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Contents

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A. Case law

I. European and international courts

European Court of Human Rights

European Convention on Human Rights – Refusal to refer a preliminary question to the European Court of Justice – Obligation to provide grounds for refusal – Non-violation of Article 6(1) of the Convention

On 20 September 2011, the European Court of Human Rights (ECHR) unanimously ruled that Article 6(1) of the Convention had not been breached by the Belgian courts' refusal, with grounds, to submit a reference for a preliminary ruling on the interpretation of European Union law to the European Court of Justice at the request of the appellants.

The appellants, who are Belgian nationals, had asked the Belgian Cour de Cassation and Conseil d'État to submit a reference for a preliminary ruling regarding to the consistency of a Belgian royal decree with the Treaty establishing the European Community. Since the Belgian supreme courts refused to do so, the appellants brought the matter before the ECHR, relying on Article 6(1) of the Convention.

The ECHR noted that, according to the wording of Article 19 of the Convention, its role is to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention. With that in mind, it is not for

the ECHR to hear complaints concerning *de facto* or *de jure* errors allegedly committed by national courts, unless and to the extent that these have infringed upon the rights and freedoms protected by the Convention. Consequently, it falls to national courts to interpret and apply national law, in compliance with European Union law where applicable, with the ECHR's role being limited to checking that the effects of their decisions are consistent with the Convention.

The ECHR first found that when a question relating to the interpretation of European Union law is raised in proceedings before a national court against the decisions of which no appeal may be brought in national law, that court must refer the matter to the European Court of Justice for a preliminary ruling. Nevertheless, this obligation is not absolute because it falls to national courts to decide whether a preliminary ruling is necessary, in accordance with the case law established by the Cilfit judgment (judgment of 6 October 1982, C-283/81, ECR 1982 p. I-3415).

It follows, in the view of the ECHR, that the Convention itself does not as such guarantee the right to have a case referred by a national court to another court, whether national or supranational. Furthermore, the Convention gives national courts alone the duty of deciding whether the conditions for reference for a preliminary ruling, as set by European Union law, have been met. Nevertheless, the ECHR observed that Article 6(1) of the Convention does require national courts to provide grounds for the decisions by which they refuse to refer preliminary questions where the applicable law only allows such refusals in exceptional cases. The ECHR found that the obligation to provide grounds had been fulfilled in the case in point.

The ECHR therefore unanimously ruled that since the obligation for national courts to provide grounds for refusal, as set by Article 6(1) of the Convention, had been fulfilled, the appellants' right to a fair trial, within the meaning of that article, had not been breached.

European Court of Human Rights, judgment of 20 September 2011, Ullens de Schooten and Rezabek v. Belgium, [*www.echr.coe.int/echr*](http://www.echr.coe.int/echr)

IA/32879-A

[MOUTIDE]

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European Convention on Human Rights – Exercise of the right to vote by expatriates – Obligation for a Contracting State to determine the arrangements – Absence

On 15 March 2012, the European Court of Human Rights (ECHR) ruled that Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") was not violated by the fact that the appellants, who are Greek nationals living abroad, could not exercise their right to vote from their place of residence. Under the provision in question, the Contracting Parties to the Convention undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

To reach its conclusion, the ECHR looked at the issue of exercise of the right to vote by expatriates from three different viewpoints, namely that of international law, that of comparative law, and finally, that of national law.

With regard to national law, the ECHR first noted that a number of international legal texts, such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights do not require their contracting states to organise voting from abroad for expatriates. Similarly, the ECHR highlighted that in practice, certain European bodies such as the Parliamentary Assembly of the Council of Europe and the Venice Commission restrict themselves to recommending or suggesting that their Member States facilitate exercise of electoral rights by expatriates, without raising these recommendations to the status of binding obligations.

From the point of view of comparative law, the ECHR noted that while most Contracting States to the Convention allow citizens living abroad to vote from their place of residence, they have different arrangements for this, meaning that no uniform right can be derived.

All in all, the ECHR found that none of the legal instruments examined formed a basis for concluding that States are under an obligation to enable citizens living abroad to exercise the right to vote, as the law currently stands.

In terms of national law, the ECHR noted that according to a study by the Scientific Council of the Greek parliament, the authorisation to exercise the right to vote from abroad, as provided for in Article 51(1) of the Greek constitution, is an option rather than a duty for the legislature. Consequently, it is not for the ECHR to indicate to the national authorities at what time and in what manner they should give effect to the provision.

European Court of Human Rights, judgment of 15 March 2012, Sitaropoulos and Giakoumopoulos v. Greece (application no. 42202/07), www.echr.coe.int/echr

IA/32880-A

[RA]

EFTA Court

European Economic Area (EEA) – Equal treatment with regard to provision of services – Prohibition of discrimination on the grounds of nationality – National law giving only citizens of that State the right not to be ordered to appear before a foreign court on the basis of a jurisdiction agreement that has not been recorded publicly – Inadmissibility

Having been asked to rule on a question concerning the interpretation of Articles 4 and 36 of the EEA Agreement, namely whether it was possible for a national of an EEA State to seek to benefit from a provision in national law that gives citizens of that State the right not to be ordered to appear before a foreign court on the basis of a jurisdiction agreement unless that agreement has been recorded publicly, the EFTA Court ruled that:

"Article 36 EEA precludes a provision of national law which accords only nationals the right not to be sued abroad on the basis of a jurisdiction agreement unless that jurisdiction agreement has been publicly recorded.
It is for the national court, as far as possible, to interpret and apply the relevant provisions of national law in such a way that it is possible duly to remedy the consequences of the breach of EEA law. In that context, it is for the national court to determine whether (…) any national provisions can be applied for the purposes of an interpretation in conformity with EEA law."

In that connection, it observed that:

"(…) the freedom to provide services under Article 36 EEA entails, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in an EEA State other than that in which the service is to be provided (…)." (paragraph 40)

"A national rule (…) which imposes different requirements dependent on whether the jurisdiction agreement confers jurisdiction on a (…) [national] court or a foreign court, treats (…) nationals differently from other EEA nationals, in so far as (…) nationals are protected against the enforcement of foreign agreements (…), unless they have been publicly recorded, whereas (…)[other] EEA nationals are not given the same protection." (paragraph 46)

EFTA Court, judgment of 25 April 2012, case E-13/11, Granville Establishment v. Volker Anhalt, Melanie Anhalt and Jasmin Barbaro, née Anhalt, www.eftacourt.int

IA/33309-A

[LSA]

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European Economic Area (EEA) – Medicinal products for human use – Directive 2001/83/EC of the European Parliament and of the Council – Import of medicinal products from another EEA country by a healthcare institution for the use of the people it treats – Need to obtain a marketing authorisation – Authorisation granted by the State of export for medicinal products that are

identical or essentially similar to products that have been granted an authorisation in the State of import – Admissibility

The EFTA Court was asked to rule on several questions concerning the interpretation of Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use (hereinafter referred to as "the Directive). Some of these questions aimed to determine whether a care establishment was able to import, from another EEA Member State, medicinal products for the use of the people it treats when these medicinal products had received a marketing authorisation in the State of export but did not meet the requirements of a marketing authorisation issued by the State of import for medicinal products bearing the same name.

The national court also requested clarification on the freedom of the competent authorities to grant exemptions, by virtue of Article 63(3) of the Directive, when the imported medicinal products were not intended for self-medication by the patient but were prepared by a pharmacist employed by the institution and delivered to patients in boxes that were specially designed for the purpose.

With regard to the first question, the EFTA Court ruled that:

"The national authorities may make importation by a health care institution for use by the people in the care of the institution, of medicinal products from the EEA State of export which have been granted national marketing authorisation in the EEA State of export, and which are identical or essentially similar to products which have national marketing authorisation in the EEA State of importation, subject to a parallel import licence.

Such a licence must be issued under a procedure limited to controlling that the medicinal products in question have a valid marketing authorisation in the EEA State of export, and that the product is identical or essentially similar to products having marketing authorisation in the EEA State of importation.

In this context, the national authorities may not require parallel importers, to submit manufacturing control reports. Such a practice cannot be justified under Article 13 EEA."

In this connection, it noted that:

"(…) the objective of safeguarding public health pursued by the Directive justifies such stringent measures only in regard to medicinal products which are being put on the market for the first time (…)." (paragraph 55)

"The provisions of the Directive concerning the procedure for issuance of marketing authorisations cannot apply to a medicinal product covered by a valid marketing authorisation in one EEA State which is being imported into another EEA State as a parallel import of a product essentially similar or identical to a product already covered by a marketing authorisation in the EEA State of importation. In this case, the imported medicinal product cannot be regarded as being placed on the market for the first time in the EEA State of importation (…)." (paragraph 57)

"However, to request a parallel importer to provide to the national authorities traceability information in the form of the manufacturing control reports constitutes a measure having equivalent effect to a quantitative restriction on imports, and if thus contrary to Article 11 EEA unless it can be justified under Article 13 EEA (…)." (paragraph 62)

Then, with regard to the question on the freedom of the competent authorities to grant exemptions under Article 63(3) of the Directive under the conditions mentioned above, the EFTA Court ruled that:

"When a medicinal product is not intended to be delivered directly to the patient, the competent authorities' right to grant exemptions under Article 63(3) of Directive is limited by the general principles of EEA law. The discretion must not be exercised in a disproportionate, arbitrary or abusive, in particular protectionist, manner."

EFTA COURT, judgment of 30 March 2012, case E-7/11, Grund, elli- og hjúkrunarheimili v. the Icelandic Medicines Agency (Lyfjastofnun), www.eftacourt.int

IA/33310-A

[LSA]

II. National courts

1. Member States

Germany

Acts of the institutions - Directives – Obligation to interpret national law in line with the purpose of the directive – Limits – Methods and tradition of national law – European Court of Justice judgment in the Heiniger case

The Bundesverfassungsgericht ruled on the limits, in national law, of interpreting national provisions in line with European directives. The subject of this constitutional appeal was a Bundesgerichtshof judgment handed down after the European Court of Justice's preliminary ruling in the Heiniger case (judgment of 13 December 2011, C-481/99, ECR 2001, p. I-09945) on the interpretation of Council Directive 85/577/EC to protect the consumer in respect of contracts negotiated away from business premises. The German law on the cancellation of doorstep transactions and analogous transactions (Haustürwiderrufsgesetz) established an exception to its scope of application by providing that a consumer who had concluded a secured-credit agreement was not entitled to cancel it. In the Heiniger case, the European Court of Justice decided that Council Directive 85/577/EEC had to be interpreted as applying to secured-credit agreements.

In accordance with this preliminary ruling, the Bundesgerichtshof had decided that the national provision in question had to be interpreted restrictively so as to comply with Council Directive 85/577/EEC and include secured-credit agreements in the scope of application of the German law on the cancellation of doorstep transactions and analogous transactions.

The Bundesverfassungsgericht did not admit the constitutional appeal, viewing it as unfounded (Nichtannahmeabschluss). It found that the Bundesgerichtshof's judgment respected the limits of case law interpretation and did not breach the fundamental rights of the appellants. In particular, it noted that the principle of the separation of powers had not been violated.

The court pointed out that under Article 4(3) TEU, national courts must interpret their national law in the light of the wording and purpose of the directives. However, it highlighted that Member States' obligation to interpret national law in line with European directive is limited by legal tradition at national level and that interpretation in line with the directives is only possible to the extent that national law makes such interpretation possible.

In view of these considerations, the Bundesverfassungsgericht found that the Bundesgerichtshof's restrictive interpretation did not violate the principle of the separation of powers. It also considered that the principle of legitimate expectations had not been breached, since reversing case law does not pose a problem when sufficient grounds are given for the reversal. Moreover, it held that the development of the case law of the Bundesgerichtshof was not entirely unpredictable.

Bundesverfassungsgericht, order of 26 September 2011, 2 BvR 2216/06,
www.bundesverfassungsgericht.de

IA/33231-A

[AGT]

Austria

Fundamental rights – Charter of Fundamental Rights of the European Union – Applicability in view of the constitutional review performed by the Verfassungsgerichtshof

In its judgment of 14 March 2012, the Verfassungsgerichtshof ruled that it would use the rights contained in the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter") as criteria for constitutional review (within the framework of its scope of application as defined in Article 51), placing these rights on an equal footing with the fundamental rights protected by the Austrian constitution, and particularly the European Convention on Human Rights (hereinafter referred to as "the Convention").

The joined cases covered by the judgment concerned two asylum seekers whose applications had been refused by the Federal Asylum Office and who then lodged an appeal with the Asylum Tribunal. The Asylum Tribunal dismissed the appeals without adversary proceedings, despite the fact that the appellants had requested a hearing. Since an appeal to the supreme administrative court was ruled out by the Austrian constitution, the Verfassungsgerichtshof had to rule, on an exceptional basis, on the question of whether the Asylum Tribunal should have held a hearing. The appellants relied on the argument that their right to an effective remedy and to access to an impartial tribunal, as guaranteed by Article 47 of the Charter, had been violated.

Article 144a of the Austrian constitution provides for the right to challenge decisions of the Asylum Tribunal before the Verfassungsgerichtshof, with grounds for an admissible constitutional appeal including the alleged violation of "a fundamental right protected by the constitution". Under the terms of this provision, a violation of European Union law is not a valid ground for a constitutional appeal.

In its judgment, the Verfassungsgerichtshof reiterated that it accepted that the Charter, as EU primary legislation, was directly applicable and had priority for application in Austria. At the same time, it highlighted that, in accordance with its established case law, it did not have the power to examine the consistency of general standards or individual administrative decisions with European Union law.

However, the Verfassungsgerichtshof referred to the principle of equivalence, as established by the European Court of Justice's judgment of 1 December 1998 (Levez, C-326/96, ECR 1998 p. I-07835), according to which the Member States must guarantee legal protection for rights derived from Community law and the arrangements for this protection must not be less favourable than those governing similar appeals based on national law. With this in mind, the Verfassungsgerichtshof concluded that rights derived from Community law must be protected by a procedure equivalent to that which protects comparable rights derived from national law.

Taking this position as its point of departure, the Verfassungsgerichtshof established a link between the Charter and the Convention, which is directly applicable as an Austrian national constitutional law (which is why there is established case law of constitutional review of laws and individual administrative acts using the criteria set down in the Convention). The court stated that the rights derived from the Charter broadly corresponded to the "national rights" protected by the Convention.

Finally, the Verfassungsgerichtshof found that the principle of equivalence required the rights protected by the Charter (within the framework of its scope of application) to be treated in the same way as the rights protected by the Convention. It added that there would be a contradiction with the concept of the Austrian constitution if the Verfassungsgerichtshof were unable to rule on rights derived from the Charter, which had largely the same content as the Convention.

Consequently, although the rights protected by the Charter are still not recognised as "fundamental rights protected by the constitution", within the meaning of the Austrian constitution, the Verfassungsgerichtshof ruled that it would treat them as such in future.

The Verfassungsgerichtshof will not only use the Charter for constitutional review of national laws when they implement EU law, but also for review of individual administrative acts based on such laws, following reference from a preliminary ruling (if necessary) and at least where "rights" comparable to those protected in the Convention are concerned (as opposed to "principles", such as those mentioned in Articles 22 and 37 of the Charter).

Finally, with regard to the main proceedings, the Verfassungsgerichtshof ruled that Article 47 of the Charter had not been violated.

Verfassungsgerichtshof, judgment of 14 March 2012, nos. U 466/11-18 and U 1836/11-13, www.vfgh.gv.at

IA/33233-A

[WINDIJO]

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Fundamental rights – Prohibition of

discrimination – Different treatment of same-sex partners in a registered partnership with regard to the registration of a double-barrelled surname without a hyphen – Inadmissibility with regard to the constitutional principle of equality

In its judgments of 3 March 2012, nos. B 518/11 and G 131/11, the Verfassungsgerichtshof declared that it was unconstitutional to treat registered partnerships (same-sex partners) differently from marriages (partners of different sexes) with regard to the format of double-barrelled surname used by registered partners, i.e. without a hyphen.

The case in the main proceedings was between a registered (same-sex) partner and the governor of the Bundesland of Styria. The Austrian law of 2009 on registered partnership between same-sex couples provides that each partner keeps his or her own surname. Under the Austrian name change law, registered partners may request a shared surname when they register their partnership. The partner in question may add his or her old surname to the new one, thus making a double-barrelled surname. The Civil Code contains a similar provision for married couples, but explicitly states that there must be a hyphen between the two surnames. Furthermore, married people may apply to change their names at any time, without limit (so they may also request a name change after their wedding).

The appellant, Mr K., entered into a registered partnership with Mr E. and decided to have a double-barrelled surname. The registrar changed his name, but made it "Mr E. K.", with no hyphen, thus applying the law literally. The appellant's request for authorisation to use the name "Mr E.-K.", with a hyphen (like a married person), was refused, as was his application to change his surname to "E.-K.", on the grounds that the application was submitted too late, as a name change was only possible at the moment the registered partnership was concluded. The appeal against this decision was dismissed by the governor of the Bundesland of Styria.

An appeal against the decision was then brought before the Verfassungsgerichtshof, which found that literal interpretation of the law breached the constitutional principle of equality. Consequently, with judgment B 518/11, the Verfassungsgerichtshof overturned the decision, asked for an interpretation in line with the constitution and requested equal treatment of married couples and couples in registered partnerships in terms of the format of double-barrelled surnames. The court found that the sole purpose of having different formats for double-barrelled surnames (without a hyphen for same-sex partners in a registered partnership, but with a hyphen for married partners of different sexes) was to discriminate against homosexuals in relation to heterosexuals.

The Verfassungsgerichtshof also decided to examine, of its own motion, the constitutionality of the Austrian name change law. In judgment G 131/11, it repealed the legal provision ruling out an application for surname change after the conclusion of a same-sex partnership on the grounds that it violated the constitutional principle of equality and Articles 8 (right to respect for private life) and 14 (prohibition of discrimination) of the European Convention on Human Rights.

Thus from now on, registered partners may request a surname change after their partnership has been registered. They will now receive the same treatment as married people with regard to double-barrelled surnames.

Verfassungsgerichtshof, judgments of 3 March 2012, nos. B 518/11 and G 131/11, www.vfgh.gv.at

IA/33234-A

[WINDIJO]

Belgium

Judicial cooperation in criminal matters – European arrest warrant and surrender procedures between the Member States – Decision to enforce the arrest warrant – Appeal in cassation – Alleged violation of Article 6 of the Convention – Appeal dismissed

H.S.S., the subject of a European arrest warrant, lodged an appeal in cassation against the judgment handed down by the prosecuting chamber of the Ghent Court of Appeal on 29 December 2011. The appellant submitted four arguments in support of the appeal.

The appellant's first argument was based on a supposed violation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and Article 4(5) of the Belgian law on the European arrest warrant (EAW). The Cour de Cassation rejected this argument, finding that a national court could not look into the violation of the right to have an investigation into whether prosecution is founded conducted within a reasonable rime, as provided for by Article 6 of the Convention, unless that court also had the power to hear the substance of the case. An investigating court acting as the executing judicial authority in a Member State does not has this power, and thus only rules on the enforcement of an EAW. In fact, in this case, public prosecution is only pending before the judicial authority that issued the arrest warrant, thus making it the only court with the power to rule on the substance of the case for prosecution. Furthermore, the fact that investigating court must examine the grounds for refusal, provided for in Article 4(5) of the law on the EAW, does not mean that it must also determine whether the reasonable time for a judgment to be made on prosecution has been exceeded. For these same reasons, the Cour de Cassation dismissed the second argument, which was based on a breach of Article 13 of the Convention (right to an effective remedy).

The third argument cited in support of the appellant's appeal was rooted in a breach of Articles 6(3) and 13 of the Convention. In the contested decision, the prosecuting chamber declared that it did not have the power to rule on the regularity of the EAW and would have to limit itself to performing the legal checks specified in Articles 16(1) and 16(2) of the law on the EAW. Furthermore, the appellant did not receive assistance from a lawyer during the hearing, which, in the appellant's view, constituted a violation of Article 6(3) of the Convention.

The Cour de Cassation also rejected this argument, pointing out that under Articles 11(1) and 11(2) of the law on the EAW, a hearing of the subject of an EAW by the investigating court only relates to the question of whether that person will be put into detention and therefore has nothing to do with the regularity of the EAW issued by the issuing judicial authority. During the hearing, the subject of the EAW is informed of: the existence and content of the EAW, the possibility of consenting to being surrendered to the judicial authority that issued the EAW, and the right to choose a lawyer and interpreter. Consequently, the cited provisions were not violated.

Since none of the appellant's arguments were upheld, the Cour de Cassation dismissed the appeal.

Cour de Cassation, judgment of 10 January 2012, P.12.0024.N, www.cass.be

IA/32961-A

[FLUMIBA]

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Freedom of establishment and freedom to provide services – Taxi and car rental services – Obligation to submit a reference for a preliminary ruling to the European Court of Justice – Absence

The Brussels court of first instance had been asked by several taxi companies established in the Flemish and Walloon regions to rule on their applications contesting the Brussels-Capital Region order of 27 April 1995 on taxi and chauffeur-driven car hire services. Under this piece of legislation, a vehicle driver working for a taxi service operated from outside Brussels-Capital Region is prohibited from taking a fare from within Brussels-Capital Region on the grounds that the operator of the taxi service does not have a licence to operate in Brussels-Capital Region. Since the court observed that two judgments of the Brussels Court of Appeal, handed down in 2009 and 2011 respectively, had reached opposite conclusions on the matter, it decided to stay proceedings and refer two preliminary questions to the Cour Constitutionnelle. The second of these questions asked about the consistency of the aforementioned order with, among others, the principles of free movement of persons, goods, services and capital.

In their submission, the appellants declared that if the Cour Constitutionnelle's response to their preliminary questions was negative, they

wanted it to submit to the European Court of Justice a reference for a preliminary ruling with regard to the interpretation of Articles 49 and 56 TFEU. The Cour Constitutionnelle found that as a result of the Cilfit judgment (judgment of 6 October 1982, C-283/81, ECR 1983, p. I-4219), it was not under any obligation to refer to the European Court of Justice, despite being a court of the type referred to in paragraph 3 of the article (a court against the decisions of which no appeal may be brought), because it had at its disposal elements that would allow it to answer the questions raised by the parties.

The Cour Constitutionnelle then analysed the consistency of the contested order with Articles 49 and 56 TFEU. It highlighted the case law of the European Court of Justice in a number of cases, mentioning that restriction of these freedoms could be justified if the measures in question pursued a legitimate objective, in a relevant and proportionate manner, or were justified by imperative requirements in the general interest. It concluded that, in the case in point, the order met these conditions as it pursued the objective of regulating and coordinating transport and the legislature issuing the order had not taken any excessive measures in the aim of achieving the objective. Consequently, the Cour Constitutionnelle concluded that the measures were properly justified and that the rights that the parties concerned derived from Articles 49 and 56 TFEU had not been breached, meaning there was no need to submit a reference for a preliminary ruling to the European Court of Justice.

Cour Constitutionnelle, judgment of 8 October 2012, no. 40/2012,
www.const-court.be

IA/32962-A

See also the contribution on the European Court of Human Rights' judgment of 20 September 2011, Ullens de Schooten and Rezabek v. Belgium (page 1 of this issue of *Reflets*).

[FLUMIBA]

Denmark

Treaty of Lisbon – Application to have the law ratifying the Treaty declared unconstitutional - Dismissal

The Østre Landsret (Eastern High Court) dismissed an application lodged by 34 Danish citizens against the Prime Minister and the Minister for Foreign Affairs with regard to the constitutionality of the law ratifying the Treaty of Lisbon (see also *Reflets no. 1/2011*, p. 14).

Taking as their basis a range of changes introduced by the Treaty of Lisbon, the appellants argued that the treaty transferred powers to international authorities, so the ratifying law should not have been adopted by a simple majority in the Danish parliament, as was the case, but rather in line with the procedure for transferring powers to international authorities, set out in Article 20 of the Danish constitution, which requires approval by a majority of five-sixths of the parliament's members or a simple majority of members and a referendum.

The Østre Landsret reiterated that Article 20 of the constitution had been introduced to enable Denmark to participate in international cooperation that involved transferring to an international authority legislative, administrative or judicial powers that have direct effect in Denmark without having to amend the constitution. Thus such transfer of powers may only be made in line with the procedure set down in Article 20, unless the constitution is amended.

The Østre Landsret stated that ratification of a treaty amending a treaty that had already been ratified using the procedure set down in Article 20 required a new procedure under that provision when the amendment entailed transferring to an international authority legislative, administrative or judicial powers that have direct effect in Denmark. This is the case when an international authority is given the power to regulate new areas through acts that will have direct effect for individuals and companies in Denmark, and also when the nature of the transferred powers is expanded.

If an amendment to a treaty only involves introducing a legal base with a view to specifying a power that the international authority already holds by virtue of another

legal base, there is no expansion or amendment of that authority's powers to require application of the procedure set down in Article 20.

Similarly, changes to the organisation, composition and voting rules of the international authority, where these do not entail expanding the treaties' scope of application or transferring new or expanded powers to the international authority, do not, in principle, require the application of the procedure set down in Article 20.

Where an amendment to a treaty concerns Denmark's opt-outs with regard to citizenship, the euro, justice and home affairs, and the defence policy (Protocol no. 22), there is no need to apply the aforementioned procedure.

With regard to the legal personality of the European Union (Article 47 TEU) and the categories and areas of Union competence (Articles 2-6 TFEU), the Østre Landsret argued that this was a case of a legal base being introduced with a view to specifying a power that the European Union already holds by virtue of another legal base. In this respect, it referred to Declaration no. 24, according to which "the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or act beyond the competences conferred upon it by the Member States in the Treaties". Moreover, the court believed that the explicit listing of the Union's powers did not constitute an expansion thereof, but rather a confirmation of the distribution of powers between the Union and the Member States that was already in place before the Treaty of Lisbon was adopted.

With regard to the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") (Article 6(2) TEU), the Østre Landsret considered that this was neither an expansion of the Union's powers not a set of provisions allowing the adoption of acts of law that have direct effect. In this connection, it referred to Protocol 8, Article 2 of which states that "[the accession agreement] shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of the Member States in relation to the European Convention…". The court also highlighted that the Council had to decide unanimously in favour of accession and that the decision had to be ratified by the Member States.

As for the recognition of the rights, freedoms and principles mentioned in the Charter of Fundamental Rights of the European Union, which has the same legal value as the treaties, the Østre Landsret observed that under Article 6(1) TEU, "the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties". Furthermore, it pointed out that the Charter's provisions are based on the Convention and the constitutional traditions of the Member States. It thus concluded that this recognition merely served to specify a power already held by the Union by virtue of another legal base.

With respect to changes to the legislative procedure, and more specifically, the introduction of decisions by qualified majority within the Council, the Østre Landsret found that the changes did not expand the treaties' scope of application or involve a transfer of powers. In this connection, it observed that switching from unanimous decisions to decisions by qualified majority did not entail a transfer of powers as the relevant powers were transferred in the past. The same applies to the 'bridging' clauses, particularly Article 48(7) TFEU.

In reference to Declaration no. 17 on the primacy of European Union law and the flexibility clause contained in Article 352 TFEU, the Østre Landsret found that the provisions simply specify powers the Union already holds by virtue of another legal base. It emphasised, in this connection, that Declaration no. 17 does not in any way modify the scope of the principle of primacy as defined by the case law of the European Court of Justice. Furthermore, it considered that the declaration did not amend the principle according to which the national constitution has primacy over European Union law. Finally, it observed that the differences between the old flexibility clause, which featured in Article 308 EC, and the new flexibility clause in Article 352 TFEU did not reflect an expansion of the European Union's powers. It based its position in this respect on Declaration no. 42, which states that "in accordance with the settled case law of the Court of Justice of the European Union,

Article 352 of the Treaty on the Functioning of the European Union […] cannot serve as a basis for widening the scope of Union powers."

On the subject of changes with respect to social security, energy policy, non-EU countries, humanitarian aid and international agreements, the Østre Landsret found that the provisions specify powers that the Union already holds by virtue of other legal bases.

With regard to Article 216 TFEU on the conclusion of international agreements and Article 3 TFEU on the exclusive nature of this competence, the Østre Landsret held that even before the Treaty of Lisbon, the European Union had the power to conclude international agreements and that according to the case law of the European Court of Justice, this was, to a great extent, an exclusive competence.

In the view of the court, Article 21 on the right of Union citizens to move and reside freely within the territory of the Member States merely serves to specify a power that the Union already held by virtue of another legal base.

With regard to Article 23(2) TFEU, which allows the Council to adopt directives establishing the cooperation and coordination measures necessary to facilitate the protection of all citizens by the diplomatic and consular authorities of any Member States, the Østre Landsret found that the change did not enable the adoption of legal acts that have direct effect.

The same applied to Article 39 TEU, which allows the Council to adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data, as well as to changes linked to the jurisdiction of the European Court of Justice in intellectual property matters and the Common Foreign and Security Policy. In fact, Article 262 TFEU specifies that a Council decision awarding the European Court of Justice jurisdiction in intellectual property matters must be ratified by the Member States.

Østre Landsret, judgment of 15 June 2012, (B-222-11),
www.domstol.dk/OESTRELANDSRET/NYHEDER/Pages/default.aspx

IA/33305-A

[JHS]

Spain

Telecommunications sector – Directive 97/13/EC of the European Parliament and of the Council – Fees and charges applicable to companies holding individual licences – Admissibility of a national law in light of Directive 97/13/EC of the European Parliament and of the Council – Special admissibility conditions – Dissenting opinion

Having been asked to rule on an appeal in cassation against a judgment handed down by the Audiencia Nacional (equivalent to a court of appeal) on 13 July 2006, which confirmed the judgment issued by the Tribunal Económico Administrativo on 23 May 2002, the administrative chamber of the Tribunal Supremo handed down a controversial judgment on 12 April 2012. While the court seems to have followed the European Court of Justice's judgment of 10 March 2011 (Telefónica Móviles España SA, C-85/10, not yet published in the European Court Reports), a number of judges issued a dissenting opinion. This opinion expresses the view that if the European Court of Justice's judgment had been followed properly, the Tribunal Supremo would have arrived at a different solution.

The dispute in the main proceedings related to a recovery order issued by the Secretary of State in charge of telecommunications and the information society in respect of a fee for the reservation of a public radio frequency for a certain period. As the company Telefónica Móviles wished to have the order, which was for an amount of almost €700,000, annulled, it lodged an administrative appeal against it. This appeal was dismissed by both levels of jurisdiction.

The case in hand concerned a doubt that had been raised by the company Telefónica Móviles with regard to the consistency of Spanish laws 13/2000 and 14/2000, which formed the legal basis for the recovery order, with Directive 97/13/EC of the European Parliament and of the Council on a common framework for general authorisations and individual licences in the field of telecommunications services. The Tribunal Supremo submitted a reference for a

preliminary ruling to the European Court of Justice. The question it referred related to the interpretation of Article 11(2) of Directive 97/13/EC of the European Parliament and of the Council.

In its judgment of 10 March 2011, the European Court of Justice ruled that the two Spanish laws were consistent with Directive 97/13/EC of the European Parliament and of the Council. In the view of the ECJ, national legislation that provides for a fee to be levied on operators of telecommunications services holding individual licences for the use of radio frequencies, but does not allocate a specific use to income derived from that fee, and which significantly increases the fee for a particular technology but leaves it unchanged for another, is not contrary to Directive 97/13/EC of the European Parliament and of the Council provided that the Member States meet three conditions. According to these conditions, there must be equality of opportunity between the various economic operators; the different amounts imposed must reflect the respective economic values of the uses made of the scarce resource at issue; and finally, the requirements arising from the purpose of the charge must be respected, that it to say, that the charge must be neither too excessive nor too low. Consequently, the Tribunal Supremo dismissed Telefónica Móviles' arguments relating to inconsistency.

According to the dissenting opinion, the Tribunal Supremo's judgment is based on the hypothesis that the national law is consistent with Directive 97/13/EC, without checking whether the three specific conditions were met in the case in point. In the view of the judges who issued the dissenting opinion, the fee increase for the financial year 2001 did not meet the conditions that the European Court of Justice used to justify the Spanish law's legitimacy under Community law. That would mean that the recovery order was ill-founded and that the appeal in cassation should not have been dismissed. In other words, according to the dissenting opinion, if the Tribunal Supremo had really followed the ECJ's judgment, and more specifically paragraph 37 thereof, which states that it is for the national court to determine whether the national legislation at issue in the main proceedings complies with the three conditions laid down, the opposite solution should have been reached.

Tribunal Supremo, Sala de lo Contencioso Administrativo, judgment of 12 April 2012, no. 5216/2006,
www.poderjudicial.es/search/index.jsp

IA/33308-A

[PERREGU]

France

Judicial cooperation in civil matters – Creation of a European Enforcement Order (EEO) for uncontested claims – Regulation (EC) No. 805/2004 of the European Parliament and of the Council – Certification scheme – EEO only effective within the limits of the enforceability of the certified decision – Original court's non-issuance of a certificate indicating the suspension of the judgment's enforceability immaterial

On 6 January 2012, the Cour de Cassation ruled, for the first time to our knowledge, on the European enforcement order (EEO) scheme set up by Regulation (EC) No. 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims (see also Lyon Court of Appeal, 14 October 2010, RG no. 09/04873, JCP E, 2011.2066, report by Nourissat, and since then, Second Civil Chamber, 22 February 2012, no. 10-28.379). The case concerned the scope to be given to Article 6(2) of the regulation in question, read in conjunction with Article 11 of the same regulation. According to the first provision, "where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued […]". Article 11 provides that "the European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment".

In the case in point, a creditor received a decision certified as an EEO from a German court of first instance. On the basis of the EEO, the creditor then had the debtor's accounts

garnished in France. The debtor then brought an application for release from these measures before the enforcing French court and contested the judgment that served as a basis for the EEO before a German court of second instance. Despite an appeal by the creditor, the German court concluded that the judgment was not enforceable as an EEO. The executing French court also upheld the debtor's application. The creditor then lodged an appeal with the Cour de Cassation, claiming that Regulation (EC) No. 805/2004 of the European Parliament and of the Council had been breached to the extent that the German court of first instance had not issued a certificate indicating the lack or limitation of enforceability, meaning that the EEO was still effective. However, confirming the reasoning of the Court of Appeal, the Cour de Cassation found that since the second German judgment, which was binding, had annulled the European enforcement warrant that was certified as equivalent to an EEO and issued by the German court of first instance, the Court of Appeal was right to order release from garnishment to the extent that "as per Article 11 of European regulation no. 805/2004, the European Enforcement Order was only effective within the limits of the enforceability of the judgment certified as no longer enforceable by the judgment [of the German court of second instance], meaning that there was no longer any legal basis for garnishment".

This solution appears to be consistent with the spirit and letter of the regulation, which, admittedly, provides that an informative certificate should be provided on request by the court of origin when an EEO's enforceability is suspended. However, this certificate is in no way "a substantial formality that is required for enforceability to be terminated or suspended (S. Piedelièvre, *Titre exécutoire communautaire et régime de la certification*, Revue de Droit bancaire et financier, 2012, comm. 65). This is what emerged from Cour de Cassation's judgment.

Cour de Cassation, Second Civil Chamber, 6 January 2012, no. 10-23.518, www.legifrance.gouv.fr

IA/32955-A

[MHD]

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Border controls, asylum and immigration – Immigration policy – Return of illegally staying third-country nationals – Directive 2008/115/EC of the European Parliament and of the Council – Community Code on the rules governing the movement of persons across borders – Abolition of controls at internal borders – Checks within the territory – Inconsistency of two national provisions in the aforementioned domains with European Union law as interpreted by the European Court of Justice

The Cour de Cassation issued two important decisions in quick succession, namely an opinion and a judgment on the status of non-French nationals, relating more specifically to the link between European Union law on border controls and immigration and national law. As a result, two of the main provisions of the Code governing Entry and Residence of Foreigners and the Right of Asylum (CESEDA) were rejected by France's high court judges on the basis of European Union law, as interpreted by the European Court of Justice in preliminary rulings requested by France in the Melki (judgment of 22 June 2010, C-188/10 and C-189/10, ECR 2010 p. I-05667) and Achughbabian (judgment of 6 December 2011, C-329/11, not yet published in the European Court Reports) cases.

Firstly, on 5 June 2012, at the request of the First Civil Chamber, which was examining a number of appeals, the Criminal Chamber of the Cour de Cassation issued an opinion on the sensitive issue of whether it was legal to place a third-country national in custody solely on the basis of Article L. 621 -1 of the CESEDA, which makes it a criminal offence to stay in France illegally, in light of the European Court of Justice's judgments in the El Dridi (28 April 2011 C-61/11 PPU, not yet published in the European Court Reports) and Achughbabian, (6 December 2011, mentioned above) cases.

It should be noted that in the latter judgment, the ECJ found that "Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures for returning illegally staying third-country nationals must be interpreted as precluding

legislation of a Member State repressing illegal stays by criminal sanctions, in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive […]". Following that judgment, the Ministry of Justice issued an information paper on "the scope of [this judgment] in terms of the consistency of Article L.621-1 of the CESEDA with Directive 2008/115/EC of the European Parliament and of the Council, known as the Return Directive" (CRIM no. 11 -04-C39) in which it submits that the ECJ's judgment only takes effect when criminal proceedings are opened against the illegally staying third-country national on the basis of Article L. 621-1 of the CEDESA and not when that person is placed in custody. Consequently, in the Ministry's view, the directive affects neither the custody measures taken on the basis of CEDESA nor the detention measures that may follow. Conversely, the Criminal Chamber held that in such cases, an illegally staying third-country national could not be placed in custody as the result of a procedure performed on the basis of Article L. 621-1 of the CESEDA alone. In the Criminal Chamber's view, it follows from the Return Directive, as interpreted by the European Court of Justice, that "a third-country national who is facing charges that only relate to the offence mentioned in Article L. 621-1 of [the CESEDA] shall not be imprisoned if he has not already been subject to the coercive measures referred to in Article 8 of the directive". Based on this, custody that may only be used as a measure "when there is reasonable cause to suspect that the person in question has committed […] a crime or offence punished by imprisonment", as mentioned in Article 62-2 of the Criminal Code, no longer has any basis in law. Now all we can do is await the judgments of the First Civil Chamber of the Cour de Cassation to discover what scope will be given to this opinion, which has already given rise to extensive commentary in legal literature.

Secondly, in a judgment handed down on 6 June 2012, the First Civil Chamber of the Cour de Cassation considered all the implications of the aforementioned Melki judgment, ruling that Article L. 611-1(1) of the CESEDA, according to which "independent of any identity checks, people of non-French nationality must be able to present the papers or documents authorising them to move or reside on French territory […]", does not meet the requirements set by European Union law as interpreted in the Melki judgment. It should be noted that under European Union law, it must be possible to cross internal borders without going through any controls (Article 67(2) TFEU), regardless of the nationality of the persons crossing the border. Therefore, any form of control at internal borders is prohibited, without prejudice, according to Article 21 of Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), to "the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks". In the Melki judgment, which was handed down following a reference for a preliminary ruling from the French courts, the European Court of Justice ruled that "Article 67(2) TFEU and Articles 20 and 21 of Regulation (EC) No. 562/2006 of the European Parliament and of the Council preclude national legislation granting to the police authorities of the Member State in question the power to check […] the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks

In the case in point, a Somali national, Mr Ali X., was subject to a control that was carried out on the basis of Article L. 611-1 of the CESEDA. Since he was staying irregularly, he was placed in custody, a removal order was issued against him and he was placed in detention. The judge responsible for determining whether he should remain in custody while his case was investigated (*juge des libertés et de la detention*) then extended his stay in detention, this decision being approved by an order of the First President of the Lyon Court of Appeal. Mr Ali X. lodged an appeal with the Cour de Cassation,

which ruled that the control, which was performed on the basis of Article L. 611-1(1) of the CESEDA, was contrary to European Union law, under the conditions outlined above, "since [this article] is not linked to any provisions aiming to guarantee that exercise of the power [to perform controls] does not have an effect equivalent to border checks". Thus the justification presented in the appeal order, namely the fact that the coach used by Mr Ali X. had a foreign registration plate constituted "objective evidence of foreign origin justifying the performance of controls on passengers" by virtue of Article L. 611-1 of the CESEDA, was dismissed by the supreme judges, who quashed and annulled the appeal order on the grounds that this article gives the police authorities the power, aside from any identity controls, to check the documents giving foreign nationals the right to move and reside "irrespective of their behaviour and of specific circumstances giving rise to a risk of breach of public order", despite the requirement in European Union law. The Cour de Cassation, which has jurisdiction in matters of ordinary law in European Union law, thus disapplied the contested provision of the CESEDA.

Cour de Cassation, First Civil Chamber, 6 June 2012, no. 10-25.233; Cour de Cassation, Criminal Chamber, opinion no. 9002, 5 June 2012, www.legifrance.gouv.fr

IA/32956-A
IA/32957-A

[MHD]

Greece

European Union – Monetary union – Public deficits – Memorandum of understanding between Greece and a number of eurozone countries with a view to tackling excessive public deficit – Consistency with the constitution

Having been asked to rule on a number of joined appeals lodged by 31 appellants – including the Athens Bar, the national journalists' trade union, the Chamber of Technical Professions, the Civil Servants' Confederation, the Confederation of Retired People and the Military Aviation Club, some of which were declared inadmissible for lack of *locus standi* or lack of a contestable act – the Greek Symvoulio tis Epikrateias (Council of State, hereinafter referred to as "the SE") dealt, in one of the most sensitive cases it has ever had to handle, with the difficult issue of the constitutionality of the austerity measures adopted by the Greek authorities in execution of the Memorandum of Understanding (MoU) concluded between Greece and a number of eurozone countries in the aim of tackling the debt crisis that is ravaging the country.

The Plenary Assembly's judgment on the matter (no. 668/2012), handed down on 20 February 2012, began by dismissing the objection of unconstitutionality raised by the appellants in respect of law 3888/2010, which introduced into national legal order the MoU by virtue of which administrative acts were adopted to reduce salaries, pensions and various benefits, with an application being made before the SE for the acts' annulment. The SE first observed that the MoU did not have to do with matters internal to national legislature, then examined the substance of the case. It stated that from the latter point of view, the MoU did not constitute an international treaty that transfers powers exercised by State bodied to an international organisation and which, as such, should have been approved by a three-fifths majority of members of parliament, as required in such cases by Article 28(2) of the Greek constitution. Therefore, regardless of the fact that the MoU annexed to the national law is the product of cooperation between Greece and a number of international bodies including the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF), it is in fact the national government's programme for tackling the financial crisis and the risk of the State going bankrupt. In the SE's view, the fact that the MoU is annexed to the law is merely a way of "publically and officially giving notice of its content and the schedule for its implementation". As such, according to the SE, the MoU does not give any powers to bodies within international organisations. In addition, it does not have direct effect: its implementation requires a series of internal acts to be adopted, thus further emphasising the retention of powers by national bodies.

However, this position was not supported by all of the judges, who issued a number of concurring and dissenting opinions, most of which were drew on the express terms featuring

in the MoU and their use by national public authorities. In the eyes of nine judges, the MoU is indeed an international treaty through which the Greek State transfers some of its powers to international bodies. From this point of view, its ratification by law 3845/2010, without the qualified majority required by the constitution, would be null and void.

Next, the appellants' argument that the authorisation granted through the law to allow the Minister for Finance to sign the memorandums, agreements and loan agreements with the Commission, IMF and ECB with a view to the MoU's implementation was unconstitutional, was dismissed as being irrelevant to the contested acts, so the merits of this argument were not examined.

Moreover, contrary to the appellants' allegations, the SE considered that insofar as the MoU merely constituted an official announcement of the government's intended course of action, neither the MoU nor the law incorporating it into national legal order infringed upon national sovereignty through an alleged transfer of powers relating to implementation of the country's economic and financial policy. According to the judgment, these powers continue to fall within the scope of national sovereignty. It therefore follows that Article 28(3) of the constitution, which authorises limitations on national sovereignty for important reasons in the national interest to be approved by an absolute majority of members of parliament, is no more violated by either one of the aforementioned legal texts than is Article 28(2).

The SE then ruled that measures on the reduction of certain salaries and pensions were consistent with Article 1 of Additional Protocol No. 1 of the European Convention on Human Rights (hereinafter referred to as "the Convention") on respect of assets. According to the judgment, which mentions the case law of the European Court of Human Rights (ECHR) in this regard, while the income in question does indeed constitute an asset, the provision's purpose is not to guarantee a certain level of salary or retirement pension. Since they are justified by reasons in relating to protection of the general interest – i.e. tackling the financial crisis, stabilising public finances and preventing the country's bankruptcy – such reductions, if subject to limited judicial review, do not breach the right to respect of assets. This observation holds all the more true given that the measures are being taken as part of a broader programme aiming to boost the competitiveness of the national economy and reduce inflation and, as such, are accompanied by a raft of other measures to meet these objectives.

In the SE's view, the fact that these reductions were not adopted in isolation but were, conversely, accompanied by measures with a larger scope confirms their proportionality in view of the aim they pursue.

For the same reasons, the SE found that there had been no violation of Article 17 of the constitution, which deals with protection of property, Article 25(1)(d), which enshrines the principle of proportionality, or of the principle of legitimate expectation, which does not, in any case, entitle people to a specific level of income unless there is a risk of them being forced into inhuman living conditions, an argument which was not raised by the appellants.

The judges also ruled constitutional the authorisation granted by Article 3(15) of the contested law to the Ministers for Finance and Labour and Social Security to allow them to jointly decide on all matters relating to the reduction of retirement benefits, which are governed by Articles 3(10) to 3(14). Contrary to the appellants' allegations, the SE found that the authorisation is not too general in nature, but rather is consistent with Article 43(2) of the constitution since it relates to the implementation of rules of which the principle is contained in the aforementioned legal provisions.

With regard to the right to effective judicial protection, the appellants argued that the law was excessively general and thus did not allow individual judgments to be made for each employee or retired person. The SE responded that the provisions in question were implemented by individual acts, which could then be contested before the administrative courts.

Maintaining the same line, the SE held that in cases of prolonged economic crisis, the legislature can set measures to reduce public

spending, within the limits of the principle of equal discharge of public burdens, according to individual abilities (Article 4(5) of the constitution) and the principle of respect for human dignity. Consequently, these burdens must be spread over all categories of workers by virtue of the principle of national and social solidarity, enshrined in Article 25(4) of the constitution. The legislature is thus not allowed to put certain groups of citizens at a disadvantage while giving preferential treatment to others.

In the SE's view, this principle is not violated by the establishment of tax amnesty measures such as those set up by law 3888/2010, which provides for the conclusion of tax disputes. The measures in question entail the permanent loss of some tax revenue and imposed the contested salary reductions as a means of making up the loss. The judges, however, were of the opinion that the measures would lead to an increase in public revenue in the short term. Moreover, they held that the contested reductions would not be felt if they were introduced in isolation; their impact stems from their relationship with other measures. Only the combined effect of all of these measures could be subject to limited judicial review, particularly in the view of the current economic climate, which is a serious threat to the national economy.

The SE also found that the contested measures were consistent with the principle of equality. Indeterminate application of reductions to the Christmas and Easter benefits and paid leave of all public-sector employees earning less than €3,000 per month and of all retired people aged over 60 and earning less than €2,500 per month does not constitute identical treatment of different situations. On the contrary, the greater needs that justify the adoption of these measures affect all employees and retired people, without any distinction linked to their salary or pension, which explains the uniform application of the measures. Moreover, the criterion of age set by the legislature is justified by the care provided to elderly people. Besides this, the contested provision is almost temporary in nature, since the legislature intends to combine these measures with a restriction on early retirement, which will be introduced through a subsequent law.

Finally, the SE dismissed the appellants' claims that law 3845/2010 violated economic freedom (Article 5(1) of the constitution), the guarantee accorded to collective agreements as the way to set employees' salaries (Article 22 of the constitution) and trade union freedom and the right to collective bargaining (protected by Article 23 of the constitution and by international labour agreements). The judges found that these rights and principles are connected to provisions of the law that were not implemented by the contested acts, and thus refused to examine the merits of the arguments relating to them.

Symvoulio tis Epikrateias, Plenary Assembly, judgment no. 668/2012 of 20 February 2012, NOMOS database,
www.lawdb.intrasoft.com

IA/33061-A

[RA][MARKEAF]

Italy

Fundamental rights – Right to respect for private and family life – Right to marry – Transcription of a marriage contracted abroad between two members of the same sex – Qualification of the act in national legal order

Having been asked to rule on a matter relating to whether it was possible to transcribe in Italy a marriage certificate issued in the Netherlands upon the marriage of two men, the Corte di Cassazione drew some new conclusions in an effort to coordinate the case law of the Corte Costituzionale (judgment no. 138/2010, discussed in *Reflets no. 3/2010*) with that of the European Court of Human Rights (ECHR) in that respect (Schalk and Kopf v. Austria, application no. 30141/04, judgment of 24 June 2010).

The Corte di Cassazione had been asked to rule on an application to have declared illegal the registrar's refusal (which was confirmed on appeal) to transcribe into the civil status register of the town of Latina a marriage concluded by an Italian same-sex couple in the Netherlands. The registrar's refusal was contested on the basis of Article 18 of presidential decree (DPR) no. 396 of 3 November 2000 on civil status, which stipulates that certificates issued abroad cannot be transcribed in Italy if they are contrary to public policy.

In line with the settled case law of the Corte di Cassazione, the Court of Appeal had ruled that the marriage contracted abroad was a measure that did not exist in Italian legal order because it was essential to the very existence of marriage that the spouses be of different sexes. The Corte di Cassazione confirmed that the marriage could not be transcribed into the civil status register. However, it overturned the traditional interpretation based on the inexistence of the measure, as adopted by the Court of Appeal, and developed a completely new line of reasoning that constituted a true reversal of case law.

After examining the relevant national provisions, from which it could be concluded that it is an essential condition in Italian legal order that the spouses be of different sexes, the Corte di Cassazione reiterated that the aforementioned Corte Costituzionale judgment precluded the recognition of same-sex couples' right to marry by the constitution. Nevertheless, the Corte di Cassazione considered it necessary to introduce the ECHR's interpretation of the issue, which had been issued in the meantime, into Italian law. The judgment in Schalk and Kopf v. Austria, mentioned above, affirmed on the one hand that the right to marriage, within the meaning of Article 12 of the European Convention on Human Rights, was not restricted to couples of different sexes, and on the other hand, that the matter was left at the discretion of national legislatures. On the basis of the ECHR judgment, the Corte di Cassazione found that the premise that marriage can only be contracted between spouses of different sexes should no longer be used in Italian law.

While Italian law does not recognise the right of same-sex couples to marry and does not allow marriage certificates issued abroad upon the marriage of two people of the same sex to be transcribed in Italy, same-sex couples must be considered to have a "right to family life", and thus the right to request and receive "similar treatment to that given by law to married couples".

With regard to the specific issue of whether it was possible to transcribe a marriage contracted abroad by two people of the same sex, the Corte di Cassazione found that the ban could not be contested on the grounds of the non-existence or invalidity of the marriage under Italian law. Rather, it could only be contested on the grounds that the foreign certificate would be unable to produce any legal effect as a marriage in Italian law.

The judgment, which received a lot of media coverage, not only represents a significant reversal of the case law of the Corte di Cassazione, it also gave a less restrictive interpretation to the Corte Costituzionale judgment mentioned above, this interpretation being based on the recent case law of the ECHR.

Corte di Cassazione, Sez. I, judgment of 15 March 2012, n° 4184, www.italgiure.giustizia.it

IA/32877-A

[REALIGI]
[MSU]

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Competition – Directive 98/30/EC of the European Parliament and of the Council – Internal market in natural gas – Procedures for the award of public works contracts – Exclusion of companies that have already been directly awarded gas distribution services without competitive tendering

In its decision of 8 October 2011, the Consiglio di Stato ruled that a company that had already been directly awarded natural gas supply contracts without a formal public tendering procedure could not be authorised to take part in other procedures for the award of public works contracts in the gas sector.

In this respect, the Italian legislation transposing Directive 98/30/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas stipulated, on the one hand, that public authorities had to award gas distribution services exclusively through competitive tendering procedures, and on the other hand, banned companies that operate or had already operated in the gas sector in Italy or any other EU country without having gone through a competitive tendering process to secure their contracts from participating in other competitive tendering procedures for gas distribution contracts.

After specifying that the legislature's objective is to liberalise the gas market, the Consiglio di Stato interpreted the scope of the ban as also applying to promoters chosen within the framework of the financed project, regardless of the fact that such a project could well comply with the rules on competition.

In the view of the Consiglio di Stato, public contracts for gas distribution services are awarded in interdependent stages.

This means that the stage of defining the intervention project is significant for the subsequent stages, which are to do with the actual competitive tendering procedure for the public contract.

Consequently, promoters must, in principle, meet the conditions imposed on contractors. The project developed by the promoter is binding upon the contractor when there are no other projects. Finally, the promoter also has priority over the contractor, which enables the promoter to be awarded the service in another's place and under the same conditions.

Given the interdependence between the various stages, the Consiglio di Stato ruled that the ban on participating in other procedures for the award of public works contracts should also apply in the first stage for the selection of promoters' projects.

This judgment and the Italian legislation in question could be problematic in view of the principles relating to free competition contained in the TFEU.

However, their justification is rooted in the fact that they pursue the aim of no longer giving preferential treatment to operators that have already been awarded public works contracts directly, without competitive tendering.

Consiglio di Stato, judgment of 8 October 2011, no. 5495, www.dejure.it

IA/32875-A

[VBAR]

Latvia

Copyright and related rights – Storage media – Private copying – Fair compensation provided for by Directive 2001/29/EC of the European Parliament and of the Council – Fee levied on empty storage media and devices for making copies – Government's duty to amend the national regulation in view of technological development

With its judgment of 2 May 2012, the Satversmes tiesa (Latvian Constitutional Court) ruled on the consistency of the provisions of government regulation no. 321 of 10 May 2005 on collection of a fee on storage media with Article 113 of the Latvian constitution (Satversme), which provides for copyright protection.

The appellant, namely all copyright companies, had lodged a complaint against the provisions of the contested regulation, demanding that the Satversmes tiesa rule on the unconstitutionality of the provisions. The regulation did not provide for a fee to be levied on some storage media, including USB sticks, while other media (such as CDs and DVDs) were subject to the fee. Moreover, the contested regulation had not been amended to take account of the fast development of storage media technology since its entry into force.

While checking the consistency of government regulation no. 321 with the Latvian law on copyright (Autortiesību likums), the Satversmes tiesa took note of the requirements laid down in Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society and decided that there was no justification for leaving various types of storage media off of the common list.

When it was drawing up the list of storage media, the government did not set specific criteria to justify the inclusion of certain storage media, as required by the European Court of Justice's judgment of 21 October 2010 in the Padawan case (C-467/08, not yet published in the European Court Reports). As such, the Satversmes tiesa, referring to the German Bundesverfassungsgericht's order [no. 1 BvR 1631/08] of 30 August 2010 (see *Reflets no. 3/2010*, p. 9), emphasised that it was for the government to periodically

consider the need to amend the regulation in question, particularly by adopting or revising special criteria to take account of the overall development of technology.

The Satversmes tiesa also found that the competent institution (the Ministry of Culture in the case in point), which is required to examine opinions from the various social partners and institutions, did not have to ensure an agreement between the partners. As to the need to amend the provisions in question, the court held that a difference in opinion did not free the government from its duty to consider amending the provisions itself.

Satversmes tiesa, judgment of 2 May 2012, no. 2011-17-03, www.satv.tiesa.gov.lv

IA/33304-A

[AZN] [KETOVAL]

Lithuania

Judicial cooperation in civil matters – Insolvency proceedings – Council Regulation (EC) No. 1346/2000 Recognition of main insolvency proceedings opened by a court in another Member State – Grounds for refusal – Contrary to public policy in the State in which recognition is sought – Debtor against whom insolvency proceedings may not be brought in the State in which recognition is sought - Exclusion

In its judgment of 4 April 2012, the Aukščiausiasis Teismas (Supreme Court) ruled on the recognition and enforcement of a judgment opening insolvency proceedings handed down by a court in another Member State.

The person concerned, a commercial bank, asked the Aukščiausiasis Teismas to refuse to recognise and enforce the decision on the grounds that Lithuanian law did not provide for the hypothesis of a natural person being insolvent. In that connection, the bank argued that Council Regulation (EC) No. 1346/2000 on insolvency proceedings should only be applied in Lithuania in cases of insolvent companies, because otherwise, recognition or enforcement could produce a series of effects that would be manifestly contrary to Lithuanian public policy, particularly with regard to the fundamental principles or rights and individual freedoms guaranteed by the Lithuanian constitution.

Nevertheless, the Aukščiausiasis Teismas dismissed this argument, observing that the exception of public policy, as established by Council Regulation (EC) No. 1346/2000, did not extend to cases in which the debtor's nature precludes the debtor from having insolvency proceedings brought against him or her in the Member State in which recognition or enforcement is sought.

With regard to recognition of the decision, the Aukščiausiasis Teismas stressed that as per Article 16(1) of Council Regulation (EC) No. 1346/2000, any judgment opening insolvency proceedings falling within the Regulation's scope of application is recognised automatically as soon as it becomes effective in the State in which proceedings are opened. Consequently, the person concerned had no legal interest in submitting an application for recognition to the court.

Furthermore, with regard to the judgment's enforcement, the Aukščiausiasis Teismas noted that judicial enforcement could not be ordered for a judgment opening insolvency proceedings that does not specify the measures to be taken. Such judgments are purely declaratory in nature.

Lietuvos Aukščiausiasis teismas, order of 4 April 2012, 3K-3-151/2012, www.lat.lt

IA/33311-A

[LSA]

Netherlands

Citizenship of the European Union – Article 20 TFEU – Right of a third-country national who is the parent of a Dutch minor child to reside in the Netherlands – Dutch parent able to take care of the child, with assistance from social bodies

In a judgment handed down on 7 March 2012, the Raad van State ruled that insofar as a parent with Dutch nationality would be able to receive assistance from social bodies with a view to bringing up a Dutch minor child, it cannot be argued that the refusal of the Dutch competent

authorities to grant a residence permit to the child's other parent, a third-country national, deprives the child of the genuine enjoyment of the substance of the rights conferred by his or her status as a citizen of the European Union.

The case related to an application by a Moroccan national (hereinafter referred to as "the foreigner") for a fixed-term residence permit. The foreigner's wife and their minor daughter were both Dutch nationals. The application was denied. Referring to the European Court of Justice's judgments in the Ruiz Zambrano (judgment of 8 March 2011, C-34/09, not yet published in the European Court Reports) and Dereci (judgment of 15 November 2011, C-256/11, not yet published in the European Court reports) cases, the foreigner argued that the Dutch authorities had disregarded the fact that denying his application deprived his daughter of the genuine enjoyment of the substance of the rights conferred by her status as a citizen of the European Union, given that his wife was not able to take care of the child.

The Raad van State first pointed out that a European citizen is only deprived of his or her right to reside in a Member State when that citizen is completely dependent on a non-EU national and, following the competent authorities' decision not to issue a residence permit to that non-EU national, has no choice but to reside with that person outside the European Union. In the Raad van State's view, when a family is made up of a parent who is a third-country national, a parent who is an EU national and a child who is also an EU national, it is important to note that the Dutch parent could receive assistance with looking after the minor child from the appropriate social bodies in the Netherlands. In fact, the social bodies could even be required to provide the family with such assistance in order to prevent an EU citizen from having to leave the European Union. Consequently, the foreigner would have to show that the other parent is unable to look after the minor child, even with assistance from the relevant social bodies. By merely providing documents showing that his wife is incapable of working as a result of psychological problems, the foreigner did not sufficiently demonstrate, in the view of the Raad van State, that his wife was unable to take care of the child, given that she could receive assistance with caring for the child from the relevant Dutch social bodies. On this basis, the Raad van State found that in the case in point, it had not been proven that the child would have to leave the Netherlands if the competent Dutch authorities refused to issue a residence permit to the foreigner and it could not be concluded that the child was deprived of the genuine enjoyment of the substance of the rights conferred by her status as a European citizen.

Raad van State, 7 March 2012, Foreigner v. Minister for Immigration and Asylum, www.rechtspraak.nl, LJN BV8619

IA/33157-A

[SJN]

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Citizenship of the European Union – Article 20 TFEU – Right of a third-country national who is the parent of Dutch minor children to reside in the Netherlands – Dutch parent deceased – Children living with the other parent in a third country

In a judgment handed down on 7 March 2012, the Raad van State ruled that the refusal of the Dutch competent authorities to issue a temporary residence permit to a third-country national who was the parent of Dutch children deprived these children of the genuine enjoyment of the substance of the rights conferred by their status as European Union citizens, given that their Dutch parent was unable to take care of them. According to the Raad van State, it did not matter that the children and parent, who was a third-country national, did not live in the Netherlands at the time the application was submitted.

The case related to an application by an Indonesian national for a temporary residence permit. In 1993, the appellant married a Dutch man, with whom she lived in the Netherlands until 2000. In October 2000, they moved to Indonesia. Two children were born of the marriage: a girl, on 18 February 1996, and a boy, on 18 July 2001. The children have both Indonesian and Dutch nationality. The appellant's husband died in January 2009. On 15 April 2010, she submitted, while in the Netherlands, an application for a temporary residence permit, which was denied. According to the Dutch competent authorities, there were

no objective reasons to prevent the appellant and her children from having a family life outside of the Netherlands. In that connection, the authorities argued that it had been the appellant's choice to move to Indonesia in 2000. They added that the appellant had family in Indonesia and that, consequently, her social life was based there. The appellant countered that denial of her application for a temporary residence permit was contrary to Article 20 TFEU as it deprived her children, who were Dutch nationals, of the genuine enjoyment of the substance of the rights conferred by their status as European Union citizens.

Referring to the European Court of Justice's judgments in the Ruiz Zambrano (C-34/09, mentioned above) and Dereci (C-256/11, mentioned above) cases, the Raad van State first pointed out that a European citizen is only deprived of his or her right to reside in a Member State when that citizen is completely dependent on a non-EU national and, following the competent authorities' decision not to issue a residence permit to that non-EU national, has no choice but to reside with that person outside the European Union. Given that in the case in point, the appellant was the only parent able to take care of the children, they had to stay with her in Indonesia. Although the children lived in the European Union in both the Ruiz Zambrano and Dereci cases, the Raad van State held that the European Court of Justice's judgments also applied to cases where the children did not live in the European Union, as in the case in point. In both situations, the children are deprived of the genuine enjoyment of the substance of the rights conferred by their status as European Union citizens when their parent, who is a non-EU national, is not authorised to enter the European Union.

Finally, the Raad van State found that it was irrelevant that the children could live in the Netherlands with their grandparents, as claimed by the competent authorities, because in the two judgments mentioned above, the European Court of Justice only considered relevant the fact that the children had to leave the European Union to accompany their parents (in the Ruiz Zambrano case) or parent (in the Dereci case).

Raad van State, 7 March 2012, Other party v. Minister for Foreign Affairs, www.rechtspraak.nl, LJN BV8631

IA/33158-A

[SJN]

United Kingdom

Citizenship of the European Union – Right to free movement and residence in the territory of the Member States – Social security for migrant citizens – Persons entitled to draw a pension under the legislation of another Member State than the host Member State – Application for payment of a benefit paid by the host State to retired people habitually resident in that country – Indirect discrimination on the grounds of nationality – Restriction - Justification

On 16 March 2011, the Supreme Court ruled that making residence a condition for granting a benefit aimed at giving retired people a minimum level of income constituted indirect discrimination on the grounds of nationality, but could be justified given that it pursued the objective of protection.

The appellant, a Latvian national, who was entitled to a retirement pension in Latvia, came to the United Kingdom in 2000 to claim asylum on the basis of her Russian ethnic origin. Despite her claim being refused, the British authorities took no measures to remove her. After Latvia joined the European Union, the appellant applied for State Pension Credit, a non-contributory benefit aimed at guaranteeing a minimum level of income to retired people residing in the United Kingdom or in the Common Travel Area between Ireland and the United Kingdom. The benefit is means-tested and is only paid as a supplement to the people with the lowest incomes.

Her application was denied by the Department for Work and Pensions on the grounds that she did not have the right of residence in the United Kingdom. The appellant appealed against this decision, arguing that she had been the victim of direct discrimination on the grounds of nationality, contrary to Article 3 of Council Regulation (EEC) No. 1408/71. The Social Security Appeal Tribunal upheld her appeal, and the Department for Work and Pensions appealed against the judgment to the Upper

Tribunal, then the Court of Appeal. In the view of the Court of Appeal, nothing in European Union law requires the United Kingdom to provide social assistance to those who have no right of residence.

Having been asked to rule on the dispute, the Supreme Court found that restricting entitlement to the benefit to people resident in the United Kingdom or in the Common Travel Area was not direct discrimination, since British nationals could also be excluded from receiving the benefit if they were not habitually resident there. That said, the Supreme Court acknowledged that the restriction constituted indirect discrimination, to the extent that British nationals were more likely to meet the residence condition that nationals of other Member States.

The Supreme Court then turned to the question of whether there was objective justification for treating nationals and non-nationals differently. In this connection, it found that the objective of the residence condition was to protect the national social security system from people wishing to come to the United Kingdom not to work, but to claim benefits. This objective is based on the principle that access to social assistance in the host Member State must be restricted to people who are economically or socially integrated into that country.

According to the Supreme Court, this principle, which is rooted in considerations other than nationality, constitutes a legitimate reason for making residence a condition. Consequently, indirect discrimination was not sufficiently demonstrated.

Supreme Court, judgment of 16 March 2011, Galina Patmalniece v. Secretary of State for Work and Pensions & Aire Centre [2011] 2 CMLR 45, www.bailii.org

IA/33319-A

[PE]

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Citizenship of the European Union – Right to free movement and residence in the territory of the Member States – Directive 2004/38/EC of the European Parliament and of the Council – Right of permanent residence of European Union citizens – Limits – Pregnant worker who has ceased work – Loss of right of residence – Absence of entitlement to certain benefits – Non-violation of the principle of non-discrimination

In a judgment handed down on 13 July 2011, the Court of Appeal ruled that a European Union citizen who had ceased work due to pregnancy could not claim for payment of a benefit for people on low incomes because she no longer had the right to reside in the United Kingdom.

The appellant, a French national, moved to the United Kingdom in 2006 and worked there for a year before enrolling for a full-time higher education course. She then became pregnant and decided to stop studying after a few months. The appellant resumed work until the sixth month of her pregnancy, in March 2008. The baby was born in May 2008 and after a period of three months, the appellant resumed work.

During this period, she applied to receive Income Support, a benefit awarded to people whose income and capital are lower than a certain level and who work fewer than 16 hours a week. Entitlement to this benefit is linked to the concept of residence, which is based on both the duration of residence in the United Kingdom and employment. Since the appellant was not employed, her application was denied by the Department for Work and Pensions (DWP).

After her appeal against the DWP was dismissed in the first instance by the High Court, she brought her case before the Court of Appeal. In particular, she argued that she had a right of residence by virtue of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. She argued that Article 7(1) of the directive established the principle that Union citizens who have temporarily ceased work retain their status as workers, even when, as in the case in point, their situation is not included in the list featured in Article 7(3). In the appellant's view, Article 7(3) merely provides an indicative, non-exhaustive list of situations in which the status of worker is retained. If this were not the case, she argued, Article 7 would establish unfair

discrimination against pregnant women, who, as a result of their state of health, are unable to work.

In its reasoning for dismissing this argument, the Court of Appeal took as a basis the European Court of Justice's judgment in the Dias case (judgment of 21 July 2011, C-325/19, not yet published in the European Court Reports), finding that it was implicit in Article 7(3) that anyone who ceases to work for reasons other than those set out in that provision does not retain the status of worker. In that connection, the Court of Appeal considered that adding in another example mentioning pregnancy would go against the wording of the directive and would constitute illegitimate judicial legislation.

As for the claim of discrimination against pregnant women, the Court of Appeal rejected this argument, noting that the 31st recital to the directive declares that the directive respects the Charter and the principle of non-discrimination, and pointing out that Advocate General Trstenjak did not consider Article 7 to be discriminatory in her conclusions on the Dias case (mentioned above). The Court of Appeal also referred to the Supreme Court's judgment in the Patmalniece case (see above).

Court of Appeal (Civil Division), judgment of 13 July 2011, JS v. Secretary of State for Work and Pensions [2011] 3 CMLR 48,
www.bailii.org

IA/33320-A

[PE]

Slovakia

Tax provisions – Harmonisation of legislation – Turnover tax – Joint system of value-added tax – Special arrangements for taxable dealers – Margin scheme – Scope of application – Purchase of used vehicles from suppliers from Member States and resale by the buyer in other Member States – Inclusion – Condition – Reference to the articles of Council Directive 2006/112/EC or to a national law providing for this scheme in invoices issued by the suppliers

In its judgment of 25 April 2012, the Najvyšší súd (Supreme Court of Slovakia) addressed the taxation of products subject to valued-added tax in a situation where a dealer had purchased used vehicles from suppliers identified for VAT in other Member States and then sold them on in Slovakia, where he was on the VAT register.

In the case in point, the dealer had applied the margin scheme provided for in Article 66 of the law on VAT (Article 313 of Council Directive 2006/112/EC on the common system of value added tax) for VAT purposes, and had thus only paid VAT on his margin (the difference between the sale price and the purchase price.

In its deliberations, the Najvyšší súd argued that when determining the type of taxation to be applied to used vehicles purchased in one Member State and sold on in another, it was important to find out whether the suppliers were identified for VAT and see under which tax system they had supplied the vehicles. In this connection, the court underlined that in the case in point, the invoices issued by the suppliers only mentioned the net price, exclusive of tax. Consequently, the purchases should be treated as supply of goods to another Member State and exempt from VAT, since the VAT was to be paid by the dealer in Slovakia (normal tax system).

In the view of the Najvyšší súd, for the dealer to be able to apply the margin scheme, the invoices issued by the suppliers would have to refer to Articles 313, 326 or 333 of Council Directive 2006/112/EC or to a provision of a national law providing for this scheme. However, if, as in the case in point, the suppliers identified for taxation in other Member States did not refer to this specific scheme, the transaction should be treated as supply of goods to another Member State (intra-Community supply of goods). Consequently, the buyer should pay tax on the goods in Slovakia in line with the normal system of taxation, under which the basis for VAT is all of the compensation that the dealer received from the buyer when he resold the vehicles to the end consumer. This ruling cannot be challenged by the dealer's argument that the suppliers later declared in writing that all the vehicles were supplied under the margin scheme, since these declarations were not included on the relevant invoices.

Najvyšší súd, judgment of 25 April 2012, 6Sžf/30/2011,
www.supcourt.gov.sk/rozhodnutia/

IA/33077-A

[VMAG]

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Border controls, asylum and immigration – Asylum policy – Criteria and mechanisms for determining the Member State responsible for examining an asylum application – Discretion of the Member States – Power to examine an asylum application falling to another Member State – Express request to the Member State concerned to use this option – Obligation of this Member State to examine the application

The Najvyšší súd's judgment of 12 October 2011 related to the interpretation and application of Article 3(2) of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereinafter referred to as "the Dublin Regulation"), according to which any Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the regulation.

In the case in point, the competent police force in Slovakia dismissed the appellant's asylum application on the grounds that the appellant, who came from a third country, had crossed the border with Greece irregularly and that consequently, Greece was the Member State considered responsible for examining the asylum application under Article 10(1) of the Dublin Regulation. Given the circumstances and in view of communication with the Greek authorities, the police force decided to transfer the appellant to Greece. However, the appellant requested application of Article 3(2) of the regulation. The police force did not issue a decision on this request.

The Najvyšší súd found that while it is true that Article 3(2) of the Dublin Regulation is about the discretionary power of the relevant Member State, if the applicant expressly requests that the article be applied, the competent authority must examine the application and justify its decision. As a result, the Najvyšší súd overturned the administrative decision and sent the case back to the competent police force.

In so doing, the Najvyšší súd adhered to the judgment handed down by the Ústavný súd (Constitutional Court) in the same case on 31 May 2011 (judgment no. III ÚS 110/2011-39). The Ústavný súd concluded that in the aforementioned proceedings, the competent authorities had violated the appellant's right not to be subjected to torture or inhuman or degrading punishment, as guaranteed by Article 16(2) of the Slovak constitution and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This is an *absolute* or *inalienable* right held by every individual and, as such, no restrictions may be applied to it. In this connection, the Ústavný súd emphasised that the circumstances of the case in point had to be examined carefully and that it was necessary to take into consideration information from official sources about the difficult situation in the Greek asylum system.

Najvyšší súd, judgment of 12 October 2011, 10 Sža 43/2011,
www.supcourt.gov.sk/rozhodnutia/

IA/33078-A

[VMAG]

Slovenia

Direct insurance other than life insurance – Council Directives 73/239/EEC, 88/357/EEC and 92/49/EEC – National legislation providing for prior notification of approval of proposed increases in premium rates – Failure observed by the European Court of Justice – Incorrect and incomplete transposal – Direct effect of aforementioned directives

In a judgment on insurance handed down on 13 March 2012, the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) ruled, taking into account the European Court of Justice's judgment in the Commission v. Slovenia case (C-185/11, not yet published in the European Court Reports), that Article 62(2)(6) of the law on healthcare and health insurance (Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju, Uradni list RS, št. 9/92), in its amended, supplemented

version (hereinafter referred to as "the ZZVZZ"), was inconsistent with Council Directives 73/239/EEC and 92/49/EEC in particular, since it provided for prior notification or approval of proposed increases in premium rates by the public authorities.

The case related to the temporary licence withdrawal and suspension of an actuary (hereinafter referred to as "the appellant") by the Slovenian Insurance Inspectorate (hereinafter referred to as "the Inspectorate") on the grounds that she had applied an increase in premium rates for complementary insurance over the period covered by the insurance, contrary to Article 62(2)(6) of the ZZVZZ. The appellant lodged an appeal against this decision with the Vrhovno sodišče and suggested, in particular, that it submit a reference for a preliminary ruling to the European Court of Justice with regard to the consistency of the provision in question with the aforementioned directives. The Vrhovno sodišče decided to stay proceedings until the European Court of Justice ruled on the Commission v. Slovenia case, mentioned above.

First of all, taking the European Court of Justice's judgment of 19 January 1982 in the Becker case as its basis, the Vrhovno sodišče pointed out that directives, in principle, have effects that reach individuals through the implementing measures adopted by each Member State. Nevertheless, this does not preclude the possibility of an individual arguing that a State has failed to meet the obligations falling to it as a result of a directive. This means that an individual is entitled to rely directly on the provisions of a directive when the implementing measures adopted by the relevant Member State are not consistent with the directive. However, this implies that the provisions of the directive must be unconditional, sufficiently clear and apt to define the rights that individuals may claim in respect of the State.

The Vrhovno sodišče then observed that in principle, the directives provide for an unconditional and clear prohibition on Member States introducing or retaining legislation requiring prior notification or approval of premium rate increases by the public authorities for complementary insurance during the period covered by the insurance. It follows from this that the appellant was entitled not to be prosecuted on the grounds of incorrect application of the requirement to obtain prior written approval for increases to premium rates for complementary insurance.

Finally, the Vrhovno sodišče pointed out that it followed from paragraphs 26 and 27 of the Commission v. Slovenia judgment that Article 8(3)(3) of Council Directive 73/239/EEC and Articles 29(2) and 39(3) of Council Directive 92/49/EEC prohibit the retention or introduction of prior notification or approval for proposed premium rate increases, unless these measure constitute an essential component of general price-control systems. In the view of the Vrhovno sodišče, since the contested national provision is not part of such a system, it infringes upon Article 8(3) of Council Directive 73/239/EEC and Articles 29 and 39 of Council Directive 92/49/EEC.

The Vrhovno sodišče therefore upheld the appeal and overturned the contested Inspectorate decision on the grounds that it cannot be founded on Article 62(2)(6) of the ZZVZZ.

Vrhovno sodišče Republike Slovenije, gospodarski oddelek, judgment of 13 March 2012, Sodba G 8/2009,
www.sodisce.si/znanje/sodna_praksa/vrhovno_s_odisce_rs/2012032113042929/

IA/33307-A

[SAS]

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Freedom to provide services– Games of chance offered over the Internet – National legislation prohibiting offering games of change without a government concession – Justification – Overriding requirement relating to the general interest – Protection of minors – Proportionality of measures

In an order handed down on 16 February, relating to freedom to provide games of chance over the Internet, the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) ruled on the restriction of access to an illegal website, set down in Article 107(a) of the Slovenian law on games of chance. The order was based on the relevant case law of the European Court of Justice on the subject.

The case in point concerned a provider of games of chance established in a Member State (hereinafter referred to as "the provider") who offered games of chance in Slovenia, over the Internet, without a concession from the Slovenian government. After the Upravno sodišče Republike Slovenije (Administrative Court of the Republic of Slovenia) confirmed the Slovenian Gambling Control Office's decision banning the provider from offering such services (hereinafter referred to as "the decision in question"), the provider brought an appeal against the order before the Vrhovno sodišče. The provider argued that the ban on offering games of chance over the Internet without a government concession did not respect the principle of proportionality. After all, the provider could not make it technically impossible for Internet users to access the websites. The provider held that the restriction was not appropriate as it was not liable to make it more difficult for Internet users to access the provider's websites. Consequently, in the provider's view, the ban disproportionately infringed upon the provider's right to freely exercise commercial activities.

First of all, the Vrhovno sodišče noted that in this case, enforcement of the ban on offering games of chance was both appropriate and proportionate. Article 107(a) of the law on games of chance relates to cases in which providers offer games of chance without a concession. The Upravno sodišče only limited access to the website containing the illegal content, not to other websites on which the provider offered games of chance. The measure in question was easier to implement than other measures, such as filtering visits to the Internet Protocol address (IP address) in question, or filtering the IP address depending on its content. Moreover, the provider did not demonstrate that there was a better or easier way to implement the decision in question.

Next, with regard to the appropriateness of the contested measure and given that, on the basis of the decision in question, access to the relevant site cannot be made impossible, the Vrhovno sodišče found that the objective pursued by Article 107(a) of the law on games of chance would be met by enforcing the decision in question. This would mean that any Internet users visiting the website would be redirected to the website of the Slovenian Gambling Control Office, where they would be informed that the content on the blocked site was illegal and therefore could not be accessed. Consequently, the Vrhovno sodišče found that the contested measure was appropriate.

Finally, the Vrhovno sodišče pointed out that the law on games of chance aimed to regulate games of chance and restrict their provision with a view to protecting minors and other vulnerable people, and as such, it did not infringe upon free exercise of commercial activities. The aforementioned law requires anyone wishing to provide games of chance to have a concession, and failure to comply with the requirement is penalised.

For these reasons, the Vrhovno sodišče dismissed the appeal and confirmed the order issued by the Upravno sodišče.

Vrhovno sodišče Republike Slovenije, upravni oddelek, order of 23 February 2012, Sklep I Up 66/2012,
www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113043088/

IA/33306-A

[SAS]

2. Non-EU countries

United States

Supreme Court of the United States – Reform of the health insurance system – Powers of Congress – Obligation to take out health insurance – Constitutionality – Requirement for the states to expand the scope of application of the Medicaid programme on pain of having all of the allocated funding withdrawn by the federal government - Unconstitutionality

On 28 June 2012, the Supreme Court of the United States handed down a long-awaited judgment on the reform of the healthcare system, which was adopted in 2010. In its judgment, the court recognised, in part, the constitutionality of the Patient

Protection and Affordable Care Act (ACA).

To recap, the ACA requires the majority of American citizens to take out minimum health insurance coverage, an obligation known as the individual mandate. Starting in 2014, anyone who does not comply with this obligation will be issued with a fine, to be paid at the same time as his or her taxes. The ACA also provides for the expansion of the Medicaid programme, which aims to help the poorest, most vulnerable people. From 2014, the states will be required to expand the programme's coverage to all adults whose income does not exceed 133% of the federal poverty level. If they do not comply, all of the funding they receive for the programme will be withdrawn by the federal government.

Twenty-six states and a number of natural and legal persons lodged appeals in the aim of having the relevant provisions of the ACA declared unconstitutional.

With regard to the requirement to take out minimum insurance coverage, the appellants argued that the American constitution did not give Congress the power to adopt such a measure. In response to this argument, the majority of Supreme Court judges found that Congress could base its action on neither the Commerce Clause nor Article 1(8) of the constitution, which enables Congress to adopt the "necessary and proper" laws in order to execute the powers bestowed upon it by the constitution (known as the Necessary and Proper Clause). According to the majority opinion drafted by Chief Justice Roberts, the power to regulate commerce presupposes the existence of a commercial activity, but does not entail compelling individuals to take part in commercial activity. An interpretation allowing Congress to adopt laws governing not only existing situations, but also situations in which no activity takes place, would not be consistent with the principle that the federal government is a government of limited and enumerated powers. Thus the individual mandate cannot be considered an integral part of the ACA's other reforms of the healthcare system. Even if its adoption were necessary, it would not in any case constitute a proper method of implementing the healthcare reforms.

However, the Supreme Court found that Congress could adopt a measure such as the individual mandate within its power to "lay and collect taxes" (the Taxing Clause of the constitution). To arrive at this conclusion, the majority of judges interpreted the relevant provisions of the ACA in line with the constitution, which led them to decide that the individual mandate could be considered, in substance, as imposing a tax for a non-excessive amount on those who decide not to take out insurance. Admittedly, at first glance, the individual mandate could be understood as requiring the people in question to take out insurance coverage, and Congress does not have the power to adopt such measures.

However, the Supreme Court must resort to every reasonable interpretation in order to save a law from unconstitutionality. In that connection, while the ACA provides for the payment of a "penalty" and not a "tax", the choice of wording is not decisive when it comes to determining whether it is within Congress' power to tax to require individuals to make such a payment. Adopting a functional approach, the Supreme Court found that the individual mandate does not have to be interpreted as implying that those who do not take out insurance are acting unlawfully. The wording used by Congress does not require reading the penalty as punishing unlawful conduct. In view of its limited amount, generalised application and collection method, the penalty could reasonably be considered a tax, meaning its adoption would fall within the powers of Congress. This in no way implies that the aim of the payment is not to encourage American citizens to take out health insurance. Consequently, in adopting the individual mandate, Congress did not exceed the powers conferred on it by the American constitution. Furthermore, the Supreme Court upheld the appellants' arguments with regard to the sanction to be applied to any states refusing to expand the coverage of the Medicaid programme. In the view of the Supreme Court, a sanction that consists of withdrawing federal funding for the entire Medicaid programme is particularly drastic and leaves the states no choice but to accept the expansion. Such a measure would be contrary to the Spending Clause of the constitution, which gives Congress the power to establish inter-state funding programmes, since the legitimacy of the legislation adopted on the basis of that clause depends on whether a state

voluntarily and knowingly adopts the terms of such programmes. Given that it threatens the states with withdrawal of all their funding, the legislation adopted by Congress forces the states to adopt the programme in question and is thus contrary to the American federal system. Moreover, the measure adopted by Congress cannot be considered a mere modification of the existing Medicaid programme because of the scope of the modification it introduces. However, the Supreme Court's declaration of unconstitutionality only applies to the sanction provided for by Congress, and not to the expansion itself. Consequently, the expansion of Medicaid still stands, although, from a practical standpoint, the Supreme Court's judgment has made its implementation by the states optional.

U.S. Supreme Court, National Federation of Independent Business e.a. v. Sebelius, Secretary of Health and Human Services e.a., Opinion of the Court of 28 June 2012, 567 U.S. (2012), http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf

IA/33158-A

[CREM]

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Industrial property – Patent law – Article 35 U.S.C. 101 – Exclusion of the patentability of methods of observing natural phenomena – Medical diagnosis

With its judgment of 20 March 2012 in Mayo Collaborative Services v. Prometheus Laboratories, the Supreme Court of the United States ruled that medical diagnostic tests are not patentable on the grounds that they relate to methods of observing natural phenomena.

The case in point related to a diagnostic test developed by the company Prometheus Laboratories for the purposes of treating a gastrointestinal disease involving the immune system, such as Crohn's disease. The test enables doctors to determine the dose of thiopurine metabolite to be administered to a patient in order for a positive effect to be produced, without side-effects. Since patients react differently to doses of thiopurine metabolite, the diagnostic test enables doctors to better tailor the dosage to their patients. After all, if a dose is too low, it will be ineffective in treating the disease, and if it is too high, there could be harmful side-effects.

The case began when Mayo Collaborative Services, which had previously purchased and used testing kits manufactured by Prometheus Laboratories, decided to sell and market its own diagnostic test. At the same time, it challenged the validity of the patents before the courts. Ruling in the first instance, the District Court of California upheld Mayo Collaborative Services' argument, finding that the diagnostic method described by Prometheus Laboratories' patents were not patentable as they were the expression of natural laws. Ruling on the appeal, the Court of Appeals for the Federal Circuit set the District Court's judgment aside, but its reasoning was based on a judgment it had handed down that was subsequently set aside by the Supreme Court. For this reason, Mayo Collaborative Services then obtained a writ of certiorari from the Supreme Court, enabling it to have its case re-examined in the light of the latest judicial developments.

First of all, the Supreme Court pointed out that a procedure that contained a law of nature or an algorithm was not, in principle, patentable. However, it also observed that in order to make an unpatentable law of nature patentable, it was necessary to do more than simply state that law.

The court then noted that the patents in question only referred to the relationship between the concentration in the blood of thiopurine metabolites and the likelihood that the drug dosage would be ineffective or induce harmful side-effects, which is insufficient for patentability.

In the Supreme Court's view, this relationship exists in nature, irrespective of any human intervention. It is simply an expression of the laws of nature that doctors must take into account when treating a patient.

For all that the techniques for determining a drug dosage are well known, the Supreme Court considered that this circumstance did not, in itself, allow the procedure in question to be patented. In the court's view, the existence of an obvious and well-known activity is not enough to make an unpatentable law of nature patentable.

Finally, the Supreme Court found that

the excessively wide scope of the patents in question could disproportionately restrict the use of certain laws of nature by third parties.

U.S. Supreme Court, Mayo Collaborative Services vs. Prometheus Laboratories, Opinion of the Court of 20 March 2012, 566 U.S. (2012),
www.supremecourt.gov/opinions/11pdf/10-1150.pdf

IA/33314-A

[SAS]

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Private international law – Hague Conventions – Convention of 15 November 1965 on the service abroad of judicial and extra-judicial documents in civil or commercial matters – Article 10(a) – Validity of the international service of process by mail – Admissibility

In its decision of 16 February 2012 in New York State Thruway Auth. v. Fenech, the State of New York Supreme Court (Appellate Division, Third Judicial Department) interpreted Article 10(a) of the Convention of 15 November 1965 on the service abroad of judicial and extra-judicial documents in civil or commercial matters (hereinafter referred to as "the Convention"). The article in question provides that "provided the State of destination does not object, the present Convention shall not interfere with: a) the freedom to send judicial documents, by postal channels, directly to persons abroad […]". In the view of the court, this provision does not preclude service of documents by mail.

The case in point concerned Mr Fenech, who, while driving a heavy goods vehicle belonging to the company Silver Creek Transport, damaged the underside of a bridge. The New York State Thruway Authority (hereinafter referred to as "the appellant") filed an action for damages against Mr Fenech, the company Silver Creek Transport and the company Graham Corporation as the owner of the cargo. Mr Fenech and the company Silver Creek Transport were Canadian and, in accordance with §253 of the Vehicle and Traffic Law were served the relevant judicial documents by mail. For this reason, they dismissed the complaint, arguing that service by mail was not permitted within the meaning of the Convention.

First of all, the State of New York Supreme Court noted that the United States and Canada are both signatories of the Convention, a primary aim of which is to simplify service of process abroad. While the Convention requires that each signatory State appoint a central authority to serve documents abroad, it does not require that documents be served by this authority alone. Although it is true that Article 10(a) of the Convention uses the expression "to send", which could mean that it does not apply to service of documents, it must, nevertheless, be interpreted in the light of the text and context of the Convention. With that in mind, it is clear from Article 1 of the Convention that it applies to transmission of judicial and extra-judicial documents "for service abroad". Consequently, Article 10(a) must be read in the light of the Convention, such that despite its use of the verb "to send", it also applies to service of judicial documents.

Considering the language of Article 10 to be ambiguous, the New York State Supreme Court then took into account the preparatory work and negotiations on the Convention, for the purposes of its interpretation. In this connection, it noted that it was clear from the negotiations that the authors of the Convention intended Article 10(a) to apply to service too. Similarly, it observed that the American delegation attending the negotiations consented to Article 10 of the Convention allowing alternative methods of service. Furthermore, in the court's opinion, the majority of signatory States did not object to service by mail. Incidentally, the special commissions monitoring the application of the Hague Conventions have noted that Article 10(a) of the Convention allows service of process by pail.

In the end, the State of New York Supreme Court ruled that the appellant was entitled to serve the complaint by mail, finding that service by mail is permissible within the meaning of Article 10(a) of the Convention and §253 of the Vehicle and Traffic Law. .

This judgment will have deep-seated repercussions for international disputes, as it will no longer be necessary to have

documents served by a bailiff and the interest in the services offered through the official diplomatic channels of the central authority will evaporate.

State of New York Supreme Court, Appellate Division, Third Judicial Department, New York State Thruway Auth. v. Fenech, 2012 NY Slip Op 01167 [94 AD3d 17], Opinion and Order 16 February 2012 www://decisions.courts.state.ny.us/ad3/Decisions/2012/512512.pdf

IA/33312-A

[SAS]

B. Practice of international organisations

World Trade Organisation

WTO – TBT Agreement – Measures affecting the production and sale of clove cigarettes – Complaint lodged by Indonesia against the United States

The report of the WTO Appellate Body on the ban on the production and sale in the United States of cigarettes with "characterising" flavours, specifically clove, was adopted by the Dispute Settlement Body (DSB) on 24 April 2012.

The consultation procedure began after Indonesia lodged a complaint against the United States with regard to a provision of the United States Federal Food, Drug and Cosmetic Act that prohibited the sale and production in the United States of cigarettes with characterising flavours, such as clove cigarettes, but did not prohibit ordinary or menthol cigarettes. Indonesia, the world's biggest producer of clove cigarettes, claimed that the ban was discriminatory and unnecessary and, furthermore, that the United States had not respected a number of procedural obligations under the Agreement on Technical Barriers to Trade (hereinafter referred to as "the TBT Agreement").

The Panel issued its report on 2 September 2011. It concluded that the ban was inconsistent with the obligation to give national treatment set down in Article 2.1 of the TBT Agreement because it accorded to clove cigarettes less favourable treatment than that accorded to menthol cigarettes, the two types of cigarette being "like products" within the meaning of Article 2.1. However, the Panel dismissed Indonesia's second argument, namely that the ban was not necessary. Finally, the Panel found that the United States had acted inconsistently with certain provisions of the TBT Agreement that contained procedural obligations, particularly with regard to timescales. The United States appealed against the Panel's report.

The Appellate Body confirmed the Panel's finding that that the American provision was inconsistent with Article 2.1 of the TBT Agreement but dismissed the reasoning that had brought the Panel to that conclusion. The Appellate Body used different criteria from those used by the Panel to determine whether the cigarettes in question should be considered "like products", but like the Panel, it concluded that they should in the case in point. The Appellate Body also interpreted the requirement to accord "treatment no less favourable", contained in Article 2.1 of the TBT Agreement, as not prohibiting detrimental impact on imports that stems exclusively from legitimate regulatory distinctions and concluded that this detrimental effect reflected discrimination against the group of like products imported from Indonesia. Finally, the Appellate Body confirmed the Panel's conclusions with regard to violation of procedural obligations.

Following the adoption of the Appellate Body's report by the DSB, the United States informed the DSB on 24 May 2012 that it intended to implement the recommendations and decisions but would need a reasonable timescale in which to do so.

Report of the WTO Appellate Body of 4 April 2012 (case DS 406), www.wto.org

[FLUMIBA]

C. National legislation

Belgium

Transposal of Council Framework Decision 2008/909/JHA on the

application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

On 15 May 2012, Belgium adopted the law on the application of the principle of mutual recognition to custodial sentences or measures involving deprivation of liberty passed in another Member State of the European Union. The aim of this law is the same as that of the framework decision, namely to facilitate the social reintegration and rehabilitation of the sentenced person.

The central principle of this law is the recognition of judgments handed down in one Member State (the issuing State) in another Member State (the executing State) with a view to their enforcement in that State. Furthermore, the sentenced person must be in one of the two States. The issuing State is the only party that may decide to forward the judgment to the executing State, though both the executing State and the sentenced person may request its transmittal. The forwarded judgment must be accompanied by a certificate, the standard form of which is annexed to the law.

The Belgium law sets up a system based on two schemes, one without the prior agreement of the executing State and one with the prior agreement of the executing State. The scheme without prior agreement is applied when enforcement is requested in the Member State: of which the sentenced person is a national and on the territory of which that person lives, or of which the sentenced person is a national and to which that person may be deported, if applicable, following the judgment. The scheme with prior agreement applies in all other cases. Another general principle of this law is that the judgment may only be forwarded if the sentenced person has given consent, except in cases where the judgment is being forwarded to a Member State of which the prior agreement is not required, or to a Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings against him or her in the issuing State or following the conviction in that issuing State.

Where Belgium is the executing Member State, the competent authority for giving prior agreement is the Ministry of Justice, which assesses the aim of rehabilitation and reintegration on Belgian territory. If the Ministry of Justice agrees to having the judgment forwarded, it informs the public prosecutor's office in Brussels, which is the competent authority for recognising and enforcing a judgment in Belgium. With a view to recognition and enforcement, this body checks whether one of the causes for refusal listed in the Belgian law should be applied to the case. These causes are the same as the potential causes for refusal given in the framework decision, plus specification of whether each cause for refusal is compulsory or optional. It should be noted that recognition of a judgment on murder will be refused if it relates to abortion or euthanasia, as defined by the Belgian law.

Where Belgium is the issuing State, a distinction is drawn between two different situations. If the person who is the subject of the judgment is not being detained in Belgium, the competent authority for forwarding the judgment is the public prosecutor in the judicial district in which the judgment was made. If the sentenced person is being detained in Belgium, the competent authority for forwarding the judgment is the Ministry of Justice, after consultation with the aforementioned public prosecutor.

If prior agreement, as defined by the Belgian law, is required in the issuing Member State, the Ministry of Justice asks the competent authority in that State to give its agreement before forwarding the judgment.

If, by virtue of the Belgian law on the European Arrest Warrant, the Belgian competent authorities refuse to enforce a European Arrest Warrant issued for the purposes of enforcing a sentence and undertake to enforce that sentence themselves, enforcement will take place as per the provisions of the law of 15 May 2012.

As for the rest, particularly in terms of the timescales and procedural formalities, the Belgian law correctly transposes the provisions of the framework agreement. The transitional provisions of the law provide that the law will come into force retroactively, backdated to 5 December 2011, except in certain cases relating to the reservations for Poland and the

Netherlands. Belgium will continue to apply its previous legislation, namely the law of 23 May 1990, in its relations with Member States that have not yet transposed the framework decision.

Law of 15 May 2012 on the application of the principle of mutual recognition to custodial sentences or measures involving deprivation of liberty passed in another Member State of the European Union, M.B., 8 June 2012, *www.moniteur.be*

[FLUMIBA]

Italy

"Cresci Italia" decree on urgent provisions for competition, infrastructure development and competitiveness

The decree-law of 24 January 2012, no. 1, "Cresci Italia", provides for measures relating to competition, infrastructure and Europe.

This decree was adopted with a view to overcoming two significant obstacles to growth in Italy, namely insufficient competition between markets and inadequate infrastructure.

With regard to competition rules, changes have been made for liberal professions: the decree provides for the abolition of tariffs and the determination of remuneration for professionals on the basis of parameters indicated by ministerial decree, when liquidation is established by a judicial body. Moreover, the amount paid for professional services, which is to be calculated in proportion to the size of the task performed, must be fixed when the contract for services is concluded, and the client must be informed of the components of the fee. Failure by a professional to comply with these rules constitutes a disciplinary offence.

The decree also makes changes affecting interns wishing to enter regulated professions: the duration of an internship is now shorter, and internships may be started by people who are still studying at university.

Finally, it is important to emphasise that with regard to intellectual and industrial property, the decree inserts "sections specialised in company matters" under the heading "Companies tribunal", in the aim of speeding up certain types of dispute by widening their jurisdiction. As a result, disputes relating to contracts for public works, services and supply with European interest and to which the parties are limited-liability companies and limited partnerships with share capital now fall within the jurisdiction of these sections, as do disputes concerning violations of the European Union's antitrust rules.

Decreto-legge, del 24.01.12, n° 1, convertito in legge 24.03.12, n° 27, recante disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività, *www.dejure.giuffre.it*

[GLA]

Czech Republic

Recodification of private law

On 3 February 2012, after 11 years of preparatory work, a series of laws recodifying private law in the Czech Republic was adopted, the aim being to create unified, complex and modern rules in the domain. Although more than 20 years have passed since the fall of the communist regime, Czech private law still shows signs of its influence. This is especially visible in the large number of sources of private law and the fact that the regulations contain a number of gaps and insufficiencies with respect to European standards in the field.

The flagship measure of the reform is the new Civil Code, which is to serve as a foundation for private law. It covers all of the provisions that traditionally fall within the scope of civil law but are now subject to distinct regulation under different laws. Thus the old provisions will be repealed and replaced by the new Civil Code, which will now cover areas such as family law, liability for defective products, and insurance and employment contracts. It should be pointed out that the current Civil Code, which will be replaced by the new Civil Code, was adopted in 1963 and is based on a rather restrictive vision of relationships between individuals, in line with the socialist concept of law. Although the problematic parts of the Civil Code were repealed in the 1990s and numerous

amendments have been made to it, the current provisions on personal and property law, in particular, are rather brief or vague with respect to certain points. The new Code aims to rectify this problem by reorganising and enhancing civil law. It reforms existing concepts (types of legal persons, invalidity of judicial acts, possession and acquisition of property), expands them (enhancement of protection of the personality and physical integrity of persons, compensation for damage) and introduces new concepts (disappearance of persons). However, the most significant reform will probably be that which puts an end to the existence of two systems of regulation in contract law, with one existing under the Civil Code and the other under the Commercial Code. The Commercial Code currently contains its own provisions on contracts, without this being justified by any specific characteristics of commercial relations. When the reform comes into force, the current Commercial Code will also be repealed and the subjects it currently governs will either be integrated into the new Civil Code (provisions on entrepreneurship and provisions falling into the scope of contract law) or included in the new law on companies and cooperatives (provisions falling under the scope of company law), which was adopted alongside the new Civil Code. Both will come into force on 1 January 2014.

Zákon č. 89/2012 Sb., občanský zákoník Zákon č. 90/2012 Sb., o obchodních společnostech a družstvech (o obchodních korporacích), www://obcanskyzakonik.justice.cz/cz/uvodni-stranka.html

[KUSTEDI]

Romania

Law no. 76/2012 on the implementation of the new Code of Civil Procedure, adopted by law no. 134/2010

The new Code of Civil Procedure, which was established by law no. 134/2010, will come into force on 1 September 2012. Numerous legislative amendments have been made to the system governed by the current Code of Civil Procedure, resulting in inconsistent application and implementation of its provisions, which had repercussions for the duration, effectiveness and functioning of civil justice.

One of the most heavily criticised aspects of the functioning of the Romanian judicial system, which has been the subject of several cases in the European Court of Human Rights, is the duration of proceedings and the lack of legal means to enforce judgments.

Against this backdrop, it was necessary to take coherent, complex legislative action with a view to providing simpler, clearer proceedings for litigants and speeding up the process of reaching a judgment.

The new Code of Civil Procedure aims to prevent the harm caused to litigants by the excessive length of proceedings and eliminate the lack of legal certainty arising from the inconsistency of national case law.

The reform creates new procedural law institutions and substantially modifies existing institutions with a view to simplifying and accelerating proceedings.

To date, aside from the provisions of the Code, the principles governing civil proceedings were derived from a number of legislative acts and originated in the doctrine reflected by the case law. The new Code of Civil Procedure organises these coherently and preserves them.

One of the most notable innovations introduced by the new Code is the expansion of the powers of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) through the establishment of a mechanism for reference for preliminary ruling – a genuine means of submitting an application for interpretation – in the aim of making national case law uniform and bringing it into line with European Union law and the provisions of the international conventions to which Romania is a party. Under this new mechanism, if a court of last instance believes that a matter of law inherent to resolving the dispute on which it is ruling has not been interpreted uniformly in national case law, it can request interpretation from the Înalta Curte de Casație și Justiție. The declaration of principle issued by this court will then be binding on all national courts.

Substantial amendments were also made with regard to appeals before the supreme court, most notably through the

introduction of an appeal filtering procedure, in the aim of ensuring that the court only performs reviews of lawfulness in cases where they are clearly justified. The Romanian legislature also established a special procedure for dealing with failure to respect the right to a judgment within a reasonable time. Following the indications provided by the European Court of Human Rights, this procedure makes it possible for a party to request measures from the court with a view to stopping any irrelevant actions aimed at holding up proceedings.

For disputes involving a foreign element, the new Code opted to introduce provisions on the proceedings set down in law no. 105/1992 on relationships in private international law.

The legislative solutions developed as a result of this reform were created in the aim of complying with Directive 2000/35/EC of the European Parliament and of the Council and Regulations (EC) Nos. 44/2001, 805/2004, 1896/2006 and 861/2007 of the European Parliament and of the Council in applying them in the Romanian legal system.

Law no. 76/2012 on the implementation of the Code of Civil Procedure, Official Gazette, 1st part, no. 365 of 30 May 2012, www.legalis.ro

[VACARGI]

United Kingdom

Law governing the duration of the electoral term of the House of Commons

On 15 September 2011, a new law establishing, in principle, a fixed term of five years for the House of Commons received Royal Assent. The law represents a minor constitutional revolution, in that it conditions the exercise of the right of dissolution of this body, the most important of the British parliament, in a way that no other law has done before.

Until this law was adopted, the Prime Minister had a wide margin of appreciation when it came to determining the date of a parliamentary election, with the proviso that an election for the House of Commons had to be held at least every five years. The date chosen by the Prime Minister had to be approved by the Sovereign. The consequence of this system was that, in practice, legislatures normally had terms of four years rather than five because Prime Ministers often decided to hold parliamentary general elections when the overall situation in the country was favourable to their respective parties.

This new law has put an end to unconditional exercise of this right. It abolishes the royal prerogative with respect to dissolution of Parliament and fixes the date of the next parliamentary general elections at 7 May 2015, and every five years thereinafter.

From now on, Parliament can only be dissolved in two well-defined scenarios, of which one is entirely new and the other us a revision of existing practice.

The first scenario for dissolution is self-dissolution, namely the House of Commons' power to vote for its own dissolution in view of a new parliamentary general election. A two-thirds majority of members of the House of Commons must vote in favour of a resolution for self-dissolution for it to be passed.

The second scenario relates to the dissolution of the House of Commons following a motion of no confidence for which a simple majority of members present vote in favour. Unlike the previous practice, dissolution only takes effect if the House of Commons does not expressly declare its confidence in the government in office (whatever that may be) within a period of 14 days.

In the view of some commentators, this change was made for reasons of internal policy. In their opinion, the main purpose of this law is to guarantee that the coalition government between the Conservative party and the Liberal Democrats will remain in office for its full electoral term, which is why the government resisted any attempts to amend the bill for the law to limit the electoral term to four years.

Fixed-term Parliaments Act 2011, www.legislation.gov.uk

[PE]

D. Extracts from legal literature

The patentability of human embryos

"Constituting a particularly sensitive topic, […]biotechnology, defined by the OECD as 'the application of science and technology to living organisms' […], has played an increasingly important role in the healthcare sector in recent years, with the development of new technologies to treat and prevent diseases […] [but] at the same time, it is extremely controversial"[1]. "Eagerly awaited by specialists in biotechnology"[2], the European Court of Justice's judgment in the *Brüstle* case[3] is an excellent illustration of this point. Against a "turbulent background […] in which both national parliaments and the European Parliament had not managed […] to reach a verdict"[4], the ECJ, "having received a reference for a preliminary ruling as part of proceedings for the annulment of a patent […] finally had the opportunity to provide a definition of what constitutes a human embryo and determine the scope of patentability of inventions of which the production involves the destruction of human embryos [5].

"The first contribution made by the judgment […] relates to its definition [of the] human embryo"[6]. "Given that there is clear text on the matter, such as that contained in Directive 98/44/EC[7] […] and in view of the need to provide it with content […], the ECH […] could not […] turn away from the matter", all the more so since "[t]he task was – politically and judicially – facilitated by the fact that it was not [a question of] defining the concept of an embryo in order to give it legal personality, but rather in order to give the concept a meaning in relation to protection of the human body"[8]. Classified "as 'an autonomous concept of European Union law', that the ECJ alone is responsible for defining and interpreting uniformly in European Union territory"[9], "the concept of a human embryo as defined by the European Court of Justice is very broad. [It] includes the earliest stages of formation of a human being, […] covering not only the usual process of forming and developing a human being (fertilisation) but also all of the artificial techniques that are 'capable of commencing the process of developing a human being' […] [such as] therapeutic cloning and parthenogenesis. The decision to include such procedures under the concept of human embryos may seem surprising insofar as these procedures, unlike fertilisation, are not used to create human beings but to produce totipotent stem cells for use in cell treatment […]. [However,] [f]ailing to include these techniques in the definition of the concept […] could have made it possible to patent human embryos which, due to the technique used to produce them, would not be considered as such within the meaning of Directive 98/44/EC"[10].

While some believe that "such a criterion for distinguishing what constitutes a human embryo […] [is] as remarkable as it is consistent "[11], the definition used by the ECJ is far from meeting with unanimous approval. Criticism of the ECJ's definition relates, first and foremost, to the reference to smooth functioning of the internal market used to justify the broad interpretation chosen. "[While] [t]he Court advocates a wide interpretation of the concept of human embryo, because only in this way - so it states - can smooth functioning of the internal market be guaranteed and, vice versa, frictions avoided […] [i]t is, however, hardly comprehensible how […] [it] can arrive at this unambiguous evaluation […]. [If] Directive 98/44/EC aims at an alignment of [national] patent law provisions […] the existing divergences in patent law in no way need necessarily to be aligned in the direction of a wide embryo-concept. It is equally possible to strive for an alignment at a liberal level, and, hence a narrow concept of the embryo […]. Neither the wording, nor the ratio of the Directive demand a broad understanding of the concept of human embryo. The aims followed up by the Directive can rather and better be accomplished on the grounds of a narrow definition"[12]. Some commentators feel that the ECJ should have chosen the latter option. "It would have been advisable […] to interpret the term 'human embryo' restrictively, given the very different opinions held in European States regarding the stage of development of fertilised egg cells from which treatments using the resulting entity should be banned or may even constitute a human rights violation" [13].

Moreover, in the eyes of some, the position adopted by the ECJ contradicts its own case law and that of the European Court of Human Rights in terms of the margin of appreciation left to States in matters connected to ethical considerations. "In several decisions, the

European Court of Justice did not only highlight, but also strengthen the Member States['s discretion] insofar as they seek to protect specific values which are strongly connected to ethical or religious considerations […] [as] in its decision regarding the offering of games of chance via the internet[14] […]. [Likewise] [i]n its famous *Vo v. France* judgment [15], regarding the legal protection of life before birth, the European Court of Human Rights […] also refrained from defining critical terms of its own [reference]. It left the question of the beginning of the right to life open, and stated that it is covered by the States' margin of appreciation […]. This approach was most recently supported by […] [its] judgment in *S.H. and others v. Austria* [16] […] [where] the Court emphasized that […] the States' margin of appreciation […] is broader, in particular in case of moral or ethical issues" [17].

"The solution provided is [also] puzzling with regard to [another] point. The ECJ does not seem to take account of the distinction drawn by the Advocate General between 'totipotent' cells […], which are able to developing into a human body, and 'pluripotent' cells, which can develop into a large number of other cells to gradually form any of the organs of the human body. So should we conclude that the definition of an embryo provided by the ECJ applies to all cells, with no distinction, or that it only covers totipotent cells, as suggested by the Advocate General […]? [While] [i]t falls [to the national court] to settle the matter"[18], "[t]he doubtful position adopted by the ECJ is surprising […] given the attention it has paid to scientific data up to this point" [19]. In this sense, the ECJ's judgment is also surprising in that it seems not to consider all the implications of the need for a uniform interpretation of the concept of a human embryo for the whole European Union. "The ECJ's subsequent declaration that 'it is for the referring court to ascertain, in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage constitutes a 'human embryo' within the meaning of […] the Directive' is surprising. Here, the dogma of uniform interpretation throughout the whole territory of the European Union is being abandoned, with no justification provided" [20].

Be that as it may, while the ECJ decided to apply a broad interpretation to the concept of a human embryo, this can primarily be explained by its concern for guaranteeing the respect due to human dignity. In this connection, "[t]his case shows that human dignity, which is a general legal principle [21] and founding value of the European Union[22] […], applies not only to existing human beings but also to the human body from the first stages of its development"[23]. "[Since] provisions on human dignity are a matter of European public policy […] [and] feature at the very start of the Charter [of] Fundamental Rights"[24], "[w]e can but approve of the ECJ's reminder that this principle must not come second to economic considerations " [25].

The ECJ's expansion of the scope of the exclusion of patentability to cases where embryos are used for purposes of scientific research follows this same line of thinking. This "strict application of the exemption of the ban on patenting human embryos"[26] seems "consistent with the requirement for protection of public policy that the European legislature intended to establish when drawing up the rules on the patentability of living things […] [as] public policy could be achieved […] if the rights awarded to the patent holder guaranteed the patent holder a monopoly on exploitation for industrial or commercial purposes of an invention for which human embryos were used"[27]. Thus the ECJ has clearly opted for "the finalistic approach suggested by the text" of the Directive[28], "which is very much inspired by personalist considerations […] such as those expressed in the Oviedo Convention[29] […]. While "[m]ore utilitarian conceptions are sometimes used, which allow, particularly for the purposes of scientific research, the creation, use and even destruction of human embryos[30] […], this judgment can be read as a sound rejection of those conceptions " [31].

This finalist conception has nevertheless given rise to some reserves about its potential negative impact on investment and research in biotechnology, in particular. "*Brüstle* brings clarity, but […] it is also highly likely to be detrimental in terms of the levels of biotechnological invention and the investment in such research in the European Union" [32]. "[It is] a crude simplification of biotechnological research design and the role of the patent system in innovation and research policy […] [which] ignores the non-commercial benefits patenting may feed into research and innovation

activity of public importance"[33]. There has been a great deal of debate around this matter, especially in German-language legal literature. Some feel that while the judgment may have negative repercussions on investment and research, these repercussions should not be overestimated. "The European Union is too important an economic area for anyone to expect researchers to flee to other parts of the world"[34]. Others go further, arguing that the ECJ's judgment may even have a positive impact on research. "[T]he ECJ judgment [could be] viewed as a way out for basic research using stem cells from human embryos, as it allows researchers a great deal of freedom to work without having to get bogged down in patent paperwork and working out the limits of the research exemption"[35]. However, this opinion is far from meeting with consensus approval. "If human dignity and the right to life mean banning certain patents, they should also mean banning the procedures that are to be patented. […] With this judgment, the ECJ has set standards reaching far beyond patent law alone for the definition of the concept of embryo protection. […] Following this ECJ judgment, it will no longer be permissible to allocate EU research funding to research projects that use embryos " [36].

The judgment has also drawn criticism in connection with the principles of patent law. "Desirable as such an approach may seem to some people, the view of the Court impinges upon traditional principles of international patent law and not least also upon the clear wording of the Directive" [37]. "[It] collides head on with Article 27 TRIPS […] according to […] [which] inventions can only be excluded from patentability, if preventing their commercial exploitation is necessary to protect […] public [order] and morality"[38]. "[Indeed], [i]n accordance with […] Article 27(2) of the TRIPS agreement […] it is always and only the commercial utilization of an invention which is decisive for the analysis by patent law. Actions which have led to the invention or promoted it […] ultimately do not play a role in the context of patent law. And this is for good reason: it would completely break the mould of feasibility, if it was necessary within the scope of patent-law analysis to furnish proof that not only the narrower requirements of patentability are at hand, but also that the applicant has considered ethical and legal standards […]. [Thus,] [t]he approach of the Court […] to render not the commercial utility of the invention, but all previous actions of the inventor subject to an analysis based on the morality clause, violates the wording of the Directive and Article 27(2) of the TRIPS agreement" [39].

That said, the ECJ's judgment "must be recognised as expedient, serving the aim of harmonising patent law in the European Union. [Given that] [a] similar solution had already been reached by the Enlarged Board of Appeal of the European Patent Office (EPO) in its judgment of 25 November 2008[40] […], it was [indeed] advisable to avoid divergent interpretations, which must be issued by national courts, being applied to patents depending on how they are filed. When all is said and done, it is positive that national patents filed in the Member States are to be subject to the same exceptions as European patents and that use of human embryos cannot fall within the scope of patentability except in specific circumstances, that is to say, exclusively when use is for the purposes of diagnosis or treatment"[41]. This interpretation "augurs well for the cooperation that will need to be established between the two bodies with a view to creating a European Union patent"[42].

"Furthermore, the solution adopted by the ECH […] confirms the EPO's position that exclusion is not limited to applications"[43]. By "deciding that the exclusion must apply even if use of human embryos is not mentioned as such in the patent […], the ECJ is preserving the useful effect of Article 6(2)(c) of the Directive"[44]. This is unquestionably a significant "mark of the effectiveness of the solution adopted […] [since] [o]therwise, a certain skill in writing the applications would make it possible to easily circumvent the ban"[45].

When all is said and done, "even if, from a purely economic standpoint, it curbs the pharmaceutical industry's development in this field"[46], the ECJ's judgment "ties in perfectly with its case law, as established in *Netherlands v. European Parliament* [47], according to which […] patent law must be applied with full respect for fundamental rights, and particularly human dignity"[48]. In that sense, it "constitutes a ruling in favour of human dignity, over the encouragement to invest provided by a patent […], [illustrating] that the European Union is not simply a market, but also a legal system

rooted in fundamental ethical values " [49].

[PC] [TLA]

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E. Brief summaries

* *European Court of Human Rights*: In a decision handed down on 3 April 2012, the European Court of Human Rights (ECHR) ruled inadmissible an action challenging the European Court of Justice's refusal to declare the Brussels Convention applicable to a dispute brought before the Greek courts with regard to actions for compensation filed against Germany, and thus to confirm their jurisdiction to rule on the case.

The appellants were the successors of victims of a massacre committed by soldiers belonging to the German armed forces in Greece during the Second World War. They took the German State to the Greek civil courts in the aim of obtaining compensation for the financial loss and non-material damage they had suffered.

Having had the matter referred to it for a preliminary ruling by the Greek appeal court, the European Court of Justice found, in its judgment of 15 February 2007 (Lechouritou, C-292/05, ECR 2007, p. I-01519) that "on a proper construction of […] the Brussels Convention, 'civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State."

Following this judgment, the appellants filed an application against the 27 Member States and "the European Community" with the ECHR, relying on Articles 6 and 13 of the European Convention on Human Rights (hereinafter referred to as "the Convention") and Article 1of Protocol No. 1 to the Convention. Finding that the appellants' grievances were manifestly ill-founded, the ECHR declared the application inadmissible. It pointed out that "the judicial bodied of the European Union specialise in interpreting and applying European Union law, and the role of the ECHR is restricted to checking that the effects of their judgments are consistent with the Convention. […] There is no evidence that the interpretation of the provisions of the Brussels Convention was vitiated by arbitrary or manifestly unreasonable considerations, which may have led the ECHR to find that the Convention had been violated."

European Court of Human Rights, decision of 3 April 2012, Lechouritou and others v. Germany and 26 other Member States of the European Union (application no. 37937/07), www.echr.coe.int/echr

IA/32878-A

[VARGAZS]

* *Germany*: The Bundesverfassungsgericht handed down a judgment that dealt, on the one hand, with the scope of the obligation of national courts to submit a reference to the European Court of Justice, and on the other, with Article 50 of the Charter of Fundamental Rights (hereinafter referred to as "the Charter"), which concerns the right not to be tried or punished twice in criminal proceedings for the same criminal offence (*ne bis in idem*).

The subject of the constitutional appeal was a Bundesgerichtshof judgment that had interpreted Article 50 of the Charter while taking into account the restrictive criteria set down in Article 54 of the Convention implementing the Schengen Agreement (hereinafter referred to as "the Convention"). Under Article 54 of the Convention, a person whose trial has finally been disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party. No such condition is provided for in Article 50 of the Charter.

The appellant lodging the constitutional appeal claimed that the Bundesgerichtshof had violated Article 101(1)(2) of the Basic Law, which guarantees the right to a hearing before the proper statutory court, as given that the European Court of Justice had not established

any case law regarding the connection between Article 50 of the Charter and Article 54 of the Convention, the Bundesgerichtshof was required to submit a reference for a preliminary ruling.

The Bundesverfassungsgericht dismissed the constitutional appeal, judging it not to be founded (Nichtannahmebeschluss). It found that a violation of Article 267 TFEU did not automatically constitute a violation of the Basic Law and held that a national court has a certain degree of discretion when it comes to deciding whether it is necessary to submit a reference for a preliminary ruling. In the view of the Bundesverfassungsgericht, the Bundesgerichtshof did not go beyond the limits of this discretion. It held that taking account of the restrictive criteria laid down in Article 54 of the Convention when interpreting Article 50 of the Charter was a "defendable" interpretation, so the Bundesgerichtshof was under no obligation to submit a reference for a preliminary ruling to the European Court of Justice.

Bundesverfassungsgericht, order of 15 December 2011, 2 BvR 148/11, *www.bundesverfassungsgericht.de*

IA/33232-A

[AGT]

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The Bundesverfassungsgericht ruled that the German federal government had violated the rights of the federal parliament (Bundestag) to information during negotiations on the European Stability Mechanism (ESM) and the Euro Plus Pact. The consistency of these mechanisms with the German constitution was not challenged in the application filed against the federal government by the parliamentary group of the Greens

By virtue of the German Basic Law (Article 23(3) Grundgesetz), the Bundestag participates in "European Union matters" (Angelegenheiten der Europäischen Union), so the government must provide it with detailed information about any such matters as quickly as possible.

However, during the negotiations in question, the government had failed to share with the Bundestag certain (unofficial) drafts and documents drawn up by the Commission or the President of the Council for the purpose of the negotiations.

The European Stability Mechanism, which is intended to replace the European Financial Stability Facility (EFSF) and the European financial stabilisation mechanism (EFSM), was established by an international agreement signed by the Member States belonging to the Eurozone, outside of the existing structures of the European Union. However, in the view of the Bundesverfassungsgericht, it still falls within the scope of "European Union matters" within the meaning of the Basic Law. This concept must be interpreted broadly and covers international agreements which are closely connected with European Union law, given all the circumstances of the case in point, including the subject of the agreement in question.

The court found that the Euro Plus Pact, which primarily aims to reduce the risks linked to currency crises through structural measures, was also a "European Union matter". According to the Bundesverfassungsgericht, although the pact mainly consists of non-binding commitments for the Member States, it has substantial points in common with the European Union integration programme.

With this judgment, the Bundesverfassungsgericht has once more highlighted the need to involve the Bundestag in the European integration process. The Bundesverfassungsgericht recently (judgment of 28 February 2012, be 8/11, *Reflets no. 1/2012*) bolstering the Bundestag's participation rights in the context of measures relating to the European Financial Stability Facility.

Bundesverfassungsgericht, judgment of 19 June 2012, 2 BvE 4/11, *www.bundesverfassungsgericht.de*

IA/33228-A

[TLA]

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In an order handed down on 26 April 2012, the Bundesgerichtshof ruled that the appellants, former

operators of private gaming establishments, could not invoke the liability of the State for harm caused to individuals as a result of violations of European Union law in order to obtain reimbursement of VAT paid for the years 1979 to 1998.

Article 13(B)(f) of Sixth Council Directive 77/388/EEC provides that the operation of gambling activities and gambling machines should, in principle, be exempt from valued-added tax. However, under the German legislation in force at the time, the operation of gambling activities and gambling machines was only exempt from VAT if it took place in an approved public casino. If this same activity was performed by other (private) operators, it was not exempt from VAT.

Referring to the case law of the European Court of Justice (judgments of 1 June 1998, C-283/95, Fischer, ECR. 1998, p. I-03369, and 17 February 2005, C-453/02, Linneweber, ECR 2005, p. I-01131), the Bundesgerichtshof acknowledged that the Member States must respect the principle of fiscal neutrality and cannot make the benefit of exemption dependent upon the identity of an operator of gambling activities and gambling machines.

Nonetheless, the Bundesgerichtshof considered, with regard to the matter of discrimination between private gaming establishments and public casinos, that the fact that Germany had not transposed the Sixth Council Directive (77/388/EEC) into national law within the required timeframe did not constitute a sufficiently serious breach to invoke State liability.

Bundesgerichtshof, "*Private Spielhallen*"*, order of 26 April 2012, III ZR 215/1,* *www.bundesgerichtshof.de*

IA/33230-A

[TLA]

* *France*: The Cour de Cassation ruled on the concept of a product that could be the subject of a supplementary protection certificate under Article 1 of Regulation (EC) No. 1610/96 of the European Parliament and of the Council. The Director of the French National Institute of Industrial Property (INPI) had denied an application for a supplementary protection certificate (SPC) on the grounds that the product in question was already the subject of a certificate. The Paris Court of Appeal dismissed the action for annulment brought against the Director of the INPI's decision. The Cour de Cassation found that the substances in question were composed of the same sequence of atoms, and thus the same product. It also found that when the same active substance – i.e. the same product – is used, the product's effectiveness need not be taken into account for the purposes of issuing an SPC. This was significant because the party applying for the certificate had asked the court to take into account, when evaluating the concept of a product, the different effects of the products covered by the first certificate and those covered by the application that was the subject of the dispute.

Cour de Cassation, Commercial Chamber, judgment of 31 January 2012, appeal no. 10-25495, *www.legifrance.gouv.fr*

IA/32959-A

[ANBD]

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The Cour de Cassation put an end to an affair relating to a cartel between French mobile phone operators, which had given rise to fines amounting to several hundred million euros. In 2005, the Competition Council, which has since become the Competition Authority, fined the companies in question for exchanging confidential information about the mobile phone services market, thus distorting competition on this oligopolistic market. In a judgment handed down on 30 May 2012, the Cour de Cassation confirmed the fine imposed on Orange. However, with regard to that company, it had initially considered (in its judgment of 7 April 2010) that the assessment of the damage caused to the economy by Orange was insufficiently substantiated by the Court of Appeal, although it did confirm the sentences handed down to SFR and Bouygues Telecom. For that reason, Orange's case was referred back to the Paris Court of Appeal for a ruling on that point. This judgment confirms that handed down on 30 June 2011, after the case was referred back: the elements of analysis used by the Court of Appeal enabled it to measure the amount of damage caused to the economy in terms of both the consumers

affected and the structure of the market and the economy in general (taking into account the sensitivity of demand to prices, the existence of reduced price offers during the period in question, and so on).

In connection with the same affair, it is worth noting that Bouygues Telecom took the matter to the European Court of Human Rights on the basis of Articles 6(1) and 6(2) (right to a fair trial and presumption of innocence). The European Court of Human Rights ruled that the application was inadmissible on 13 March 2012.

Cour de Cassation, Commercial Chamber, judgment of 30 May 2012, application no. 11-22144, www.legifrance.gouv.fr

IA/32960-A

[ANBD]

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In a judgment handed down on 11 April 2012, the Chamber for Social and Labour Matters of the Cour de Cassation shed light on the rules regarding payment of the outstanding claims of an employee who was habitually employed in a Member State other than that in which his employer was established in the event that the employer becomes insolvent. These rules, which are set down by Council Directive 80/987/EEC relating to the protection of employees in the event of the insolvency of their employer, were interpreted by the European Court of Justice in a judgment handed down on 10 March 2011 (Defossez, C-477/09, not yet published in the European Court Reports). This judgment was handed down following submission of a reference for a preliminary ruling to the European Court of Justice with regard to a previous case between an employee, who worked in Belgium but was employed by a French company, and that company, which had gone into receivership. (Cour de Cassation, soc. 18 November 2009, no. 08-41.512).

In the case in point, an employee, who was employed by a Belgian company but worked in France, lost his job when his employer went into receivership. After declaring his salary claims to the company's representative, he filed an application for payment of his claims with the Belgian guarantee institution. He then filed an application with the French guarantee institution for payment of the balance of the claims not paid by the Belgian institution. The French industrial relations court and the court of appeal both dismissed his case on the grounds that by declaring his claims to the representative of the Belgian company and filing an application with the Belgian guarantee institution, he had chosen to exercise his right to repayment before the Belgian institution, that he had relinquished the right to have his claims paid by the French guarantee institution and that there was no evidence showing it was possible to combine payments from the two institutions.

The Chamber for Social and Labour Matters of the Cour de Cassation set aside the court of appeal's judgment on the basis of the interpretation of Council Directive 80/987/EEC provided by the European Court of Justice in the Defossez case. In this judgment, the European Court of Justice found that Council Directive 80/987/EEC did not preclude national legislation from providing that employees may avail themselves of the salary guarantee from that Member State's institution in accordance with its law, either in addition to or instead of the guarantee offered by the institution designated as competent under that directive, provided however that that guarantee resulted in a greater level of worker protection.

Consequently, the Cour de Cassation ruled that the sole fact that an employee, who was employed by a Belgian company but worked in France, had obtained partial payment of his salary claims from the Belgian guarantee institution did not constitute relinquishment, on his part, of the right to request payment of the balance of his claims from the French guarantee institution. The guarantee provided by the Member State in which the employer is established can thus be supplemented by the guarantee provided by that of the Member State in which the employee worked, up to the applicable guarantee ceiling.

Thus the solution adopted in this judgment, which reflects the position of the European Court of Justice, tends towards better protecting employees in the event of their employer becoming insolvent.

Cour de Cassation, Chamber for Social

and Labour Matters, 11 April 2012, no. 09-68.553, www.legifrance.gouv.fr

IA/32958-A

[CZUBIAN]

* *Ireland*: The Water Services (Amendment) Act 2012 was adopted in February 2012 as a result of the European Court of Justice's judgment in the Commission v. Ireland case (judgment of 29 October 2009, C-188/08, ECR 2009 p I-172). In its judgment, the European Court of Justice ruled that Ireland had failed to fulfil the obligations under Council Directive 75/442/EEC on waste, as amended by Council Directive 91/156/EEC. Ireland had failed to adopt all the laws, regulations and administrative provisions necessary to comply with Articles 4 and 8 of the directive as regards domestic waste waters disposed of in the countryside through septic tanks and other individual waste water treatment systems. The new law contains provisions that aim to rectify this failure by providing for a new scheme for registering and inspecting individual waste water treatment systems.

Water Services (Amendment) Act 2012 (No. 2/2012), www.oireachtas.ie

[TCR] [EXARCER]

* *Italy:* In its judgment of 9 March 2012, the Corte di Cassazione defined the scope of application *ratione personae* of decree-law no. 233 of 4 July 2006 (hereinafter referred to as "the Bersani decree") abolishing the ban on commercial advertising in the medical profession.

The Corte di Cassazione had been asked to overturn a disciplinary sanction applied by the Italian medical association to the director of two dental clinics, who had distributed leaflet advertisements offering patients free consultations and quotes. The sanction had been upheld by the Central Committee of Medical Sector Professionals, which claimed that the new provisions introduced by the Bersani decree on advertising did not apply to limited liability companies.

In the view of the Corte di Cassazione, the abolition of the ban on advertising, as effected by the Bersani decree, should not be restricted to natural persons exercising a medical profession, since "the fact that the decree's basis lies in Community law" means that the decree must be interpreted in line with the Community principles of free competition between operators in the same sector and the smooth functioning of the internal market.

The Corte di Cassazione declared that the scope of application of the liberalisation of advertising should be defined not only in the light of the national judicial framework, but also in relation to the Community principles that inspired the reform of the decree and Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, transposed by legislative decree no. 26 of 26 March 2010.

Thus the solution adopted in this Corte di Cassazione judgment enables liberalisation of advertising to have a wider scope, which is all the more important considering that it is mainly limited liability companies that use commercial advertising to raise the public's awareness of their services.

Corte di Cassazione, Sez. III, judgment of 9 March 2012, n° 3717, www.italgiure.giustizia.it

IA/32876-A

[REALIGI] [MSU]

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Council Directive 90/314/EEC on package travel, package holidays and package tours has been interpreted several times. It is particularly interesting to highlight two recent, consecutive Corte di Cassazione judgments and one judgment by the Corte Costituzionale.

With regard to the first judgment, the Corte di Cassazione declared that national legislation on holiday packages, which transposes the aforementioned directive, was applicable to services offered in a leaflet and purchased with a 'club card'. The court explained that services other than accommodation that are closely linked to tourism purposes were not ancillary to accommodation, but were the actual subject of the contract.

The second Corte di Cassazione

judgment concerned compensation for non-material damage. The court's solution both followed the case law of the European Court of Justice, according to which compensation must be paid for non-material damage, and added that compensation must only be paid when damage exceeds the "maximum tolerable level". The Corte di Cassazione explained that this reasoning was rooted in the need to "apply the rule of objective good faith and loyalty, namely reciprocal loyalty in conduct".

With regard to the case in point, it should be noted that when a honeymoon is concerned, the fact that the event cannot be repeated constitutes exceedance of the "maximum tolerable level". Finally, the Corte Costituzionale also addressed the matter to clarify the relationship between the law (legge delega) providing for transposal of the directive and the law transposing the directive. In particular, the court declared that Article 15 of the decree transposing Council Directive 90/314/EEC was unconstitutional because it restricted liability for damage to persons. The article in question referred to the International Convention on Travel Contracts, but the court pointed out that the directive, despite providing for limits in the event that such limits are provided for by conventions, does not refer to the Brussels Convention of 1970. Consequently, Article 15 of decree no. 115/1995 (the law transposing the directive) is not consistent with the directive itself.

Corte di Cassazione, sez. III, judgment of 2 March 2012, no. 3256; Corte di Cassazione, Sez. III, judgment of 11 March 2012, no. 7256; Corte Costituzionale, judgment of 30 March 2012, no. 75, www.dejure.giuffre.it

IA/32872-A
IA/32873-A
IA/32874-A

[GLA]

* *Latvia*: The general assembly of judges is a meeting of all of the judges in Latvia. The Justice Act (Par tiesu varu) imposes several administrative obligations upon it, including election of the members of the committees on the functioning of the justice system. The general assembly usually meets once a year, with an extraordinary meeting being called in the event that a decision must be made urgently regarding representation in the various committees.

With a view to saving budgetary resources, on 7 May 2012, the Judicial Council (Tieslietu padome) created the option of holding the general assembly of judges electronically. The articles of association of the general assembly of judges had to be amended with a view to regulating the procedure for an electronic general assembly.

The first electronic general assembly was organised in late May 2012, for the election of the members of the judicial ethics committee. For this election, a deadline was set for nominating candidates, and another was set for collecting the candidates' answers to questions put to them by their colleagues (the voting times were also determined). The requirement to vote by secret ballot was met by using personalised, secret codes distributed to the judges. The justice authority (Tiesu administrācija), which organised the electronic election, considered the election a success.

www.at.gov.lv
www.tiesas.lv

[AZN]

* *United Kingdom*: In a judgment handed down on 25 July 2011, the Court of Appeal ruled that transfers of money to trusts established in the Isle of Man did not constitute movements of capital within the meaning of Article 56 EC (now Article 63 TFEU). The case related to an alleged system of tax evasion wherein the appellants transferred funds to trusts in the Isle of Man, which then paid tax-free income back to the appellants.

Court of Appeal (Civil Division), judgment of 25 July 2011, R (on the application of Shiner) v Revenue and Customs Commrs [2012] 1 CMLR 19, www.bailii.org

IA/33321-A

[PE]

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Following the Court of Session's judgment on the arguments that can be raised to contest legislation emanating from the Scottish Parliament (*Reflets n° 2/2010*, p. 41), the Supreme Court also ruled on the matter on 12 October 2011. The Supreme Court ruled that

Scottish laws could be contested from the point of view of their consistency with the law creating the Scottish Parliament (and with treaty laws and European Union law), but not from the point of view of common law. This judgment is interesting in terms of its examination of the issue of judicial review of primary legislation. The Supreme Court stated that it had the power to invalidate legislation adopted by the Scottish Parliament "in exceptional circumstances", which raised a number of important constitutional questions. With regard to the situations in which this power could be invoked, the Supreme Court referred to the rule of law and the protection of fundamental rights.

Supreme Court, judgment of 12 October 2011, AXA General Insurance v Lord Advocate [2011] 1 WLR 871, www.bailii.org

IA/33322-A

[PE]

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On 22 June 2011, the Supreme Court was asked to rule on legal recourse against decisions made by the Upper Tribunal, a court created in 2007 (*Reflets n° 2/2008*, pp. 33-34 [available in French only]). The case related to several applications in which permission to appeal to the High Court was refused by lower courts and/or the Upper Tribunal. Given the resources available to the High Court and the Court of Appeal, and the level of independent scrutiny required by the rule of law, the Supreme Court ruled that decisions of the Upper Tribunal should be subject to review by the High Court in the event that an important point of principle or practice was involved or if there were some other compelling reason for the appeal to be heard.

Supreme Court, judgment of 22 June 2011, R (on the application of Cart) v The Upper Tribunal [2011] 3 WLR 107,
www.bailii.org

IA/33323-A

[PE]

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Notice

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

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

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

Reflets is available on Curia (http://curia.europa.eu) under Library and documentation / Legal information of European Union interest / "Reflets", as well as on the intranet of the Research and Documentation department.

The following administrators contributed to this edition: Rea Apostolidis [RA], Valentina Barone [VBAR], Antoine Briand [ANBD], Pedro Cabral [PC], Tess May Crean [TCR], Anna Czubinski [CZUBIAN], Patrick Embley [PE], Anke Geppert [AGT], Marion Ho-Dac [MHD], Sally Janssen [SJN], Diana Kušteková [KUSTEDI], Giovanna Lanni [GLA], Thomas Laut [TLA], Valéria Magdová [VMAG], Lina Satkuté [LSA], Céline Remy [CREM], Saša Sever [SAS], Maria Grazia Surace [MSU], Jens H. Steenberg [JHS], Giorgina Alexandra Văcaru [VACARGI], Zsófia Varga [VARGAZS], Johannes Windisch [WINDIJO], Anita Zikmane [AZN].

The following trainees also contributed: Erietta Exarchopoulou [EXARCER], Baptiste Flumian [FLUMIBA], Aleksejs Ketovs [KETOVAL], Afroditi-Ioanna Marketou [MARKEAF], Giacomo Reali [REALIGI], Deolinda Maria Moutinho De Castro Ferreira [MOUTIDE], Guillaume Perret [PERREGU].

Coordinators: Sabine Hackspiel [SAH], Loris Nicoletti [NICOLLO]

NOTES *"Extracts from legal literature"*

[1] Roset, S., "Protection des inventions biotechnologiques, *Revue Europe*, December 2011, comm. 482.
[2] Daleau, J. "Pas de brevet pour la recherche sur l'embryon humain", *Recueil Dalloz*, 2011, p. 2596.
[3] Judgment of 18 October 2011, C-34/10, not yet published in the European Court Reports.
[4] Roset, S., op. cit., supra note 1.
[5] Martial-Braz, N. and Binet, J.-R., "Exclusion de la brevetabilité des embryons à des fins de recherche scientifique", *La semaine juridique - éd. générale*, 6 February 2012, pp. 146-147.
[6] Ibid., p. 147.
[7] Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions (OJ L 213, p. 13).
[8] Galloux, J.-C., "L"embryon communautaire", *Recueil Dalloz*, 2012, pp. 410-411.
[9] Roset, S., op. cit., supra note 1.
[10] Cassiers, V., "Arrêt '*Brüstle*': la portée de l'exclusion des utilisations d'embryons humains du champ de ma brevetabilité et le sort des cellules souches", *JDE*, 2012, pp. 13-14.
[11] Ibid.
[12] Spranger, T. M., Annotation on Case C-34/10, *Oliver Brüstle v. Greenpeace*, *C.M.L.Rev.*, 2012, p. 1197, aux p. 1202 et 1206.
[13] Taupitz, Menschenwürde von Embryonen - europäisch-patentrechtlich betrachtet, Besprechung zu EuGH, Urt. v. 18.10.2011 - C-34/10 - Brüstle/Greenpeace, GRUR 2012, 1, www.http://beck-online.beck.de
[14] Cf. judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, ECR p. I-7633.
[15] Judgment of the European Court of Human Rights of 8 July 2004, *Vo v. France*, Reports of Judgments and Decisions 2004-VIII.
[16] Judgment of the European Court of Human Rights of 3 November 2011, *S.H. and others v. Austria*, Reports of Judgments and Decisions 2011.
[17] Spranger, T.M., op. cit., supra note 12, p. 1204.
[18] Roset, S., op. cit., supra, note 1.
[19] Galloux, J.-C., op. cit., supra note 8, p. 412.
[20] Taupitz, op. cit., supra note 13.
[21] See, in particular, the judgment of 14 October 2004, *Omega*, C-36/02, ECR p. I-9609. For more on this judgment, see also "Protection de la dignité humaine et libre prestation des services", *Reflets n° 3/2005*, p. 28 [available in French only].
[22] See Article 2 TEU and Article 1 of the Charter of Fundamental Rights of the European Union.
[23] Roset, S., op. cit., supra, note 1.
[24] Galloux, J.-C., op. cit., supra note 8, p. 413.
[25] Martial-Braz, N. and Binet, J.-R., op. cit., supra note 5, p. 148.
[26] Daleau, J., op. cit., supra note 2, p. 2596.
[27] Martial-Braz, N. and Binet, J.-R., op. cit., supra note 5, à la p. 149.
[28] Galloux, J.-C., op. cit., supra note 8, p. 412.
[29] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, signed at Oviedo on 4 April 1997 (European Treaty Series no. 164).
[30] See in particular European Commission - European Group on Ethics in Science and New Technologies, opinion no. 16, 7 May 2006
[31] Martial-Braz, N. and Binet, J.-R., op. cit., supra note 5, p. 149.
[32] Burke, S., "Interpretive clarification of the concept of 'human embryo' in the context of the Biotechnology Directive and the implications for patentability", *European Intellectual Property Review*, 2012, p. 346, à la p. 349. En ce sens, cf. également Straus, Anmerkung zu EuGH, Urteil vom 18.10.2011, GRURInt 2011, 1049 ff., www.http://beck-online.beck.de and Taupitz, op. cit., supra note 13.
[33] Varju, M. and Sándor, J., "Patenting stem cells in Europe: the challenge of multiplicity on European Union Law", *C.M.L.Rev.*, 2012, p. 1007, p. 1032.
[34] Feldges, Anmerkung zu EuGH, Urteil vom 18.10.2011, GRUR 2011, 1104, www.http://beck-online.beck.de
[35] Schneider, Das EuGH-Urteil « Brüstle versus Greenpeace » (Rs. C-34/10) : Bedeutung und Implikationen für Europa, ZGE / IPJ 3 (2011), 475, 492
[36] Starck, Anmerkung zu EuGH, Urteil vom 18.10.2011, JZ 2012, 145.
[37] Spranger, T.M., op. cit., supra note 12, p. 1206.
[38] Sattler de Sousa e Brito, C., "Biopatenting "Angst" v. European Harmonization – The ECJ Decision on Stem Cell Patents", *European Journal of Risk Regulation*, 1/2012, p. 130, à la p. 133.
[39] Spranger, T.M., op. cit., supra note 11, pp. 1207 and 1209.
[40] Decision of the European Patent Office of 25 November 2008, G 0002/06, on patent application EP no. 96 903/0 770 125 (OJ EPO, 5/2009, p. 306).
[41] Martial-Braz, N. and Binet, J.-R., op. cit., supra note 5, p. 149.
[42] Galloux, J.-C., op. cit., supra note 8, p. 414.
[43] Martial-Braz, N. and Binet, J.-R., op. cit., supra note 5, p. 149.
[44] Cassiers, V., op. cit., supra note 10, pp. 15-16.
[45] Martial-Braz, N. and Binet, J.-R., op. cit., supra note 5, p. 150.
[46] Daleau, J., op. cit., supra note 2, p. 2597.
[47] Judgment of 9 October 2001, *Netherlands v. European Parliament and Council of the European Union*, C-377/98, ECR p. I-7079.
[48] Roset, S., op. cit., supra, note 1.
[49] Cassiers, V., op. cit., supra note 10, p. 16.