange argument as a justification for disobeying the Security Council in the *Kadi* judgments", AVBELJ, FONTANELLI et MARTINICO, cit. supra note 2, p. 121-134, p. 132.

[24] GRADONI, L., "Kadi II : Raccontare Kadi dopo Kadi II: perché la Corte di giustizia dell\'Unione europea non transige sul rispetto dei diritti umani nella lotta al terrorismo", Diritti umani e diritto internazionale, 2013, Vol. 7, n. 3, p. 587-614, p. 590.

[25] LENTNER, cit. supra, note 16.

[26] DE WET, cit. supra, note 14.

[27] TZANAKOPOULOS, cit. supra note 23, p. 126.

[28] Ibid. p. 134.

[29] FEINAUGLE, cit. supra, note 3, p. 883.

[30] MARIO, S. "Kadi II, Ultimo atto: un modelo globale per la prevenzione amministrativa? ", Giornale Diritto Amministrativo 2013 nº 11, p. 1052-1059

[31] YANG, cit. supra, note 8, p. 186.

jurisdiction."[32] Along these same lines, Yang emphasises that "(…) cases like Kadi II play an important role in perception-building as to what kind of constitutional order the EU understands itself to be. Conceptualising it as an autonomous legal order necessarily entails delimitation from international law."[33] According to Gordillo and Martinico, this autonomy is proclaimed in relation to national law and international law: "[l]a conclusión que cabe extraer de la saga Kadi es (…) que el TJ ha considerado que el ordenamiento de la UE ha llegado a un nivel de madurez tal que ya no solo ha de proclamar su plena autonomía respecto de los ordenamientos de los Estados miembros, sino también respecto del Derecho internacional."[34] In that regard, Nic Shuibhne, in underlining that "[n]oticeably, there is no renewed justification of the autonomy of the EU legal order in Kadi II", is of the opinion that "[i]t may be that, 50 years after the judgment in van Gend Loos, the Court has opted to treat its implications as an established fact and to concentrate instead on articulating its understanding of the content of that claim in concrete circumstance."[35]

Intensity of judicial control

The doctrine is unanimous in emphasising the importance of the ruling as to the degree of judicial control that can be exercised by a Union court, particularly in the area of foreign policy and common security. Nic Shuibhne believes that the ruling "makes a critical contribution on the intensity of judicial review that should be applied when assessing Union measures that implement UN sanctions."[36] In fact, the Court "has confirmed the principle of review and, to a considerable degree, defined its parameters."[37] Simon observes that the Court "is obviously not content with a minimum control or limited control" and that it "is engaging in the total control of de facto and legal elements, as well as the assessment of motives."[38]
In addition, some authors point out the fact that the intensity of judicial control does not vary based on the origin of the restrictive measures. In that regard, Fontanelli stresses that "[w]hatever deference could be warranted in application of inter-systemic comity, the CJEU has disregarded it by equating UN-ordered and in-house listings."[39] In this sense, de Wet points out that "the benchmarks for judicial protection recognised in the Kadi case closely resemble those developed by the General Court in the Organisation des Modjahedines du Peuple d'Iran (OMPI) cases, concerned the implementation of listings adopted autonomously within the EU pursuant to UNSC Resolution 1373". As a result, "[t]his affectively amounts to a rejection of different levels of judicial protection within the EU, depending on the degree of discretion that the wording of a UNSC sanctions regime provided for in relation to its implementation." [40]

The doctrine also highlighted that "[s]alomonically however, the Court accepted international security considerations."[41] In this regard, Simon, wondering about the specific features of the fight against terrorism, believes that "(…) while it is fundamental to avoid the fight against terrorism being the pretext for the multiplication of little 'judicial Guantanamos' and zones of non-law that escape all judicial control, it is also essential not to sink into the sometimes rather non-angelic protection of the rights of individuals or entities involved in international terrorism."[42]

[32] MARTINICO, cit. supra, note 2. p. 166.
[33] YANG, cit. supra, note 8, p. 179.
[34] GORDILLO PÉREZ et MARTINICO, cit. supra n. 11, p. 477.
[35] NIC SHUIBHNE, "Being bound", European Law Review, 2013, p.435-436.

[36] Ibid
[37] SARVARIAN, A., cit. supra, note 4, p. 105

[38] SIMON, D, "Mesures antiterroristes. Un arrêt très attendu sur l'intensité du contrôle juridictionnel des mesures antiterroristes : la Cour confirme la solution du Tribunal dans l'affaire dite *Kadi II*", Europe, Mois Comm., 2013, nº 10 p. 14-16.
[39] FONTANELLI, cit. supra, note 10, p. 20
[40] DE WET, cit. supra, note 14.
[41] SCHÜTZE, cit. supra, note 1.
[42] SIMON, cit. supra, note 36.

Sarvarien believes that "the Court may well have reached an identical outcome through the application of a more restricted standard of review. In particular, the failure to produce supporting evidence for the summary of reasons or rebuttal evidence against Mr Kadi and, in itself, should as a matter of law constitute a violation of the aforementioned rights. Consequently, it is arguable that a full merits review entailing a re-examination of the strength of the evidence is superfluous."[43]

With regard to the elements of proof, de Wet underlines that "[the] CJEU also implicitly acknowledged that the Al Qaida sanctions committee or other United Nations member states are under no obligations to share the relevant (and often confidential) evidence with the competent EU authority."[44] In this regard, potential difficulties were highlighted by Yang: "(…) it is unclear when the Court will consider the probative value of information insufficient because the information is confidential or can, if at all, only be provided in abridged form. This uncertainty can backfire and cause a feeling of resignation with the Commission and Council. The difference between not supplying additional information and supplying too little or too confidential information appears indiscernible and indeed irrelevant if the Court would opt for full substantive review anyhow."[45]

The impact of fundamental rights on protection

A number of comments highlighted the fact that the Kadi II ruling leads to the strengthening of the protection of fundamental rights and the status of law in the Union: "[d]er EuGH hat einen massiven Angriff auf den Rechsstaat abgewehrt, was wir alle mit Erleichterung zur Kenntnis nehmen können."[46] Also, "[t]he level of judicial scrutiny stipulated by the CJEU in Kadi II ensured that the protection of fundamental rights in this context is effective rather than merely illusory."[47] Hence, Martinico emphasises that "[p]erhaps the Kadi saga will pave the way for a new season of contestation and, hopefully, for an improved protection of fundamental rights at the international level."[48] Indeed, "[f]ar from being a decision of principle, it is nevertheless a decision based on principles: its value lies in its systemic impact, as it incarnates the idea that certain fundamental rights cannot be silenced under the cover of generic security concerns or of knee-jerk deference to the UN Security Council's action."[49] In this regard, part of the doctrine focuses on the comparison with the approach taken by the ECtHR in the area of sanctions. According to de Wet, "[w]hereas the CJEU relied exclusively on its own internal legal order for providing judicial protection to the affected individuals or entities, the ECtHR resorted to the technique of harmonious interpretation."[50] Hence, "[i]n the Al-Jedda and Nada cases, the technique prevented an open rejection of UNSC resolution by individual states, with could result in undermining a unified system for the protection of international peace and security." [51] Fabbrini and Larik observe that "(…) the existence of a prospective control by the ECtHR on the action of the EU institutions persuaded the CJEU to maintain the high due process standard it framed in Kadi, preventing any re-emergence of challenges of ineffectiveness in the EU constitutional system."[52] As a result, "(…) European courts consistently struck the balance between global security and due process rights in a way that the latter is never eclipsed by the former."[53] However, Sarvairan is of the opinion that the Court of Justice

[43] SARVARIAN, A., cit. supra, note 4, p. 104.
[44] DE WET, cit. supra, note 14
[45] YANG, cit. supra, note 8, p. 185.
[46] KÜHNE, H. H., "Schwarze Listen: bürgerlicher Tod ohne Gerichtsverfahren und ohne Beweise: der Fall Kadi und kein Ende", Zeitschrift für Rechtspolitik. 46. Jahrg., 2013, nº 8, p. 243-247, p. 247.
[47] AL-RIKABI, Z., "*Kadi II*: The right to effective judicial review triumphs yet again", European human rights law review, 2013, Issue 6, p. 631-636, p. 6.
[48] MARTINICO, cit. supra, note , p. 171.
[49] FONTANELLI, cit. supra, note 10, p. 13.
[50] DE WET, cit. supra, note 14.
[51] Ibid.
[52] FABBRINI et LARIK, cit. supra, note 19, p. 155.
[53] Ibid., p. 156

went further than the ECtHR: "[w]hile the logic of the Court that the right to an effective remedy guaranteed by art. 47 of the Charter requires intensive review is attractive, there is similarly no case law of the European Court of Human Rights suggesting that judicial review must take the form of full merits review to ensure that the right to an effective remedy is secured. Consequently, it is suggested that the standard of full review laid down by the Court is essentially judicial doctrine based upon policy considerations rather than a Treaty obligation."[54]

Kadi and Kafka

Several authors pointed out the similarity of the procedural steps of Mr Kadi with the story of Joseph K. in Kafka's book *The Trial*.[55] If, according to Schütze, the Kadi II ruling "(…) constitutes the concluding chapter in this Kafkaesque saga",[56] for Mason[57] "[t]he denouement of Kadi II in the Grand Chamber of the Court of Justice might be read as the Disneyfication of Kafka's The Trial, a happy ending for our downtrodden protagonist (…) [T]he respective outcomes of Kadi I and II suggest that the opaque procedures which Kafka is often seen as depicting in his work can be averted by the operation of the law itself".[58] In the same way, Fontanelli quotes a passage from *The Penal Colony*:[59]

"Officer '[The Condemned Man] has had no opportunity to defend himself… Guilt is always beyond a doubt. Other courts could not follow this principle, for they are made up of many heads and, in addition, have even higher courts above them. But that is not the case here…'

The Traveller looked at the harrow with a wrinkled frown. The information about the judicial procedures had not satisfied him…

Officer 'You are trapped in a European way of seeing things… That's my plan. Do you want to help me carry it out?'

[The Traveller] hesitated a moment. But finally he said, as he had to, 'No.'"[60]

[IGLESSA] [LOIZOMI]

[54] SARVARIAN, A., cit. supra, note 4, p. 100.
[55] KAFKA, F., Der Prozess, 1925.
[56] SCHÜTZE, cit. supra, note 1.
[57] MASON, cit. supra, note 9, p. 77.
[58] Ibid.
[59] KAFKA, F. In der Strafkolonie, 1919.
[60] FONTANELLI, cit. supra, note 10, p. 7

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