



REFLETS

Brief information on legal developments of Community interest

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A. Case law

I. European and international courts

European Court of Human Rights

European Convention on Human Rights – Right to a fair trial – Applicability of Article 6(1) of the Convention to interim interdict proceedings – New approach by the ECHR – Inalienability of Article 6 requirements concerning the independence and impartiality of the court – Close family relationship between the judge and the respondent’s lawyer in interdict proceedings – Violation of Article 6(1) of the Convention

On 15 October 2009, the Grand Chamber of the European Court of Human Rights issued a judgment in the *Micallef v. Malta* case, in which it concluded by eleven votes to six that Article 6(1) of the Convention (the right to a fair trial) had been violated in that the requirement for impartiality had not been met in interim interdict proceedings

Under the former case law of the ECHR, preliminary proceedings, such as those leading to the adoption of an interim measure like an interdict, did not usually incur the protection set out in Article 6 of the Convention. However, the ECHR found that there is currently a widespread consensus among the Member States of the Council of Europe that Article 6 should apply to interim measures, given that the Member States implicitly or explicitly provide for such protection. Furthermore, the ECHR held that similar protection is provided in the case law of the Court of Justice of the European Communities, which requires that interim measures respect guarantees relating to a fair trial, particularly the right to be heard (judgment of 21 May 1980, *Bernard Denilauler v. SNC Couchet Frères*, 125/79, Rec. p. 1553, see also Article 47 of the Charter of Fundamental Rights of the European Union).

The ECHR reasoned that since many states face “considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge’s decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same ‘civil rights or obligations’ and have the same resulting long lasting or permanent effects” (no. 79).

The ECHR therefore decided that it would be appropriate to change its case law and found that Article 6 should apply if the right in question is ‘civil in nature’ and if the interim measure is determinative of the civil right at stake. However, in some exceptional cases, such as when the effectiveness of the interim measure depends on a quick decision-making process, it may not be possible to comply with all of the requirements of Article 6. Nonetheless, the ECHR finds that the independence and impartiality of the court are inalienable guarantees.

In the main proceedings, the sister of the appellant, Ms M., had been taken to civil court by her neighbour over a neighbourly dispute. Her neighbour had obtained an interdict restraining Ms M. from hanging clothes out to dry over the courtyard of his apartment. Ms M. complained that in the appeal proceedings against the interdict, the Chief Justice was not impartial because he was the brother and uncle, respectively, of the lawyers who had assisted the neighbour. After Ms M.’s death, her brother lodged an appeal with the ECHR.

As regards the admissibility of the appeal, the ECHR found that the appellant could be viewed as a victim in this case since, on the one hand, he had to pay the costs of the proceedings launched by his sister and, on the other hand, the case deals with issues related to proper administration of justice and was thus a matter of general interest. The appellant therefore had sufficient interest in the case to lodge an appeal. Furthermore, the ECHR held that the case in question dealt with a civil right, meaning that Article 6 was applicable. As for the merits of the case, the ECHR found that the appellant’s fears concerning the impartiality of the court were objectively justified, given the close family relationship between the respondent’s lawyer and the Chief Justice, so Article 6(1) of the Convention had been violated.

European Court of Human Rights, judgment of 15 October 2009, Micallef v. Malta (application no. 17056/06)
www.echr.coe.int/echr

IA/32459-A

[TLA]

European Convention on Human Rights - Nulla poena sine lege – Right to a fair trial - Principle of the retroactive application of the more lenient penalty – New approach for the ECHR – Person standing trial for murder – Trial under summary procedure, with the consent of the accused, entailing a reduced sentence – Life imprisonment replaced by 30 years’ imprisonment after the offences were committed – Reduced sentence subsequently

***withdrawn – Sentencing to life imprisonment
– Violation of Articles 6 and 7 of the
Convention***

In its judgment of 17 September 2009 on the case *Scoppola v. Italy*, the Grand Chamber of the European Court of Human Rights concluded by eleven votes to six that it would amend its case law on Article 7 of the European Convention on Human Rights (no penalty without law). The Court henceforth holds that Article 7 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws, but also, implicitly, the principle of retroactive application of the more lenient criminal law. “That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant” (no. 109).

The ECHR found that a consensus has emerged at European and international level around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the offence was committed, has become a fundamental principle of criminal law. In light of this, the ECHR referred to various sources including the Charter of Fundamental Rights of the European Union and the case law of the European Court of Justice on the Berlusconi case (judgment of 3 May 2005, 387/02, Rec. p. I-3565), which was endorsed by the French Court of Cassation (judgment of 19 September 2007, dismissal of appeal no. 06-85899).

However, a minority of judges deemed the new interpretation of Article 7 to have exceeded the limits set by the Convention’s wording. They felt that the majority had had Article 7 rewritten “in order to accord with what they consider it ought to have been”.

In the *Scoppola* case, the appellant had, during an argument with his children, killed his wife and injured one of his children. At the beginning of the criminal proceedings, the appellant had chosen to be tried under summary proceedings, which entailed a reduction of sentence in the event of conviction. However, the legislation allowing for a reduction of sentence had been amended.

When the offences were committed, it was not yet possible to reduce a sentence of life imprisonment, but during preliminary investigations, a law came into force according to which a sentence of 30 years’ imprisonment could substitute for a sentence of life imprisonment where the defendant was tried under summary procedure. The appellant was originally sentenced 30 years’ imprisonment. Yet according to a decree law that came into force on the day the verdict was delivered, trial under summary procedure could only result in a sentence of life imprisonment with daytime isolation being reduced to a sentence of ordinary life imprisonment. In the end, the appellant was sentenced to life imprisonment following the cassation of the original decision.

The Court ruled that in light of the above, the respondent State had not met its obligation to allow the appellant to take advantage of the provision for a more lenient penalty that entered into force after the offences were committed. Consequently, the ECHR decided that Article 7.1 of the Convention had been violated in the case in point.

Furthermore, the ECHR unanimously concluded that Article 6 had been violated. The Court found that State parties were under no obligation to adopt simplified procedures, but that where such procedures existed, it would be contrary to the principle of legal certainty and the protection of the legitimate trust of persons engaged in judicial proceedings for a State to be able to reduce unilaterally the advantages attached to the waiver of certain rights inherent in the concept of fair trial (no. 139).

European Court of Human Rights, judgment of 17 September 2009, Scoppola v. Italy (no. 2) (application no. 10249/03)
www.echr.coe.int/echr

IA/32460-A

[TLA]

Permanent Review Court of MERCOSUR

MERCOSUR – Integration law- Primacy - Conditions

In April 2009, the Permanent Review Court of MERCOSUR (hereafter referred to by its abbreviation in Spanish, TPR) issued its preliminary second advisory opinion on the interpretation of MERCOSUR law.

The questions, which were linked to a tax-related case, were asked by the Supreme Court of Uruguay. This Court asked, firstly, whether MERCOSUR law takes precedence over the internal provisions of a State party and, secondly, whether the provision in Uruguayan law establishing the disputed tax measure was compatible with the Treaty of Asunción, particularly Article 1 thereof, which relates to free movement within the common market.

We should reiterate that the issue of primacy was already raised in the first advisory opinion (see *Reflets no. 1/2008* [only available in French]) and the arbitrators were unable to reach a unanimous conclusion. Moreover, the first advisory opinion was characterised by the fact that the arbitrators pursued a variety of arguments, while the reasoning in the second advisory opinion is more uniform, with unanimous conclusions being drawn.

Based on the nature of MERCOSUR law (law for integration), the TPR affirmed that, generally speaking, MERCOSUR provisions take precedence over the internal legal provisions of the State parties as soon as they are ratified, incorporated or internalised, providing MERCOSUR has legislative competence for the area in question. With regard to the term “primacia” (primacy), the TPR remarked that the same term is used by the European Union, which is undergoing a far more in-depth integration process than MERCOSUR, but that the term was not specific to European Union law.

The TPR did not rule on the compatibility of the Uruguayan legal provision in question with MERCOSUR law, since it would need more explanations regarding the description of the relevant measure as a ‘tax’ or ‘duty’.

Furthermore, the TPR underlined that it would be able to rule on the compatibility of a national legal provision with MERCOSUR law, but that it fell to the relevant national court to rule on the constitutionality, applicability or nullity of that provision.

Tribunal Permanente de Revisión, Advisory opinion no. 1/2008 of 24 September 2009
www.mercosur.int

IA/32069-A

[AGT]

II. National courts

1. Member States

Germany

Competition - Cartels – Adverse effects on competition – Long-term gas supply contract between a company transporting gas over great distances and local or regional companies – Market isolation resulting from the length of the contracts and the fact that other gas suppliers could not participate in the market – Violation of Article 81(1) of the Treaty establishing the European Communities – National authorities provisionally setting a maximum length for future contracts - Admissibility

The Bundesgerichtshof ruled on the admissibility of long-term gas supply contracts.

The German high court was asked to verify the legality of a decision made by the Bundeskartellamt, the German competition authority, against E.ON Ruhrgas, the biggest gas company in Germany. E.ON had concluded gas supply contracts with a duration of more than four years with various local and regional gas companies. In most cases, the volume of gas to be delivered to these companies would completely cover their gas needs each year.

In its decision, the Bundeskartellamt not only prohibited these contracts, but also laid down a number of conditions for the conclusion of new contracts, notably a maximum supply period. More specifically, according to the German competition authority, the maximum

acceptable supply period would be determined based on the volume of gas to be supplied. For example, if the volume of gas to be supplied corresponded to more than 80% of the client's annual gas needs, the contract could only be concluded for a maximum period of two years.

The Bundesgerichtshof approved of the Bundeskartellamt's decision, which was made in application of Article 32 of the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB), a national provision equivalent to Article 7 of Council Regulation no. 1/2003 (EC) of 16 December (finding and termination of infringement).

The Bundesgerichtshof found that the long-term contracts violate Article 81 of the Treaty establishing the European Communities since they lead to market isolation, making it impossible for other suppliers to participate in the gas market. In particular, it found that the Bundeskartellamt was entitled to impose supply contracts with maximum terms for a provisional four-year period. In its reasoning, the Bundesgerichtshof made several references to the case law of the Tribunal and the European Court of Justice and took account of the difficulty of accessing the gas market. It emphasised that the adverse effects on competition were primarily connected with the length of the supply contracts and the volume of gas to be supplied. Simply rescinding the contracts in question would not have been enough to put an end to the offence, since E.ON could have used the competitive advantaged linked to its structure (a consequence of the company's past monopoly on the market) to immediately conclude new contracts that would also have adverse effects on competition.

*Bundesgerichtshof, order of
10 February 2009,
KVR 67/07
www.bundesgerichtshof.de*

IA/32190-A

[AGT]

***Fundamental rights – Equal treatment
–Occupational retirement scheme
distinguishing between married beneficiaries
and other beneficiaries and giving married
beneficiaries advantages over same-sex partners
living in a registered partnership (eingetragene
Lebenspartnerschaft) -Violation of the Basic
Law (Article 3(1) Grundgesetz)***

With regard to a statute on the occupational retirement scheme, the Bundesverfassungsgericht decided that there was no justification for distinguishing between marriage and registered partnership. Just like a married person, a person who has lived in a registered partnership is entitled to receive an allowance in the event of their partner's death.

First of all, the Bundesverfassungsgericht found that when a distinction is being drawn on the grounds of sexual orientation, very strict criteria must be applied to justify it. The Bundesverfassungsgericht pointed out that registered partnership is primarily meant for same-sex couples, according to intentions of the relevant German legislation. Excluding registered partnerships from an occupational retirement scheme would be discriminating on the grounds of sexual orientation. In this connection, the Bundesverfassungsgericht referred to the Maruko case (judgment of 1 April 2008, C-267/06, Rec. p. I-1757).

With regard to the occupational retirement scheme, the Bundesverfassungsgericht found that married people and people in a registered partnership are in comparable situations. In particular, it stressed that society had changed and the traditional image of marriage, where the working partner supports the other (*Versorgerehe*), could no longer be seen as a justification for only allocating survivor's pensions to living spouses.

Moreover, the distinction between registered partnership and marriage cannot be justified by the desire to specifically protect the latter. The Bundesverfassungsgericht highlighted that it was possible to protect the institution of marriage without putting other lifestyles at a disadvantage.

The Bundesverfassungsgericht based its argument wholly on German law, mainly the Basic Law. It overturned the Bundesgerichtshof's judgment of 14 February 2007 (which was taken well before the European Court of Justice's judgment on the Maruko case) in which the German high court, basing its judgment on its interpretation of Council Directive 2000/78/EC of 27 November 2000, had decided against the appellant, without feeling it had to refer the matter to the European Court of Justice. However, a case referred by the Arbeitsgericht Hamburg and raising similar questions to the Maruko case is currently pending before the ECJ (C-147/08, Jürgen Römer v. Freie und Hansestadt Hamburg).

*Bundesverfassungsgericht, order of
7 July 2009, 1BvR 1164/07
www.bundesverfassungsgericht.de*

IA/32474-A

[AGT]

European Union – Police and judicial cooperation in criminal matters – Framework decision on the European arrest warrant and surrender procedures between Member States – Grounds for optional non-execution of the European arrest warrant – Criminal prosecution is statute-barred – Effect of prosecution measures by foreign authorities – No effect – Requirements regarding the acts described in the European arrest warrant and regarding the check performed by the trial judge – Violation of Article 16(2) of the German Basic Law, which protects German citizens from extradition

With its orders of 3 September and 9 October 2009, the German constitutional court (Bundesverfassungsgericht, hereafter referred to as “the BVerfG”) quashed the decisions made by Munich higher regional court (Oberlandesgericht München, hereafter referred to as “the OLG”), which had declared the appellant’s extradition to be admissible. The appellant is a national of both Germany and Greece. The Greek authorities, on the basis of several European arrest warrants, are requesting the appellant’s extradition for criminal prosecution.

According to German legislation, extradition is not admissible where German courts have jurisdiction and when criminal prosecution is statute-barred under German law (see also Article 4(4) of framework decision 2002/584). In its order of 10 August 2009, the OLG decided that the prosecution measures being taken by the Greek authorities could, by their nature, interrupt the statute-barring under German law, so the fact that criminal prosecution was statute-barred in Germany would not prevent extradition.

The BVerfG believes that this interpretation is not compatible with the fundamental right enshrined in Article 16(2) of the German Basic Law, which prohibits, in principle, the extradition of a German citizen. Law-based dispensations are only possible to the extent that principles regarding the rule of law are observed. The OLG’s interpretation would mean a disproportionate amount of interference with this fundamental right and would make it impossible to give a sufficiently precise, predictable definition of the scope of this interference. For these reasons, the BVerfG threw out the order and referred the case to the OLG.

In its order of 7 September 2009, the OLG, basing its actions on another European arrest warrant, once more declared that extradition of the appellant was admissible. It ruled that the acts outlined in the arrest warrant were not statute-barred under German law.

According to the BVerfG, the OLG’s decision arbitrarily violated the fundamental right protecting the appellant from extradition. The grounds given in the order did not meet the requirements for grounds for a decision made by a trial judge. The BVerfG believed that the OLG had not sufficiently analysed the issue of potential statute-barring. Furthermore, it held that the description of actions attributed to the appellant in the European arrest warrant, which had been accepted by the OLG, was too vague for checks to take place that would meet the requirements resulting from the great significance of the fundamental right in question. Indeed, the description of actions given in an extradition request must allow investigation of whether they are punishable acts and examinations of the conditions for extradition and grounds for non-execution.

For the reasons set out above, the BVerfG also threw out the second order of 9 October 2009 and referred the case to another higher regional court, which must now rule on the admissibility of extraditing the appellant.

*Bundesverfassungsgericht, order of
3 September 2009, 2 BvR 1826/09, published on
the Bundesverfassungsgericht’s website:
www.bundesverfassungsgericht.de/entscheidung/en/rk20090903_2bvr182609.html*

IA/32457-A

[TLA]

Belgium

Police and judicial cooperation in criminal matters – European arrest warrant and surrender procedures between Member States – Relinquishment of the benefit of the rule of speciality – Tacit relinquishment – Court’s ability to determine facts alone

In its judgment of 24 March 2009, the Cour de Cassation rejected an appeal against a judgment by the Brussels Court of Appeal with regard to the European arrest warrant, holding that relinquishment of the rule of speciality can also be tacit, to the extent that this relinquishment is clear and voluntary.

In 2004, Belgium had asked Luxembourg to extradite the claimant, who had committed certain offences. Following this individual’s extradition to the Belgian authorities, the indictment division of the Ghent Court of Appeal granted the claimant temporary release on the condition that the claimant never leave Belgian territory. However, the claimant was found in the Netherlands in 2007. Consequently, the examining judge issued another European arrest warrant for the commission of certain crimes not covered in the first arrest warrant. The Netherlands then followed up on the new arrest warrant.

The Brussels Court of Appeal had decided that the claimant had, by not complying with the condition of never leaving Belgian territory, clearly and obviously relinquished the speciality clause applying to the extradition by Luxembourg. This resulted in the speciality clause being withdrawn in this case, meaning that the claimant could be prosecuted for offences committed before the extradition by Luxembourg, which had not given rise to the European arrest warrant being issued. Rejecting the argument that the claimant had never relinquished the speciality clause applying to the extradition by Luxembourg, the Cour de Cassation confirmed that a judge

could determine alone whether such a clause had been relinquished tacitly, in cases where relinquishment is clear and obvious.

Cour de Cassation, 24 March 2009, P.08.1881.N/1, www.cass.be

IA/31849-A

[JTZ]

Free movement of persons – Right of entry and residence – Right of residence for family members – Conditions – Requirement that the ascendant (from a third country) of a Belgian child be dependent upon that child – Discrimination against Belgian children born to foreign parents versus Belgian children born to Belgian parents – No discrimination

In its judgment of 3 November 2009, the Cour Constitutionnelle, which had been asked to give a preliminary ruling by the Conseil d’État, judged that former Article 40(6) of the law of 15 December 1980 on Access to the Territory, Residence, Settlement and Expulsion of Foreign Nationals, before its amendment by the law of 25 April 2007, did not violate the principles of equality and non-discrimination enshrined in the Belgian constitution, whether these principles be considered alone or together with Articles 8 and 14 of the European Convention on Human Rights.

Former Article 40(6) allowed ascendants of Belgian children, where these ascendants are nationals of a third country, to be put in the same category as EU nationals when it comes to residence rights, referring to EU regulations and directives, providing they are dependent on their Belgian children. If ascendants were not dependent upon their minor children, this article meant that such children would have to either live in an unstable situation in Belgium (given that their parents were residing in the country illegally) or follow their parents to their country of origin, which would deprive them of economic and social rights that they could only enjoy in Belgium. In its judgment, the Cour Constitutionnelle began by rejecting the appellant’s request to refer a preliminary question to the Cour de Justice (despite the Cour Constitutionnelle’s status as court of last

instance) concerning the interpretation of Articles 12, 17 and 18 of the Treaty establishing the European Community. They wished to know whether these articles give a national of a European Union Member State the right to reside within the territory of that same State. The Cour Constitutionnelle observed that in the case in point, the appellants' minor children held Belgian nationality and had the unconditional right to reside within Belgian territory, so it was not necessary to check whether a Belgian national could invoke the right of an EU national to reside within the territory of which he or she is a national. It should be noted here that the Brussels industrial tribunal did not adopt the same position and asked the European Court of Justice a preliminary question on the matter, currently pending (*Gerardo Ruiz Zambrano Gerardo v. Office national de l'emploi*, C-34/09).

The Cour constitutionnelle then reiterated that foreign ascendants may only be placed in the same category as EU nationals if they are dependent upon their children, which would involve the children taking practical and financial responsibility for them. However, when the Belgian children in question are minors, this condition must be interpreted as requiring that the parents have sufficient resources to support themselves and their children. In this case, the Cour Constitutionnelle found that while the condition of dependency could be justified on a case-by-case basis, since foreign ascendants should not become dependent on the host State by virtue of a family reunification if their adult Belgian children cannot support them, the situation for Belgian minor children was more problematic.

When analysing the supposed difference in treatment of Belgian minor children based on the nationality of their parents, the Cour Constitutionnelle referred to a letter of instruction issued by the minister responsible for the asylum and integration policy on 26 March 2009, which said that the foreign parents of Belgian minor children, providing they had a real, genuine family life with those children, must be viewed as being in an urgent humanitarian situation giving rise to exceptional conditions that could lead to the parents being granted a residence permit.

In view of this letter of instruction, the Cour Constitutionnelle held that any difference in

treatment of Belgian children created by Article 40(6) and any resulting infringement on the children's right to respect of their family life could not be considered disproportionate, since their parents could obtain the right to reside within Belgian territory.

Cour constitutionnelle, 3 November 2009, 147/2009, www.arbitrage.be

1A/32501-A

[JTZ/CREM]

Finland

Competition - Cartels – Collusion between tenderers - Violation of Article 81(1) of the Treaty establishing the European Communities – Council Regulation (EC) no. 1/2003 of 16 December 2002 – Impact of Community law on the application of national competition law on competition – Responsibility attributed – Criterion of economic continuity

The Economic Affairs Tribunal (*markkinaoikeus*, hereafter referred to as “the MAO”) referred an appeal against a decision to the Supreme Administrative Court (*korkein hallinto-oikeus*, hereafter referred to as KHO) which, in its judgment of 29 September 2009, ruled that the EU rules governing competition and the relevant case law of the European Court of Justice had to be taken into account when ruling on prohibited concerted action, even if this action had taken place before Council Regulation (EC) no. 1/2003 of 16 December 2002 came into force.

The actions leading to this judgment, under which seven asphalt companies were sentenced to pay fines amounting to €82.55 million, took place between 1994 and 2002. Over this period, the companies in question violated the Finnish Act on Competition Restrictions (480/1992) as it was at the time (hereafter referred to as “law 480/1992”). More specifically, the companies had violated Article 6 of law 480/1992, which prohibits the division of contracts, in that they engaged in concerted practices relating to tenders, which was prohibited under Article 5.

The MAO, by virtue of its decision of late 2007, sentenced the companies to pay the aforementioned fines at the suggestion of the Competition Office (hereafter referred to as “the Office”). When appearing before the MAO, some of the companies questioned, among other things, the individual responsibility of the companies involved. The attribution of responsibility was indeed a relevant issue since several companies, having taken part in this legal violation, had been dissolved. In this respect, though the MAO did not accept the Office’s argument, which was based on EU case law, it did confirm that the companies had also violated Article 81(1) of the Treaty establishing the European Community. The MAO mainly settled the matter by examining the concept of a company, as set out in the preparatory work for law 480/1992. Given that an offence was committed before the entry into force of Council Regulation (EC) no. 1/2003 of 16 December 2002 and the relevant amendment of law 480/1992, the MAO found that it was not competent to consider EU competition rules when interpreting law 480/1992. The aforementioned amendment (hereafter referred to as “law 318/2004”) gave the MAO the power to impose fines for violations of Article 81 of the Treaty establishing the European Community as well.

Further to the appeal, and with regard to the two types of fixed-price contract in question (that is, work ordered by the Finnish State within the framework of a public procurement contract and work ordered by municipalities and individuals), the KHO determined that there had been collusion between tenderers, that this collusion covered the entire country and that the aim of these actions had been to prevent fully effective competition on the Finnish asphaltting market.

Moving beyond the MAO’s very formal approach with regard to the applicability of Article 81 of the Treaty establishing the European Community to the offence, the KHO pointed out that since Finland had joined the European Union, EU competition rules were directly applicable at national level and that companies were required to comply with them. Furthermore, the KHO referred to the fact that the aim of law 480/1992 had been to bring Finnish law on the matter closer to Community law and to ensure that there were fewer differences between the structures present in the

two systems. Particularly considering that trade between Member States was affected, the KHO found that the offence in question had to be assessed according to the EU rules and case law that were in force when the Office made its suggestion. As for attributing responsibility for the offences committed, the KHO referred to the criterion of economic continuity as developed in EU case law. Since this criterion is relevant and commonly recognised, the KHO ruled that imposing fines based on it could not violate the principles of legality and foreseeability.

Korkein hallinto-oikeus, judgment of 29 September 2009, KHO 2009:83,

www.finlex.fi/fi/oikeus/kho/vuosikirjat/2009/200902389

IA/31680-A

[LAP]

France

Acts of the institutions - Directives – Direct applicability – Powers of the national court – Assessing the conformity of a national rule with the provisions of a directive

In its assembly decision on the Perreux case on 30 October 2009, the Conseil d’État ruled that “the transposition into national law of EU directives, which is a requirement stemming from the Treaty establishing the European Community, can be considered a constitutional requirement by virtue of Article 88(1) of the Constitution, among other things. (...) For these two reasons, it is the responsibility of the national court (...) to guarantee the effectiveness of the rights that each individual has as a result of this requirement with regard to the public authorities. (...) As a result, all litigants can ask for the annulment of legal provisions that may go against the aims set out in the directives and, when contesting an administrative decision, assert, whether through a legal action or an exceptional remedy, that once the relevant deadlines have passed, the national authorities may no longer allow national legal provisions to remain in force or continue to apply written or unwritten rules from national law that may be incompatible with the aims set out in the directives. (...) Furthermore, all litigants may refer to the precise and unconditional provisions of a directive in support of an appeal against a non-

statutory administrative act, where the State has not taken the required measures to transpose the directive in question by the deadline it set.”

This decision, which was handed down by the most formal formation of the Conseil d'État, is a reversal of case law when compared to the decision of 22 December 1978 in the Cohn-Bendit case (IA/01607-B) which stated that, contrary to the case law of the Cour de Justice (see in particular the judgments of 4 December 1974, Van Duyn, 41/74, Rec. 1974, p. 1337; 28 October 1975, Rutili, 36/75, Rec. 1975, p. 1219 and 5 April 1979, Ratti, 148/78, Rec. 1979, p. 1629), an appellant could only directly refer to the provisions of a directive in support of an appeal against an individual administrative act.

Of course, the significance of the Cohn-Bendit case law has diminished over time. In fact, the Conseil d'État had gradually seem more and more cases in which the provisions of directives could be cited by litigants taking legal action or by those implementing exceptional remedies (see the findings of Mr Guyomar, public rapporteur, on CE assembly decision of 30 October 2009, Perreux case, published in RFDA 2009, p. 1125). In so doing, the Conseil d'État had, in particular, allowed appellants to refer to the provisions of a directive when questioning statutory measures or whether a directive had been transposed. It also allowed appellants using exceptional remedies to raise the illegality (in terms of the provisions of a directive) of the statutory standard on which an individual decision was based (see inter alia CE decision of 3 February 1989 in the Alitalia case; CE decision of 30 October 1996 in the Cabinet Revert et Badelon case and CE decision of 6 February 1998 in the Tête case).

However, the Conseil d'État had never officially discarded the Cohn-Bendit case law. It has now done so, and at the same time, the judgment in the Perreux case has ended the 'case law isolation' of Conseil d'État in Europe as regards the direct applicability of directives (see the findings of Mr Guyomar, mentioned above, and also S.J. Liéber, D. Botteghi, *Mme Perreux - Où Cohn-Bendit fait sa révolution*, AJDA 2009, p. 2385 and P. Cassia, *Une nouvelle étape dans l'Europe des juges. L'effet direct des directives devant la juridiction administrative française*, RFDA 2009, p 1146).

Conseil d'État, assembly, 30 October 2009,

Perreux, appeal no. 298348

www.legifrance.gouv.fr

IA/32055-A

[VGP]

Primacy of Community law - Directive 2003/87/EC of the Parliament and of the Council of 13 October 2003 - Transposition – Reconciling the supremacy of the constitution with EU requirements – Judicial cooperation

By applying the solution used by the European Court of Justice (judgment of 16 December 2008, C-127/07, Société Arcelor Atlantique et Lorraine e.a., not yet published), the Conseil d'État put an end to the Arcelor case with its judgment of 3 June 2009. The case had begun two years before when, in an earlier judgment, the Conseil d'État set out; in principle, the methods for checking the constitutionality of statutory acts directly transposing a directive with precise and unconditional provisions (CE assembly decision of 8 February 2007, no. 287110, Société Arcelor Atlantique et Lorraine e.a., see *Reflets no. 2/2007*, p. 11 [only available in French], QP/05767-A9).

At that time, the Conseil d'État found that, given the constitutional requirement to transpose directives, this check must be performed according to special methods. The national court, when faced with an argument based on the failure to consider a provision or principle of constitutional value, must find out whether there is a general rule or principle in Community law which, in view of its nature and significance, as interpreted by the current case law of the EU courts, guarantees the applicability of compliance with the national constitutional provision or principle in question. If there is, the administrative court must then find out whether the directive being transposed by this decree complies with this general rule or principle in Community law. If there are no major difficulties, the argument must be dismissed or otherwise referred for a preliminary ruling. However, if there is no general rule or principle in Community law guaranteeing the applicability of compliance with the constitutional provision or principle in question, the national court may directly assess the constitutionality of the contested statutory provisions.

The national court determined that there was a major difficulty in the case in point, and so, applying the reasoning set out above, referred the case for a preliminary ruling as regards the validity of Directive 2003/87/EC of the Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community. In a judgment handed down by the Grand Chamber on 16 December 2008, the European Court of Justice concluded that the directive did not ignore the principle of equal treatment. Taking note of the solution found by the European court, the Conseil d'État also concluded that the argument that the constitutional principle of equality had not been taken into account by decree no. 2004-832 of 19 August 2004, which was adopted to transpose the directive, was unfounded.

The Conseil d'État's method makes it possible to guarantee the primacy and uniformity of Community law, initially through a 'transfer' procedure in favour of Community law with the reclassification of the argument of unconstitutionality as an argument of unconventionality and secondly, if the case is referred to the European Court of Justice and this court replies, through a 'detransfer' operation conducted by the court *a quo* (Mr Guyomar's findings on the CE decision of 3 June 2009, *Société Arcelor Atlantique et Lorraine e.a.*, no. 287110, RFDA 2009, p. 8000 and F. Lafaille, *La jurisprudence Arcelor bis permet-elle de [concilier l'inconciliable]?*, AJDA 2009, p. 1711).

Conseil d'État, 3 June 2009, appeal no. 287110, Société Arcelor Atlantique et Lorraine e.a., www.legisfrance.gouv.fr QP/05767-P1

[NRY]

Ireland

Fundamental rights – Equal treatment and non-discrimination – Exclusion of women from membership of a private club – Council Directive 2004/113/EC of 13 December 2004 – Freedom of association

In a judgment handed down on 3 November 2003, the Supreme Court confirmed a High Court decision according to which the ban on women joining a certain golf club was not discriminatory within the meaning of the law on equal treatment in access to goods and services, the Equal Status Act 2000. The main issue at hand was whether the different treatment given by the club could fall within the scope of one of the Equal Status Act 2000's exceptions to the principle of equal treatment. In the case in point, the members of the Supreme Court were divided on the issue and drew up four different judgments. However, the majority ruled in favour of the golf club. This decision was met with strong criticism from the Irish media and several associations in Ireland. The golf club in question, which is based in Portmarnock (Dublin) and was founded in 1894, was recognised by the Supreme Court as an old and venerable institution in Ireland. It is also one of the last two golf clubs in the country to continue excluding women from membership.

The Supreme Court concentrated on the interpretation of the relevant provisions of the Equal Status Act 2000, which, in the case in point, were Articles 8 and 9 on discriminating clubs. Under Article 8(2), a club is considered to be a discriminating club "if it has any rule, policy or practice which discriminates against a member or an applicant for membership". Article 8(2)(b) lists specific examples of discriminatory behaviour, such as refusing to admit a person to membership. Article 9 of the law sets out some exceptions to Article 8. For instance, such discriminatory practices by a club are allowed where the club's primary purpose is to meet the needs of people of a particular gender. Article 9(1) is worded as follows: "For the purposes of section 8, a club shall not be considered to be a discriminating club by reason only that- (a) Its principal purpose is to cater for the needs of *inter alia* (i) persons of a particular gender...". In this respect, it should be noted that Article 9(1) was drawn up bearing in mind the constitutional right of citizens to freedom of association. This

case is an excellent example of the difficulties surrounding the relationship between this constitutional right and the principle of non-discrimination.

In the case in point, the judges agreed that the golf club could be considered a discriminating club within the meaning of Article 8 of the Equal Status Act 2000. The club's rules explicitly stated that membership of the club was restricted to "gentlemen properly elected", i.e. to men. However, in practice, women were allowed to play golf at the club and had access to the changing rooms, the bar and the restaurant, so the main issue for the Supreme Court was determining whether the exception mentioned in Article 9 was applicable to the club in question. This entailed a detailed examination of the wording of Article 9, particularly the words "principal purpose" and "needs". According to the appellant (the Equality Authority, a non-governmental body aiming to fight discrimination), the club can only be covered by the exception if there is a logical connection between the club's primary purpose and men's needs. The Equality Authority believed that it was clear from the rules of the club in question that the club's principal purpose was to enable golfers to play golf. Moreover, the Equality Authority argued that golf could not be considered a "need" of men. For its part, the golf club held that its principal purpose was to meet the needs of its members, i.e. men, which would mean it was covered by the exception outlined in Article 9.

The majority of the Supreme Court judges supported the club's argument. Judge Hardiman found that the Equality Authority's reasoning was too limited. He held that the meaning of the word "needs" was much broader and covered social, cultural and sporting needs, as well as more basic needs like food, water and so on. He observed that the case raised fundamental questions relating to the constitutional rights of citizens to freedom of association and the State's power to regulate such associations. The court took account of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, noting that single-sex private clubs are protected by the directive. In this connection, Judge Hardiman remarked: "'But it is of

course possible that Irish law in this regard is more restrictive than European law, whether or not such restriction would pass muster in Strasbourg or in Luxembourg."

Supreme Court, judgment of 3 November 2009, Equality Authority v. Portmarnock Golf Club [2009] IESC 73, www.courts.ie

IA/31678-A

[SEN]

European Convention on Human Rights – Freedom of expression – Journalist's privilege – Journalists' right to protect their sources – Contravention of Article 10 of the Convention

In a judgment pronounced on 31 July 2009, the Supreme Court ruled unanimously on journalists' right to protect their sources following an appeal against a High Court decision handed down on 23 October 2007. According to one commentary, this decision is a decisive step in the development of legal recognition of journalists' right to protect their sources, given that this was the first time the Supreme Court had ever explicitly ruled on the subject? The judgment, which was delivered by Judge Fennelly, also stands out by its very clear argumentation on the application of the European Convention on Human Rights in Ireland and the developments the judgment contains with regard to the principal of freedom of expression, which is protected by Article 10 of the Convention.

The dispute arose following investigations ordered by an administrative court (Tribunal of Inquiry into Certain Planning Matters and Payments, hereafter referred to as "the Tribunal") into certain payments received by politicians. Against this backdrop, one of the appellants, the journalist Mr Keena, published an article in the national newspaper The Irish Times in September 2006, revealing that the Tribunal was examining payments received by Bertie Ahern, who was Taoiseach (Prime Minister) at the time and had Minister for Finance in the past. The article was based on a confidential letter which had been written by the Tribunal as part of its private inquiries and sent anonymously to Mr Keena.

After this article was published, the Tribunal, by virtue of the powers bestowed upon it by the Tribunals of Inquiry (Evidence) Acts 1921 to 2004, asked Mr Keena to provide it with the confidential documents he had received anonymously. Mr Keena and the editor of the Irish Times, Ms Kennedy, refused to do so, claiming that the documents had been destroyed. Ms Kennedy also maintained that the information was protected by journalist's privilege. In the face of their refusal, the Tribunal asked the High Court to order them to comply with its request. In a judgment delivered on 23 October 2007, the High Court ordered the appellants to answer the questions the Tribunal asked to identify the source of the confidential information. In its decision, the High Court recognised the right of journalists to protect their sources: "the non-disclosure of journalistic sources enjoys unquestioned acceptance in our jurisprudence and interference in this area can only happen where the requirements of Article 10(2) (CEDH) are met...". Despite this statement, the High Court, after evaluating the interests at stake, decided that the need to ensure that the public continued trusting the Tribunal was more important than journalists' right to protect their sources. It should be noted, in this respect, that the High Court considers destruction of documents by journalists to be particularly reprehensible, so this was an important factor in its decision.

When asked to rule on an appeal against this decision, the Supreme Court did not confirm the High Court's position. It determined that in the case in point, the High Court had taken the wrong approach to balancing interests. According to Judge Fennelly, the High Court had devalued journalist's privilege to such an extent that it balanced interests incorrectly. Consequently, the High Court had not struck the right balance between the Tribunal's right to protect the inquiry and the journalists' right to protect their sources. Judge Fennelly ruled that the national law on the Tribunal had to be interpreted in a way that was compatible with the State's duties under the European Convention on Human Rights. After applying the principles established by the case law of the European Court of Human Rights on Article 10 of the European Convention on Human Rights, and especially by the judgment in *Goodwin v. United Kingdom* (1996)

E.H.R.R 123, the Supreme Court ruled that an order requiring journalists to reveal their sources could only be justified by an overriding requirement in the public interest. In the Supreme Court's view, there was no such requirement in the case in point.

Supreme Court, judgment of 31 July 2009, Alan P. Mahon & Others v Keena & Kennedy [2009] IESC 64, www.courts.ie

IA/31677-A

[SEN]

Italy

Request for access to the documents on an administrative proceeding – Party indirectly affected by the administrative proceeding – Refusal of request by the administrative authority in question - Admissibility

In a judgment passed on 2 November 2009, Lazio Regional Administrative Court rejected an appeal against the decision of the Italian competition authority (Autorità Garante della Concorrenza, hereafter referred to as "AGCM") refusing access to documents on an administrative proceeding against the company Telecom Italia Spa (hereafter referred to as "Telecom").

In the case in point, the appellant had requested access to these documents with a view to using them in another pending civil proceeding against Telecom.

The administrative court's decision to confirm the AGCM's decision to withhold access to the documents was based on the fact that the appellant's interests were not related to the subject of the administrative proceeding to which access had been requested (i.e. abuse of Telecom's dominant position on the market).

Consequently, the administrative court held that the AGCM's refusal of the request for access was justified by the fact that a general interest in information is, in itself, not enough to gain access to administrative documents. It is also essential to establish that there is a direct, concrete and current interest, which exists when the appellant is directly affected by the administrative proceeding in question. Where this is not the case, the administrative bodies in question shall legitimately refuse any requests for access.

Moreover, the administrative court pointed out that since the appellant could have asked the civil court to order AGCM to provide the relevant documents when the proceeding against Telecom began, given that the appellant was interested in the documents as a source of proof of a right to compensation due to anti-competitive behaviour on the telecommunications market.

Tribunale Amministrativo regionale - regione Lazio, judgment of 2 November 2009, no. 615 www.giustizia-amministrativa.it

IA/32321-A

[VBAR]

European Convention on Human Rights – Respecting international obligations – Conflict between a national provision and a provision in the Convention – Breach of the Italian constitution – Jurisdiction of the Constitutional Court

In its judgment of 26 November 2009, the Constitutional Court reached a decision on the matter of whether an Italian law, which the referring court believed may conflict with Article 6 of the European Convention on Human Rights (hereafter referred to as “the Convention”), was compatible with Article 117 of the Italian constitution, which provides that international obligations must be met.

At that time, the Court defined its jurisdiction, highlighting that it was entitled to check whether a provision of the Convention, as interpreted by the European Court of Human Rights in Strasbourg, goes against the Italian constitution or not.

The Constitutional Court held that where this was the case, the national law transposing the Convention would have to be considered unconstitutional, since it is not possible to declare the Convention’s provisions unlawful.

The case in point concerned the administrative, technical and auxiliary staff (hereafter referred to as “ATA staff”) of state schools, who had initially been employed by a local authority but had then acquired the status of state employee. The staff in question asked for the right to be included in the same pay categories as ATA staff who had always been employed by the State and who had the same seniority.

The Italian legislation mentioned by the ATA staff provided for the recognition of years worked for the local authorities originally employing the staff. However, during the pending proceedings against itself, the State adopted legislation with a retroactive effect for imperative reasons of a general nature. This legislation meant that transferred staff no longer had the right to be included in the same pay categories as ATA staff originally employed by the State. In view of this, the primary appellants cited a violation of Article 6 of the Convention.

The case in question was also referred to the European Court of Justice for a preliminary ruling. In its order of 3 October 2008 (Savia e.a., C-287/08, Rec. p. I-136), the Court declared that it manifestly did not have jurisdiction to rule on the matter.

Conversely, the Constitutional Court, ruling on the merits of the case, threw out requests aiming to declare the Italian legislation in question unconstitutional with regard to both Article 117 of the Italian constitution and Article 6 of the Convention.

Corte Costituzionale, judgment of 26 November 2009, no. 31 www.lexitalia.it

IA/32320-A

[VBAR]

Malta

Judicial cooperation in civil matters – Council Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Scope – Civil and commercial matters – Concept – French judgment ordering a Maltese company to cease its activities in horse-racing bets, an activity covered by the monopoly awarded by French law to a single operator in the interests of protecting public order – Exclusion – Refusal of exequatur

In its judgment of 9 January 2007, the Maltese Court of Appeal (Qorti ta' l-Appell) refused to grant an exequatur order for a judgment by the Paris Court of Appeal ordering Zeturf, a company under Maltese law, to cease its bookmaking activities on French territory since

French law accords a monopoly on this activity to the economic interest grouping *Pari mutuel urbain* (hereafter referred to as “PMU”) in the aim of protecting public order. According to the Maltese court, the case could not be qualified as a dispute in civil or commercial matters within the meaning of Council Regulation (EC) no. 44/2001 of 22 December 2000, since PMU was actually acting for the government.

Zeturf organises and runs online bets on horse races, most of which take place in France. In June 2005, PMU referred the matter to the Paris Regional Court to request the cessation of this activity. As part of its action, PMU mentioned that it held a legal monopoly on organising bets on horse races and that this had been infringed upon. In its first order, issued on 8 July 2005, the Regional Court found in favour of PMU and instructed the Maltese company to cease its “clearly unlawful” activities. The Paris Court of Appeal, which was asked to rule on the appeal against this order, confirmed the Regional Court’s decision on 4 January 2006 and pointed out that PMU holds a monopoly on the relevant activity due to legal provisions aiming to protect public order in France.

Once this judgment had been passed, PMU asked Malta to force its execution in application of Council Regulation (EC) no. 44/2001 of 16 December 2000. This request was accepted in the first instance by the First Hall of the Civil Court (Il-Prim' Awla tal-Qorti Ċivili), which handed down its decision on 16 March 2006. The decision was appealed to the *Qorti ta' l-Appell*, which upheld Zeturf’s appeal. The court observed that Council Regulation (EC) 44/2001 of 16 December 2000 only applied to judgments in civil and commercial matters and therefore did not apply to the French decision of 4 January 2006. In support of this line of reasoning, it mentioned the judgment in the *Steenbergen* case (European Court of Justice judgment of 14 November 2002, C-271-00, Rec. p. I-10489) and concluded that an action to defend PMU’s legal monopoly belonged in the domain of administrative law rather than civil law, given that the law awarding this monopoly aims to protect public order.

After this judgment was pronounced, the decision by the Paris Court of Appeal was suppressed by the *Cour de Cassation* (see

Reflets no. 3/2007, p. 14 [only available in French]).

Qorti ta' l-Appell, judgment of 9 January 2007, *GIE Pari Mutuel Urbain v Zeturf Limited* (C35469)
<http://www.justiceservices.gov.mt/courtservices/Judgments/default.aspx>

IA/29189-A

[PE] [SOHA]

The Netherlands

Social policy – Protection of workers’ health and safety – Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 – Working time – Interpretation in line with the directive – Administrative fine – Violation of the principle of legal certainty

In a judgment handed down on 4 March 2009, the *Raad van State* ruled that for reasons of legal certainty, national legislation could not be interpreted in line with Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 for the purposes of imposing an administrative fine.

The Minister of Social Affairs and Employment had, through a decision issued on 20 September 2006, imposed a fine on the company *Mandemakers* (hereafter referred to as “Mandemakers”) because some of its employees did not keep to the appointed working times and rest periods. According to the Minister, the time taken by *Mandemakers* employees to travel between their homes and their first and last clients of the day should be counted as working time. *Mandemakers* lodged a complaint against this decision, which resulted in the Minister reducing the fine by 50% in a decision issued on 4 July 2007.

On 4 July 2007, *Breda District Court* overturned the Minister’s decision, citing faulty reasoning, but ruled that the legal consequences of the decision should still stand. The court held that the Dutch law on working time should be examined in the light of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (hereafter referred to as “the directive”). According to the directive, working time means “any period

during means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice". The court added that according to the European Court of Justice, working time is a concept in Community law and should be interpreted autonomously. Consequently, the court found that the time taken by Mandemakers employees to travel between their homes and their first and last clients of the day should be counted as working time.

Mandemakers lodged an appeal against this decision with the Raad van State, which threw out the judgment at first instance.

The Raad van State observed that as Dutch law does not define the concept of 'working time', Article 2 of the directive had been not been correctly transposed into Dutch law. According to the Raad van State, it was impossible to interpret the concept of 'working time' in line with the directive for the purposes of imposing an administrative fine on Mandemakers. Referring to the European Court of Justice's judgments in the *Kolpinghuis* (80/86, Rec. p. 3969) and *Arcero* (C-168-95, Rec. p. I-4705) cases, in which the ECJ found that "obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of community law and in particular the principles of legal certainty and non-retroactivity", the Raad van State argued that this case law should also be applied to cases involving administrative fines, such as the case in point. The Raad van State held that the principle of legal certainty did not allow the directive to be interpreted in line with Dutch law, and so concluded that the Minister was not competent to impose an administrative fine upon Mandemakers.

Raad van State, 4 March 2009, Keukencentrum Mandemakers BBV v. Minister van Sociale Zaken en Werkgelegenheid,

www.rechtspraak.nl. LJN BH4621

IA/31854-A

[SJN]

State aids – Flight tax – Interim proceedings

On 20 December 2007, a flight tax [or (airport) departure tax for environmental purposes] was introduced by the Dutch law establishing environmental protection taxes (hereafter referred to as "the law"). The tax is charged for each passenger leaving an airport in the Netherlands and must be paid by the airport operators. It is then passed on to the airlines and finally, the passengers.

Transfer passengers are exempt from this tax.

Maastricht Aachen Airport B.V (hereafter referred to as "MAA"), which operates Maastricht Aachen Airport, and Ryanair, an airline that operates flights from Maastricht Aachen Airport, opposed this tax because there are no transfer passengers at Maastricht Aachen Airport, so Ryanair has to pay flight tax for all its passengers. Conversely, 42% of the passengers at Schipol Airport are transfer passengers. In view of this fact, MAA and Ryanair argued that they are more affected by the tax than Schipol Airport and the airlines operating from there and that the State is therefore providing aid to Schipol Airport and the airlines that use it.

In an application for interim measures, MAA and Ryanair asked that the Dutch law establishing the tax be declared irrelevant until the European Commission had made a decision on the matter. The District Court and The Hague Court of Appeal found that the tax did not seem to constitute a State aid and dismissed the application for interim measures.

The Hoge Raad (Supreme Court) then found, during cassation proceedings, that the Court of Appeal's judgment was not vitiated by an error of law.

First of all, the Hoge Raad observed that the case in point dealt with a formal legal provision, which could only be declared irrelevant if it undeniably constituted a State aid within the meaning of Article 87(1) of the Treaty establishing the European Community and indisputably contravened Article 88(3) of that treaty (Article 108(3) of the Treaty on the Functioning of the European Union). This is

not true of the case in point, since the tax is paid by all airport operators in the Netherlands for all departing passengers, except transfer passengers. This is not called into question by the fact that some operators benefit more from the exemption than others.

Consequently, taking into account that an in-depth economic analysis would probably have to be conducted before determining the effect of the exemption for transfer passengers and although that there was no place for it in an interim proceeding, the Hoge Raad concluded that flight tax was not indisputably a State aid and could therefore not be declared contrary to Article 88(3) of the Treaty establishing the European Community (Article 108(3) of the Treaty on the Functioning of the European Union) within the framework of such a proceeding.

Hoge Raad, 4 September 2009, Maastricht Aachen Airport B.V., Ryanair Limited Ireland v. the Dutch State (Ministry of Finance), www.rechtspraak.nl, LJN BI345

IA/31242-A

[S]JN

Poland

Constitutional law – Overlapping competences of the State’s central constitutional authorities – Competence to appoint Poland’s representatives on the European Council – Competence to adopt Poland’s position and present this position to the European Council

The Constitutional Court ruled on the competence of Poland’s central constitutional authorities to represent Poland in the European Council in a decision handed down on 20 May 2009 following referral of the matter by the Prime Minister.

In practice, the Polish cabinet usually determined the make-up of its delegation and the position it would adopt. The Prime Minister generally headed up the delegation, except in rare cases where the cabinet felt that the President was competent to do so, given the subject under discussion at the European Council summit. The problem arose when the President expressed his wish to take part in the summit and went there, despite the position adopted by the cabinet.

Article 4 of the Treaty on European Union provides that the European Council is composed of the heads of state and government of the Member States, thus leaving the choice to national laws. Since the Polish constitution contains no explicit rules on this matter, the Constitutional Court systematically interpreted the provisions relating to the tasks, duties and competences of the executive branch of government.

As per Article 146 of the constitution, the Polish cabinet is responsible for Poland’s domestic and foreign policy and handles matters of state policy that are not reserved to other authorities and local government units. According to the Constitutional Court, European matters are closely linked to domestic policy, so the more the subject under discussion at the European Council summit had to do with domestic policy, the less necessary it was for representatives of bodies other than the cabinet to attend. According to the principles set out in the constitution and legislation, the Polish cabinet is generally responsible for managing relations with foreign countries and Poland’s external security. The Prime Minister is responsible for implementing the cabinet’s policies and determining how they will be implemented (Article 148 of the constitution). The Polish cabinet’s competence to manage the country’s external relations is supplemented by Article 133 which, when listing the President’s prerogatives, states that the President represents the State in the domain of external relations. The President needs to cooperate with the Prime Minister, the Minister of Foreign Affairs or the Parliament to exercise some of the prerogatives.

The Constitutional Court held that the President, the cabinet and the Prime Minister had to observe the principle of inter-authority collaboration, as mentioned in the preamble to and Article 133(3) of the constitution, when performing their duties and exercising their competences. It found that the President could not take decisions on foreign policy by himself, though he was entitled to decide to attend the European Council summit if he felt that his attendance was justified in the light of his duties as president. If the President attends a European Council summit, he must work together with the Prime Minister and the minister responsible for the summit’s subject in the aim of guaranteeing the uniformity of

actions taken in Poland's name within the context of the country's relations with the European Union and its institutions. Moreover, cooperation between the President, the Prime Minister and the minister responsible for the summit's subject would enable the President to give his opinion on the position adopted by the cabinet and, if necessary, determine the form and extent of his participation in the European Council summit in question.

The Constitutional Court concluded that it fell to the cabinet to adopt Poland's position, which would then be presented to the European Council by the Prime Minister or the minister responsible for the subject.

Trybunał Konstytucyjny, order of 20 May 2009, Kpt 2/08, Orzecznictwo Trybunału Konstytucyjnego, Zbiór Urzędowy, seria A, 2009, Nr 5, poz. 78 www.trybunal.gov.pl

IA-31675-A

[MKAP]

Czech Republic

Competition – Cartel created before the Czech Republic joined the European Union and disbanded after the Czech Republic became an EU member – Competence of the national competition authority to penalise the cartel in question for its activities in the period before EU membership – Compliance with the ne bis in idem principle

In its judgment of 10 April 2009, the Nejvyšší správní soud (Higher Administrative Court) found that the national competition authority was competent to impose penalties for an infringement on competition law committed before the Czech Republic joined the European Union, even though the anti-competitive behaviour in question continued after the country became an EU member.

In the case in point, those involved in the cartel (which was created by an agreement in 1988) were punished by the European Commission for the offence, which continued after the Czech Republic had joined the European Union. The national competition authority then prosecuted the cartel members for the same unlawful behaviour which took place before the country's membership of the EU. Referring to the case law of the European

Court of Justice, which views a cartel as a "single continuing agreement", the Nejvyšší správní soud found that the change in *jurisdiction* that arose from the Czech Republic joining the European Union put an end to the anti-competitive actions taking place on national territory, which were punishable under the national *jurisdiction* only. The continuation of this same anti-competitive behaviour after the Czech Republic joined the European Union formally constitutes a separate offence – a contravention of Community law – and thus falls within the joint competence of the national competition authority and the European Commission, with the European institution taking precedence. On this basis, the high administrative court concluded that the *ne bis in idem* principle had not been violated, since the continuing cartel in question should be considered as having ceased its activities in Czech national territory as soon as the national authorities and courts no longer had exclusive competence in the matter, that is, when the Czech Republic joined the EU.

The Nejvyšší správní soud therefore threw out the decision made by the lower court, which had applied the *ne bis in idem* principle and referred the dispute to the Nejvyšší správní soud. By its decision of 11 December 2009, Brno Regional Court asked the European Court of Justice to make a preliminary ruling on this legal issue (C-17/10).

Nejvyšší správní soud, judgment of 10 April 2009, 2 Afs 93/2008-920, available at this [web address: www.nssoud.cz/main.aspx?cls=AnonymZneniList](http://www.nssoud.cz/main.aspx?cls=AnonymZneniList)

IA/32233-A

[PES] [VMAG]

Treaty of Lisbon – Checking constitutionality before ratification – Conformity of the Treaty and its contested provisions with Czech constitutional order

In its judgment of 3 November 2009, which was its second judgment to deal with the

Treaty of Lisbon, the Ústavní soud (Constitutional Court) confirmed that the various individual provisions of the Treaty, the Treaty as a whole and the Treaty's ratification conformed to Czech constitutional order.

The Ústavní soud had been asked to rule on the case in point by the Senate (the second chamber of the Czech parliament) once more supported by Václav Klaus, President of the Czech Republic. The Senate held that the Treaty of Lisbon and certain contested provisions were not compatible with the Czech Republic's constitutional character as a state governed by the rule of law because the Treaty was not clear enough, violated the principles of non-retroactivity, political neutrality and legitimate expectations and infringed on the sovereignty of the Czech Republic. The democratic deficit was also mentioned.

In this judgment, the Ústavní soud ruled on the entire Treaty of Lisbon and various provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union that had not been covered in its first judgment on Treaty of Lisbon, which it handed down on 26 November 2008 (see *Reflets no. 1/2009*, IA/31356-A [only available in French]). From a procedural point of view, the court explained its assessment of the judgments it made as part of the procedure ensuring that an international treaty conforms with constitutional order before its ratification with regard to the *exceptio rei iudicatie* and drew the conclusion that there were no longer any formal barriers to the ratification of the Treaty of Lisbon. Moreover, the Ústavní soud took the opportunity to give its opinion on the timeframes involved, saying that generally, proceedings should be launched and the treaty in question ratified quickly after their conclusion, which did not happen in this particular case

With regard to the appellant's request to define "the material limits of the transfer of powers to the EU", the Ústavní soud deemed that it was not competent to draw up a list of non-transferrable powers, given its position within the constitutional system. This concerns political decisions that are taken by the legislator, so the Ústavní soud can only check them after they have been made at political level.

Firstly, ruling on the merits of the case, the Ústavní soud threw out the argument that the Treaty of Lisbon goes against the principles of non-retroactivity because EU authorities could modify the Treaty to correct mistakes. According to the Ústavní soud, any linguistic changes made would have to be published in the Collection of International Treaties of the Czech Republic for them to come into force. Moreover, such changes are always performed through protocols that must be approved by all State parties.

Secondly, with regard to the argument that the Treaty is not clear enough, the Ústavní soud underlined that the Treaty of Lisbon is an international treaty governing the very foundations of the European Union, so it is not possible to subject it to requirements such as those developed by the Ústavní soud for national rules and regulations.

Thirdly, with regard to the issue of democratic deficit, the Ústavní soud referred to its judgment of 26 November 2008 and mentioned the possibility of giving representatives of the Member States a "special mandate" for negotiating within the European institutions and boosting the role of the national parliaments as defined in the Treaty of Lisbon. The court also stated that Article 1(10) of the Treaty on European Union, according to which the functioning of the Union is based on representative democracy, refers to procedures at both European level and national level and mentioned that these are interdependent, so the European Parliament does not bear exclusive responsibility for the democratic legitimacy of its decisions.

Fourthly, the Ústavní soud did not find anything in the aims of the EU, as listed in Article 3 of the Treaty on European Union, that contradicts the principle of the political neutrality of the Czech Republic. It pointed out that the Czech constitution is not based on neutral values. In fact, the constitution focuses on certain ideas that express the fundamental, inalienable principles of a democratic society, so the values upon which Czech constitutional order is based are compatible with the aims of the EU.

Fifthly, with regard to the argument that the sovereignty of the Czech Republic is being infringed upon, the Ústavní soud referred to its first judgment on the Treaty of Lisbon again, stating that in a modern democratic state,

sovereignty does not constitute an end in itself. Rather, it is a way of achieving the fundamental values supporting a state based on the rule of law. The voluntary transfer of certain powers, undertaken with the participation of the state in question and in line with predetermined rules, does not weaken sovereignty. In fact, such a transfer may strengthen sovereignty as it will further the common progress of the organisation into which the State is integrating. Besides, the Czech Republic showed its agreement with this concept of shared sovereignty when it submitted its request to join the EU. The Ústavní soud adopted this standpoint in its examination of the appellant's arguments concerning the gradual creation of a European defence policy, measures to manage the flow of migrants and cooperation in penal matters.

Sixthly, the Ústavní soud deemed the requirement for European commitment, by virtue of Article 17(3) of the Treaty on European Union, to be legitimate and compatible with the principle of equality, since Commission members carrying out their duties in the general interest of the EU must be faithful to the EU's interests and aims, which are completely compatible with the values on which Czech constitutional order is based.

Seventhly, the Ústavní soud also rejected the argument that greater cooperation would go against the principle of democracy and infringe on the sovereignty of the Czech Republic, emphasising that such cooperation is a legitimate way for states to exercise their sovereignty as subjects of international law. Moreover, the contested provisions allow the Czech Republic's constitutional bodies, including the two chambers of Parliament, to decide if, when and how the Czech Republic will participate in such cooperation in future.

Eighthly, with regard to the procedure for withdrawing from the EU, which, according to the appellant, contravenes the principle of sovereignty, the Ústavní soud pointed out that this principle does not mean that states can arbitrarily violate existing international commitments. However, the obligation to

honour the existing procedure, which is also a result of international legal requirements relating to the right to revoke treaties, conforms fully with Czech constitutional order. It is therefore incorrect to claim that "the withdrawal of powers" is necessarily subject to consent by the EU. On the contrary, the procedure in question strikes a balance between the Czech Republic's need for sovereignty and its obligation to honour the commitments it assumed, along with the other Member States.

All that remains is to note that none of the judges in the plenary assembly (which, in the case in point, exceptionally brought together all fifteen judges) expressed a dissenting opinion, which was also true of the first case on the Treaty of Lisbon. Furthermore, this case was examined under summary proceedings, so the judgment was handed down just five weeks after proceedings were launched. The judge-rapporteur was the president of the Ústavní soud.

Ústavní soud, judgment of 3 November 2009, Pl. ÚS 29/09, available at this web address: www.nalus.usoud.cz/Search/Search.aspx, English version available at this web address: www.concourt.cz/view/726

IA/32234-A

[PES] [VMAG]

Romania

Fundamental rights – Law transposing Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services – Unconstitutionality – Continuous nature of the requirement to retain data and lack of sufficient, appropriate guarantees protecting people from arbitrary application of the law – Violation of the right to personal, private and family life, secrecy of correspondence and freedom of expression

In a judgment of 8 October 2009, the Romanian Constitutional Court ruled on the constitutionality of law 298/2008 transposing the provisions of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications service.

The law, which applies to traffic and location data and the related data required for identifying the subscriber or user, establishes the obligation for electronic service providers to keep such data and, if necessary, make them available to the competent authorities for the purposes of criminal prosecution for serious crimes.

The Constitutional Court found that this law was likely to affect the exercise of certain human rights and fundamental freedoms guaranteed by the Romanian constitution (albeit indirectly), namely the right to personal, private and family life, as well as secrecy of correspondence and freedom of expression. The Constitutional Court based this conclusion on evidence relating to several aspects, some of which stemmed from the requirements set out by the directive itself and others of which (the larger group) stemmed from flaws in the directive's transposition, particularly with regard to the law's outlining and definition of certain concepts. As the law transposes an EU directive, the Constitutional Court reiterated that the Romanian legislator is free to determine the actual methods and solutions it will use to achieve the result required by Community law, while taking account of the particular features and actual situation at national level. However, in this case, the lack of clear definitions could result in abuse in the domain of data retention, as the law could not meet the conditions of foreseeability or clarity or fulfil the requirement for proportionality in breaches of fundamental rights.

In the Constitutional Court's view, retaining data over a six-month period (the minimum duration set down by the directive) establishes a continuing requirement that targets everyone, regardless of whether they have committed offences or are subject to criminal prosecution. With a court's authorisation, it will be possible to use such data for a period in the past rather than a period in the future. The Romanian Code of Criminal Procedure's rules in this matter

stipulate that, with a court's authorisation, data on a single person and a single event may be stored and intercepted for a period of no more than 120 days. The Constitutional Court believed that this would give rise to a constant limitation of the ability of natural and legal persons (to whom the law applies) to exercise their rights to personal, private and family life and secrecy of correspondence, without any connection to a defined event or cause but in the overall aim of generally preventing or discovering serious crimes. While the Constitutional Court admitted that the data in question were technical and that the law did not apply to the content of messages, it nonetheless stressed that the lack of a legal definition outlining the concept of "related data required for identifying the subscriber or registered user" paved the way for abuses and arbitrariness in data retention and use. The same risk could result from a lack of clear criteria defining "threats to national security", for the prevention of which the law grants the competent authorities access to data. The Constitutional Court held that without clear criteria and references, even everyday activities could be viewed as 'threats' and the people to whom the law applies could find themselves classed as being under suspicion, without their knowledge.

Moreover, the Constitutional Court found that the law interfered too much with the rights of the person to whom a message was addressed. In this case, the identification and retention of data would not only affect the message's author, but also its addressee, who, as the passive receiver of the message, would have the law applied to them as a result of the will of the sender, who may have sent the message improperly or with malicious intent, and through no desire of their own.

Consequently, the Constitutional Court declared the entire law unconstitutional given the lack of sufficient, appropriate guarantees protecting people from the risk of improper, arbitrary use of traffic and location data, bearing in mind both the continuous nature of the requirement to retain these data and the lack of clear definitions and criteria outlining the concepts used in the law.

Curtea Constituțională a României, judgment no. 1258 of 8 October 2009, published in the Romanian Official Gazette on 23 November 2009, www.ccr.ro

United Kingdom

European Convention on Human Rights – Right to respect for private life – Ban on assisted suicide – Violation of Article 8 of the Convention – Justification – Requirement to publish the guidelines on prosecution of the crime

On 30 July 2009, in one of its last judgments before transferring its judicial functions to the Supreme Court, the House of Lords asked the authority responsible for prosecution to clarify the law on assisted suicide following the request of a British citizen demanding the right to end her life in Switzerland, with her husband's help, without her husband being prosecuted. This judgment marks a reversal of the House of Lords' case law in the matter of assisted suicide.

The appellant, Ms Purdy, who was 46 years old at the time, has suffered from multiple sclerosis since 1995. She feared that one day, her condition would deteriorate to a point where her quality of life would be intolerable and she would be completely dependent on her husband and thus expressed the desire to go, with her husband's help, to one of the many Swiss clinics legally providing medically assisted suicide. However, she wants her husband not to be prosecuted upon his return to England. In both England and Wales, assisting suicide is classified as involuntary homicide under the Suicide Act 1961 and is punishable by a maximum of fourteen years' imprisonment.

The 1961 Act provides that those assisting suicide may only be prosecuted with the approval of the Director of Public Prosecutions (hereafter referred to as "the DPP"), who is also responsible for issuing guidelines defining the circumstances under which a person may be prosecuted. Since the DPP rejected Ms Purdy's request for such guidelines, she lodged an appeal with the aim of forcing him to issue guidelines. This appeal was rejected by the High Court, then by the Court of Appeal, which stated that Parliament was responsible for clarifying the law on this point. The Court of Appeal also held that it was bound by the judgment made on 29 November 2001 in the *Pretty* case, whereby the higher court confirmed the DPP's decision not to guarantee the applicant that her husband would be immune from prosecution if he helped her to commit suicide. The *Pretty* case was also referred to the European Court of Human Rights (hereafter

referred to as "the ECHR"), which concluded that the decision did not breach the European Convention on Human Rights (hereafter referred to as "the Convention") (appeal no. 2346/02).

In the appeal lodged with the House of Lords, the appellant claimed that the ban on assisted suicide infringed on her right to respect for private life, which is enshrined in Article 8 of the Convention. This argument was rejected in the judgment in the *Pretty* case on the grounds that Article 8 did not confer a right to decide when and how to die. Conversely, the ECHR found that preventing a person from avoiding an undignified and distressing end to their life may engage Article 8.

The House of Lords, when asked to rule on the matter, unanimously decided to reverse its old case law and find that Ms Purdy could refer to her right to respect for private life to demand the publication of guidelines on the prosecution of assisted suicide. In Lord Hope's opinion, making national case law compliant with the convention would entail taking account of the fact that dignity and freedom are the very essence of the Convention and that the concept of quality of life takes on great significance under Article 8. Be that as it may, Lord Hope also found that the ban's interference with respect for private life would be justified under Article 8(2) of the Convention if the DPP issued guidelines satisfying the requirements of foreseeability and public accessibility resulting from the case law of the ECHR.

On 23 September 2009, the DPP published guidelines detailing the circumstances under which a person could be prosecuted for assisting the suicide of a friend or family member. Generally speaking, those helping a friend or family member to commit suicide are unlikely to be prosecuted if their actions are motivated by compassion and if the wishes of the person intending suicide are clear. However, prosecution is likely if the person intending suicide is aged under 18. The draft version of the guidelines has undergone public consultation and the DPP plans to publish the final version in March 2010. It is important to note that these guidelines will only apply to England and Wales, since Scotland and Northern Ireland have their own laws governing such matters.

House of Lords, judgment of 30 July 2009, R (on the application of Purdy) v Director of

Public Prosecutions [2009] UKHL 45
www.bailii.org

IA/31683-A

[PE] [SOHA]

Constitutional law – Removal from office of the most senior magistrate in Gibraltar

In the opinion issued on 12 November 2009, the Judicial Committee of the Privy Council (hereafter referred to as “the JCPC”) recommended that the most senior magistrate in the Gibraltar judicial system be removed from office due to his inability to discharge the functions of his office.

The Governor of Gibraltar appointed Mr Schofield as Chief Justice of Gibraltar in 1996, in line with the Queen’s instructions. Mr Schofield thus became head of the Gibraltar judiciary and sat on both the Supreme Court and the Court of Appeal of the territory. In April 2007, a group of lawyers, including almost all those with the rank of Queen’s Counsel in Gibraltar, lodged a complaint with the Governor, asking him to begin the procedure to remove Mr Schofield from office. The signatories confirmed that they had lost confidence in his ability to discharge the functions of his office and that they have noticed some behaviour on his part that, in their opinion, called into question his independence and impartiality.

The complaint was lodged following the Chief Justice’s response to the introduction of a bill to reform Gibraltar’s judiciary. The law, which was adopted in 2007, removed the Chief Justice’s role as head of the judiciary in Gibraltar, a move that was contested by Mr Schofield on the basis that it harmed judicial independence. His wife then accused the Prime Minister of having introduced reforms that constituted an attempt to violate the constitution of Gibraltar. She also wrote a letter to the Chairman of the Gibraltar Bar asserting that the sole purpose of the reform was to force her husband’s resignation. Mr Schofield supported his wife when, after having criticised the members of the Bar, she launched a libel action against its Chairman.

Under the constitution of Gibraltar (see *Reflets no. 2/2007*, p. 27 [only available in French]),

the Chief Justice can only be removed from office following a decision by the Governor, taken on the recommendation of the JCPC. The dismissal procedure may only be launched if a tribunal of inquiry appointed by the Governor duly notes any inability on the part of the Chief Justice to discharge the functions of his office or any misbehaviour on his part. Upon receipt of the complaint, the Governor began the relevant procedure and appointed a tribunal made up of three former judges of the House of Lords. The Chief Justice was suspended while awaiting their findings.

After collecting the relevant witness statements, the tribunal submitted its report to the Governor on 12 November 2008. This report was very critical of the Chief Justice, asserting that his behaviour damaged the dignity of his office and noting that he tended to overreact to perceived slights. The case was then referred to the JCPC.

The JCPC, which was made up of six Supreme Court judges plus the Chief Justice of England and Wales, ruled by four votes to three that Mr Schofield should be removed from office. The court believed that it would be appropriate to investigate whether Mr Schofield’s behaviour directly affected his ability to discharge the functions and carry out the duties of his office, whether it affected others’ perception of his abilities to perform these functions and duties, whether keeping the Chief Justice in office would be inimical to the due administration of justice in Gibraltar and whether the Chief Justice’s behaviour had brought the office of Chief Justice into disrepute. In this case, the concept of ‘inability to discharge the functions of office’ must be interpreted rather broadly to encompass inability caused by certain character flaws. In this respect, the actions of Mr Schofield and his wife made Mr Schofield’s position untenable. The JCPC therefore recommended that the Chief Justice be removed from office, and the Governor gave the relevant order on 18 November 2009.

Judicial Committee of the Privy Council, opinion of 12 November 2009, Hearing on the report of the Chief Justice of Gibraltar [2009] UKPC 43, www.bailii.org

IA/31684-A

[PE]

2. Non-EU countries

Russia

Constitutional law – Death penalty – Moratorium imposed by the Constitutional Court until jury trials are implemented – Possible to apply the death penalty when there are jury trials throughout the Federation – Rejection – Unlimited extension of the moratorium in view of the obligations resulting from having signed the 6th Protocol of the European Convention on Human Rights

Having been asked by the Верховный Суд Российской Федерации (Supreme Court of the Russian Federation, hereafter referred to as “the BC”) to interpret the fifth point of the pronouncement of its judgment of 2 February 1999 (hereafter referred to as “the 1999 judgment”), namely that it would be possible to apply the death penalty in Russia from 1 January 2010, the Конституционный Суд Российской Федерации (Constitutional Court of the Russian Federation, hereafter referred to as “the KC”) declared in its order of 19 November 2009 (hereafter referred to as “the 2009 order”), that the death penalty could no longer be applied in Russia.

The Russian Constitution allows for the death penalty to be applied, though it classifies it as an exceptional punishment that may only be applied until its abolition. The Constitution also sets down the right of accused criminals who may face the death penalty (hereafter referred to as “accused criminals”) to a jury trial. However, when the KC handed down the 1999 judgment, the jury system had not yet been established in all regions of the Russian Federation.

Consequently, in the fifth point of the pronouncement of the 1999 judgment, the KC, basing its decision on the principle of equality, declared that from the entry into force of the 1999 judgment to the entry into force of a federal law guaranteeing that all accused criminals throughout the whole territory of the Russian Federation would have their cases heard by a jury, the death penalty could not be applied, regardless of whether the case was

heard in a jury trial or not. The KC found that accused criminals in regions of Russia where the jury system was already being implemented at the time of the 1999 judgment could not be given unequal treatment when compared to accused criminals in the rest of the country.

However, as of 1 January 2010, the jury system will be implemented in the Chechen Republic, the only Russian region that does not yet hold jury trials. According to the 1999 judgment, this would put an end to the moratorium on the death penalty.

The BC asked the KC to rule because it assumed that from 1 January 2010, the fifth point of the pronouncement of the 1999 judgment would create a contradictory practice when it came to applying the death penalty. The BC believed that this ambiguity arises from the fact that in 1997, the Russian Federation agreed to abolish the death penalty in peacetime by signing the 6th Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The abolition of the death penalty was a condition for Russia’s membership of the Council of Europe. Notwithstanding the fact that the Duma has not yet ratified the Protocol, considering abolition of the death penalty to be premature for the country (Russia is the only one of the Council of Europe’s 47 Member States not to have ratified the Protocol), and in accordance with Article 18 of the Vienna Convention on the Law of Treaties, Russia must respect the rules set down in the 6th Protocol, even before ratifying it. This means that from the date it signed the 6th Protocol, Russia has not been entitled to apply the death penalty or perform executions.

In answer to the question posed in the 2009 order, the KC referred to Russia’s international obligations deriving from the legal documents mentioned above and worldwide development and trends.

The KC also referred to established legal practice since the entry into force of the 1999 judgment. Russia has not executed anyone since 1996 (though according to information from the Council of Europe, the Chechen Republic executed some people in 1999).

The KC found that given the legal practice caused by the long moratorium on the death penalty (10 years), robust guarantees have been formed on the individual's right not to be punished by death. It also emphasised that international legal trends and the obligations that Russia has adopted mean that Russia is irrevocably on the path to completely abolishing the death penalty. Consequently, in the KC's view, the death penalty cannot be applied, even after the establishment of the jury system across the whole of the Russian Federation.

The KC therefore extended the moratorium indefinitely, that is, until Russia decides to cease its participation in the 6th Protocol or until it modifies the provisions of its Constitution to temporarily allow the death penalty.

While many legal experts welcome the de facto abolition of the death penalty, the 2009 order (which was passed by sixteen votes to three) has been heavily criticised. The 2009 order is often viewed as correct from a political viewpoint but dubious from a legal viewpoint.

In particular, the KC has been criticised for having gone beyond the limits of its competences and having interpreted elements that were not present in the 1999 judgment. The 1999 judgment makes no mention of the death penalty being incompatible with Russia's international duties, nor does it mention established practice on the application of the death penalty in Russia. The judgment did not even look at the fundamental issue of the constitutionality of the death penalty.

In its 2009 order, the KC held that it had taken account of Russia's international obligations when it issued the 1999 judgment. However, at the time the judgment was handed down, the KC assumed that the issue of ratification would be resolved within a reasonable time frame, and certainly before the jury system became established throughout the entire Russian Federation, so the intention of taking account of international obligations is not reflected in the text of the 1999 judgment.

Конституционный Суд Российской Федерации, judgment of 19 November 2009, no. 1314-O-P

www.rg.ru

IA/31681-A

[LSA]

Switzerland

International agreements – EC-Switzerland Agreement on the free movement of persons – Right to move and reside freely within the territory of Member States – Right of entry and residence for non-EU citizens who are family members of EU citizens – Right of residence for a spouse from a non-EU country – Legal residence within the territory of a Member State required – Inadmissibility

In a judgment handed down on 29 September 2009, the Swiss Federal Court brought its case law into line with the recent case law of the European Court of Justice, and more specifically the Metock judgment (judgment of 25 July 2008, C-127/08, Rec. p. I-6241), by abandoning its old case law, which was based on the judgment in the Akrich case (C-109/01, Rec. p. I-9607).

The dispute concerns a Palestinian's request for a residence permit under family reunification rules. Not only had the Palestinian been residing in Switzerland illegally since his arrival in 1996 (having refused on several occasions to comply with decisions to expel him from Swiss territory), he had also been sentenced to a total of 28 months' imprisonment in 1998 and 2000 for narcotics-related offences. He served most of this sentence and was released in 2001. After his release, in 2008, he was convicted of having illegally possessed arms in 2003. In the meantime, the Palestinian had married a Spanish national who was resident in Switzerland, so his request for a residence permit was based on the right to family reunification. However, his request and subsequent appeals were rejected.

In its judgment, the Swiss Federal Court first pointed out that it and the European Court of Justice shared competence in matters relating to the EC-Switzerland Agreement on the free movement of persons and stressed that to the extent that the Agreement involves concepts from Community law, Switzerland had to take account of the relevant case law of the European Court of Justice from before the signature of the agreement.

The Federal Court then gave a brief overview of the European Court of Justice's case law in relation to the right to residence of a non-EU spouse, making special mention of the Akrich judgment in 2003 and the Metock judgment in 2008.

Believing that there was nothing to justify the existence of two different systems of case law in the matter (one system of case law within the EU and a different system for the EU's relations with Switzerland); the Federal Court decided to modify its case law in line with the development of EU case law and to follow the rules set down in the Metock judgment. The Federal Court was actually not required to do this, since the relevant decisions were made after the signature of the EC-Switzerland Agreement on the free movement of persons, but it had already done so, for the same reasons, with regard to the Akrich judgment.

Consequently, the Federal Court stated that the appellant should be given a residence permit for purposes of family reunification with his Spanish wife, unless it could be shown that one of the exceptions provided for under Swiss law, such as disturbance of public order or endangerment of health or security, applied in his case.

However, the Federal Court found that none of these exceptions applied as since his release, the appellant has lived a stable life, has gained a good command of German, has found a job and has not claimed welfare. With regard to the criminal acts committed by the appellant in the past, the Court felt that a certain period of time had passed since the narcotics-related offences and that the offence related to illegal possession of arms was not especially significant. As a result, the Federal Court ordered that the appellant be granted a Swiss residence permit.

*Bundesgericht, judgment of
29 September 2009
2C_196/2009,
www.bger.ch*

IA/32473-A

[CHEE]

B. Practice of international organisations

Human Rights Committee

International Covenant on Civil and Political Rights - Right to an effective recourse - Right to liberty of movement - Right to leave a country, including one's own - Right to a fair trial - Principle of equality of arms - Presumption of innocence - Reasonable time frame for proceedings - Right to enforcement of remedies - Principle of legality of penalties - Protection from arbitrary or unlawful interference with one's privacy - Right to freedom of thought, conscience and religion - Right to freedom of association - Principle of non-discrimination - Violation of Article 12 and Article 17 of the Covenant

In its findings delivered on 22 October 2008, the Human Rights Committee concluded that Belgium had violated the International Covenant on Civil and Political Rights (Articles 12 and 17) with preventive measures aimed at eradicating the terrorist threat. This is the first time Belgium has been 'condemned' by the Human Rights Committee.

The case arose in the context of preventive measures designed to eradicate the terrorist threat. Since 1999, the United Nations Security Council has issued a number of resolutions based on Chapter VII of the Charter of the United Nations, with a view to combating the threat of terrorism. A Sanctions Committee has been set up to maintain, on the basis of the information communicated by States, a list of individuals and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban. These resolutions oblige States to block the funds of the persons and entities included on the list, and to limit their movements on national territory.

In the wake of the attacks on 11 September 2001, the plaintiffs, Mr Sayadi, a Lebanese national who obtained Belgian nationality in 2001, and Ms Vinck, a Belgian national who converted to Islam, were suspected of belonging to the Al-Qaida movement. On the basis of the said Security Council resolutions and of the European Union Council Regulation No. 881/2002, a criminal investigation of the plaintiffs was initiated in September 2002. On 19 November 2002, Belgium informed the

Sanctions Committee that the plaintiffs were, respectively, the director and secretary of *Fondation Secours International*, reportedly the European branch of the Global Relief Foundation (GRF), an American association that has been on the sanctions list since 22 October 2002. Following this communication by the Belgian authorities, the plaintiffs' names were placed on the list. As a result, their assets were frozen and they were prohibited from leaving Belgium. The plaintiffs' accounts and financial income were blocked and their passports withdrawn.

The plaintiffs brought an action before the Brussels Court of First Instance, which on 11 February 2005 ordered the Belgian State to request that the Sanctions Committee remove their names from the list. The Belgian State complied with this ruling, but no decision was taken by the Sanctions Committee and the plaintiffs' names remained on the list. The Judge's Chambers of the Brussels Court of First Instance also confirmed the plaintiffs' innocence, dismissing the case on 19 December 2005 after more than three years of criminal investigation. As a last resort, the plaintiffs instituted proceedings against the Belgian State in the Human Rights Committee.

The plaintiffs alleged violations of their right to an effective remedy, their right to travel freely, their right not to be subject to unlawful attacks on their honour and reputation, the principle of legality of penalties, respect for the presumption of innocence and their right to proceedings that afford structural guarantees.

In the case in point, the Committee considered the compatibility with the Covenant of the national measures taken to implement the United Nations Security Council resolution. As regards the substance of the case, the Committee concluded that the Covenant had been violated twice. Firstly, it held that the travel ban, and more specifically the prohibition on leaving Belgium which had been imposed on the plaintiffs, represented an unjustified restriction of the right to travel freely as enshrined in Article 12 of the Covenant. In the Committee's view, the facts did not show that said restriction of the plaintiffs' right to leave the country was necessary to protect national security or public order. The Committee then held that the placement of the plaintiffs' names on the Sanctions Committee list as a result of the actions of the State party resulted

in unacceptable interference in their private lives, contrary to Article 17 of the Covenant, in relation more specifically to their honour and reputation. It held that the dissemination of personal information about the plaintiffs constituted an attack on their honour and reputation, in view of the negative associations that some people might make between their names and the title of the sanctions list.

This ruling that there had been a twofold violation of the Covenant was based largely on the fact that the plaintiffs continued to be subject to the contested measures restricting their freedom even though the criminal investigation instituted against them had ended in a dismissal of the case in 2005 and that no charge had been brought against them. The fact that the Belgian State did not have the power itself to remove the plaintiffs' names from the UN list did not diminish its responsibility. In the Committee's view, the responsibility of the Belgian State was raised directly since it had communicated the identity of the plaintiffs to the Sanctions Committee, without due consideration.

Communication No. 1472/2006 'Sayadi and Vinck' [www://tb.ohchr.org/default.aspx](http://tb.ohchr.org/default.aspx)

[SEN]

World Trade Organisation

Definitive anti-dumping measures on certain iron or steel fasteners from China - Complaint brought by China

On 26 January 2009, the Council adopted Regulation (EC) No. 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China. As a result, definitive anti-dumping duty of up to 85% was imposed on dozens of Chinese companies for a five-year period. Subsequently, a number of these companies brought actions for annulment before the Court of Justice. These were Ningbo Yonghong Fasteners (action brought on 10 April 2009, T-150/09), Würth and Fasteners (Shenyang) (action brought on 24 April 2009, T-162/09), Shanghai Biaowu High-Tensile Fastener and Shanghai Prime Machinery (action brought on 24 April 2009, T-170/09) and Gem-Year and Jinn-Well Auto-Parts (Shejiang) (action brought on 24 April 2009, T-172/09).

In addition, on 31 July 2009 China requested consultations with the European Communities regarding the said Regulation as well as Article 9(5) of Council Regulation (EC) No. 384/96 (core anti-dumping regulation) within the framework of the World Trade Organisation (WTO). China claimed that the provisions were, *inter alia*, incompatible with the obligations of the European Communities under provisions of the WTO Agreement, the 1994 General Agreement on Tariffs and Trade (GATT) and the Anti-Dumping Agreement (Agreement on Implementation of Article VI (anti-dumping measures) of GATT).

These consultations having failed, on 12 October 2009 China requested the establishment of a panel. In the absence of opposition from the European Communities, the Dispute Settlement Body agreed to this request at its meeting on 23 October 2009. Canada, India, Japan, Chinese Taipei and the United States reserved their third-party rights. Subsequently, Brazil, Chile, Colombia, Norway, Thailand and Turkey reserved their third-party rights. On 30 November 2009, the European Communities requested the Director-General to determine the composition of the panel. On 9 December 2009, the Director-General composed the panel.

WT/DS 397: European Communities – Definitive anti-dumping measures on certain iron or steel fasteners from China,
www.wto.org

[CHEE]

C. National legislation

Germany

Act on the participation of the national parliament in the process of European integration

On 25 September 2009, the Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, Integrationsverantwortungsgesetz – ‘IntVG’) entered into force.

This act transposes the requirements resulting from the judgment by the German

Constitutional Court (Bundesverfassungsgericht) of 30 June 2009 (cf. *Reflets No. 2/2009*, p. 3 [only available in French]), in which the Bundesverfassungsgericht ruled that the act ratifying the Lisbon Treaty was compatible with the German constitutional order, but at the same time demanded a strengthening of the participation of national legislative bodies in the European integration process.

According to the IntVG, Germany’s consent to Community acts is subject, in the cases listed in the Act, to the approval of the national parliament. For example, as regards a simplified revision procedure for the Treaty (Article 48(6), TEU), approval of the revision must be enshrined in a law passed by the German parliament. As regards acts based on the bridging clauses, namely Article 48(7) TEU and Article 8(3)(2) TFEU, approval or abstention by the German government representative in the Council requires a law to that effect to have been passed by the German parliament in advance. Moreover, the same applies to implementation of the flexibility clause (Article 352 TFEU) and of Article 83(1)(3) TFEU concerning the enlargement of EU competences in the domain of criminal law.

Integrationsverantwortungsgesetz (Article 1 of the Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, Bundesgesetzblatt I Nr. 60, Seite 3022), www.bundesgesetzblatt.de

[TLA]

Belgium

Taxation of savings income and exchange of information

Under the law of 17 May 2004 transposing into Belgian law Council Directive 2003/48/EC on taxation of savings income, Belgium (in common with Austria and Luxembourg) benefited from a transitional regime enabling it to retain its banking secrecy for a few more years. Belgium could therefore refrain from exchanging information on savings income covered by the Directive (i.e. income of non-residents) while applying withholding tax to such income at a rate increasing progressively to 35%. This transitional regime was revoked on 1 January 2010, pursuant to the Royal Decree of 27 September 2009. Henceforth, Belgium will

automatically exchange information and will disclose to the State of residence of the recipient of the income the first and last names, date and place of birth, full address and bank account number(s) of the recipient, together with the amount of interest received by the latter.

Royal Decree implementing Article 338(a)(2) of the 1992 Income Tax Code (Code des impôts sur les revenus/ Wetboek van de inkomstenbelastingen), Moniteur belge/Belgisch Staatsblad, 1 October 2009, p. 65609

[CREM]

New obligation of prior referral to the Constitutional Court

A special law of 12 July 2009 made an important amendment to the special law of 6 January 1989 on the Court of Arbitration (Cour d'arbitrage/Arbitragehof - now known as the Constitutional Court (Cour constitutionnelle/Grondwettelijk Hof)), with the aim of ensuring uniformity in the interpretation and application of national law by the various Belgian courts. Henceforth, Article 26 of the special law on the Court of Arbitration states, in a new paragraph 4, that, "when it is claimed before a court that a law [...] violates a fundamental right guaranteed in entirety or partially the same way by a provision of Title II of the Constitution and by a provision of European or international law, the court must first refer a preliminary question to the Constitutional Court regarding compatibility with the provision of Title II of the Constitution." However, this obligation does not apply in the cases exhaustively listed in the law, most notably when the Constitutional Court has already ruled on a question or an appeal on the same subject, when the court considers that the provision of Title II of the Constitution is clearly not violated, or when the court finds that a judgment handed down by an international court or by the Constitutional Court demonstrates that the provision of European law, international law or Title II of the Constitution is clearly violated. Although this provision says nothing about the possibility of direct referral to the Court of Justice, it nonetheless raises questions about its practical application and its compatibility with Article 267 TFEU (formerly Article 234 EC).

Special law of 12 July 2009 amending Article 26 of the special law of 6 January 1989

on the Court of Arbitration, Moniteur belge/Belgisch Staatsblad, 31 July 2009, p. 51617

[CREM]

Lithuania

Amendment of the Law on the Protection of Minors against the Detrimental Effects of Public Information

On 14 July 2009, the Seimas (Parliament of the Lithuanian Republic) passed a law amending the Law on the Protection of Minors against the Detrimental Effects of Public Information. The law, which is due to enter into force on 1 March 2010, stipulates *inter alia* that it is prohibited to "directly disseminate to minors" any public information whereby "homosexual, bisexual or polygamous relations are promoted", because it has "a detrimental effect on the development of minors".

In so doing, the Seimas rejected the veto which the President of Lithuania had issued against the law of 14 July. The President felt that the criteria used to judge whether public information was detrimental to minors' development were vague and legally unclear, which could have led to controversial interpretations.

The law of 14 July was widely discussed at national and Community level.

On 17 September 2009, the European Parliament adopted a resolution on the law in question. Reaffirming the importance of the European Union (EU) fighting against all forms of discrimination, and in particular discrimination based on sexual orientation, the European Parliament asked the EU Agency for Fundamental Rights to give an opinion on the law and the amendments in the light of the EU Treaties and EU law. However, in its response dated 10 November 2009, the Agency said that it lacked the competence to undertake such a task.

The new President of Lithuania, having signed the law of 14 July, set up a working group to examine possible changes to the law.

Finally, on 22 December 2009, the Seimas adopted the amendments to the law of 14 July 2009, which, like the law itself, will enter into force on 1 March 2010, and which no longer refer to homosexual relations. Under these amendments, public information "which encourages the exploitation of and sexual

violence against minors and sexual relations of minors”, information “which encourages sexual relations”, information “showing a disrespect for family values and encouraging another conception of marriage and the family than that contained in the Lithuanian Constitution and Civil Code” are considered as having “a detrimental effect on the development of minors” and it is therefore prohibited to disseminate them to minors (with some exceptions such as dissemination for education and other purposes expressly provided for by the law).

Laws on the protection of minors against the detrimental effects of public information, (Žin., 2009, Nr. 86-3637; Nr. 154-6959)
www3.lrs.lt

[LSA]

Romania

Publication of the new Criminal and Civil Codes

On 24 July 2009, the new Criminal and Civil Codes, adopted respectively by laws No. 286 and No. 287 of 17 July 2009, were published in Monitorul Oficial, the official journal of Romania. They will enter into force at a later date, as set down in the laws relating to their implementation. These laws will be put before Parliament by the Government, within 12 months of the date on which the codes were published.

As soon as it enters into force, the new Civil Code will replace the current code, which has constituted the basic civil law since 1864, to which it makes a series of important amendments and revocations. Professor Flavius Baias notes in this connection that Romania was the only Eastern European country under communist rule to have retained a civil code dating from pre-communist times.

The new Civil Code addresses the need to adapt the basic civil law to contemporary social realities. It establishes new civil law institutions and introduces major changes, restructuring and systematisation affecting almost all areas (including in particular obligations, property, personal and family law and a more uniform approach to civil and commercial relations).

The same need to adjust to social and technical realities prompted the drafting of the new

Criminal Code. A radical restructuring was also required due to the imbalances created over time by the multitude of amendments and provisions contained in special criminal laws.

[RUA]

United Kingdom

Reform of the system of parliamentary expenses

On 21 July 2009, a new act reforming the expenses system for members of the House of Commons received royal approval. The law is the first attempt to reform a system that has remained unchanged for a long time.

The act came about following the scandal provoked in May 2009 by the publication in a daily newspaper of a series of articles revealing in detail the amounts reimbursed to MPs at the taxpayer's expense. One MP received over €34,000 for gardening expenses, including a duck island, while another used public money to clean the moat of his mansion. The scandal of the fraudulent expense claims degenerated into one of the gravest political crises of recent years, forcing the Speaker of the House of Commons to resign for the first time in over 300 years.

The scandal highlighted the inadequacy of the system of parliamentary self-regulation of expense claims as well as the laxness with which the office responsible for approving reimbursement applications applied the rules, which were in any case far from restrictive. To restore public confidence in the political system, the Prime Minister instituted a reform aimed at establishing an independent authority for managing the expenses systems.

The main provision of the new act is therefore the creation of the Independent Parliamentary Standards Authority (IPSA), a non-parliamentary body responsible for the payment of MPs' salaries, and for setting up and managing a new system of expenses based on the recommendations made by the Committee on Standards in Public Life, a non-ministerial public body charged with promoting ethical standards in the political and administrative sphere. The IPSA is also tasked with preparing a new code of conduct on MPs' financial interests.

The new act also creates the post of Commissioner for Parliamentary

Investigations, whose task is to investigate abuses of the system where he has reason to believe that an MP has received a reimbursement to which he or she is not entitled, or has breached his/her obligations under the code of conduct on financial interests. An investigation may be launched either at the Commissioner's initiative or in response to a complaint by a third party or at the MP's own request. The provisions relating to the Commissioner have not yet entered into force.

In addition, any MP who has supplied false or misleading information with a view to reimbursement may be prosecuted. This offence carries a maximum sentence of 12 months' imprisonment and/or a fine. In the UK, parliamentary immunity does not extend to criminal offences, and MPs are treated like any other citizen in this regard.

Finally, it should be noted that the government has recently announced its intention to amend the law to abolish the role of the Commissioner and transfer the latter's powers to the IPSA. The government also plans to transfer responsibility for managing the code of conduct from the IPSA to Parliament.

These amendments are in line with the recommendations issued by the Committee on Standards in Public Life in its report on parliamentary expenses.

The text of the Parliamentary Standards Act 2009 is available at www.statutelaw.gov.uk

[PE] [SOHA]

Sweden

Taxation of winnings from a lottery organised in an EEA Member State

In December 2008, the Swedish parliament passed a law (2008:1322) amending the Income Tax Act, *Inkomstskattelagen* (1999:1229), under which winnings from foreign games of chance and premium bonds are treated on equal terms with those from domestic games of chance and premium bonds. The law, which entered into force on 1 January 2009, applies from the 2010 tax year onwards.

The amendment to the Swedish law came in response to the Lindman case (judgment of 13 November 2003, C-42/02, ECR I-13519), in which the Court of Justice stated that "Article 49 EC prohibits a Member State's

legislation under which winnings from games of chance organised in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable." Given that Swedish legislation was identical to the Finnish legislation in this area, the judgment in question required the Swedish law to be amended, to which end a bill was drawn up making the provisions of the Swedish law compatible with Community law. The provisions affected by the amendment are Article 3 of Chapter 8 and Article 25 of Chapter 42 of the Income Tax Act.

The new provisions of the Income Tax Act mean that winnings from a foreign lottery organised in another Member State of the EEA are exempt from tax. Also, winnings from premium bonds are exempt from tax on condition that the premium bond was issued by a Member State of the EEA. The exemption from tax only applies to the EEA, as regards winnings from games of hazard and winnings from premium bonds.

For the tax exemption for foreign games of chance to apply, it must be determined that the game of chance is arranged in a country that is a Member State of the EEA. In this connection, the preparatory documents to the law stipulate that the place of residence of the game's organiser is the determining factor. Games of chance are generally strictly regulated in the Member States and a licence is usually required to organise such games. For those reasons, it was not deemed necessary to impose additional conditions on either Swedish lotteries or those organised in an EEA Member State, for the rules on exemptions to apply. Games of chance operated on the Internet pose particular problems, not least because they often involve more than one country. To determine the country in which the game is organised, factors such as the country where the licence to organise the game was issued and the country where the main activity is carried out, and in particular where the activity is organised and managed, must be examined and taken into account.

Winnings from premium bonds do not require any additional controls since premium bonds must be issued by an EEA Member State to qualify for exemption.

[LTB]

D. Extracts from legal literature

Discrimination by association on the grounds of disability in European Union law

The Coleman judgment of 17 July 2008 (C-303/06, ECR I-5603), “handed down by the Court of Justice sitting as a Grand Chamber [...] enshrines a potentially substantial enlargement of the scope of the anti-discrimination legislation developed over time by the European Union institutions” (Le-Barbier-Le Bris, M., “Protection pour la mère d'un handicapé: la Cour de justice reconnaît la ‘discrimination par association’”, RJS, 11/08, p. 883). “[If] most of the judgments handed down by the [...] Court pass members of the public by, and receive little or no attention in the mainstream media [...], from time to time, the Court delivers a judgment which makes headline news and which captures the public’s attention. The Coleman case, concerning the question of whether EC non-discrimination law prohibits discrimination against an individual on the grounds that they associate with a disabled person, is one such case” (Waddington, L., Annotation on Case C-303/06, S. Coleman, C.M.L.Rev., 2009, p. 665). “Just a week after the Feryn judgment [judgment of 10 July 2008, C-54/07, ECR I-5187]”, in which it established that public statements made by an employer in the course of a recruitment procedure may constitute discrimination, even in the absence of an identifiable victim, “the Court reconsiders the notion of direct discrimination, a more controversial point, to judge by the reactions of the many Member States wishing to submit observations” (Driguez, L., “Lutte contre la discrimination en raison du handicap”, Europe, October 2008, p. 27).

“Just before the adoption of Directive 2000/78, some authors were highlighting [...] the shortcomings of the future legislation, as regards the lack of precision on objectives and means and the inconsistency of the Community in seeking to impose obligations on the Member States without thinking to comply with them itself [cf., in particular, Bocquillon, F. and Kessler, F., RDDS, 2000, p. 187]. [Although] some of these shortcomings remain, disability is [...] an opportunity for the Court to inject new life into the fight against discrimination” (Boujeka, A., “Le handicap par association”, RDDS, No. 5/2008, p. 865, to pp. 871-872). Finding that “the ban on

discrimination on the grounds of disability within the meaning of Directive [...] 2000/78 benefits not only the disabled persons themselves but also those associated with them, who are, for that reason, the subject of unfavourable decisions or behaviour constituting harassment on the part of their employer” (Cavallini, J., “Une discrimination par association fondée sur le handicap est contraire au droit communautaire”, La semaine juridique - éd. sociale, 21 October 2008, p. 25), in the Coleman judgment the Court “incorporates [...] into Community law the notion of ‘discrimination by association’, on the grounds of disability in this instance” (Le Barbier-Le Bris, M., op. cit., p. 883), whose “legal identification appears for the first time in the conclusions of the Advocate General Poiares Maduro” in the case in question (Boujeka, A., op. cit., p. 865) “Although the Court [...] does not use the exact expression, it enshrines the notion in an approach which furthers Community protection of disabled persons and of those close to them [...]. Moreover, the Coleman judgment is in line with the movement towards increased protection from discrimination for disabled people, which was given a powerful boost by the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities. [The Convention] is also the partial inspiration for the proposal for a Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation” (ibid., pp. 865 and 867).

The issue at stake in this case was “clearly substantial and the Member States were under no illusions about this, as evidenced by the fact that five governments saw fit to intervene [...]. [T]he Italian and Dutch governments in particular [...] tried, following the example of the United Kingdom, to invoke case law of the Court itself, which [had] already had to rule on discrimination on the grounds of disability in the Chacon Navas case [judgment of 11 July 2006, C-13/05, ECR I-6467; see *Reflets no. 3/2007*, p. 29 (only available in French)]. This case [having] led it to limit the notion of disability, which it did not extend to illness” (Le Barbier-Le Bris, M., op. cit., p. 884) “ – a position that was heavily criticised in the literature – [...] the whole of this argumentation was aimed at recommending a restrictive reading of the *ratione personae* scope of the right to non-discrimination and excluding disability by association” (Boujeka,

A., op. cit., p. 870). The Court did not go down this path. Without revising the strict definition of disability adopted in the Chacon Navas case, it “makes it more specific by stating, in substance, that although the judgment in question precludes illness from being considered a factor of discrimination due to the exhaustive nature of the list in Article 13 TEC and Directive 2000/78, such a restriction *ratione materiae* in no way authorises a restriction *ratione personae* of the Directive” (ibid., pp. 870-871), nor does it prohibit “a very broad conception of the notion of discrimination, to the point of including the concept of ‘discrimination by association’” (Le Barbier-Le Bris, M., op. cit., p. 884).

“The solution proposed by the judgment is [...] split into two parts. The first addresses the question of principle as to whether it is possible to recognise a prohibition on direct discrimination or harassment ‘by association’ [...]. The second is confined to the circumstances of the case in question” (Broussy, E., Donnat, F. and Lambert, C., “Discrimination fondée sur le handicap”, AJDA 2008, pp. 2330-2331). “The Court adopts a conventional approach. Far from adhering to the wording of the obligations laid down, it adopts a teleological interpretation. Since the Directive advocates the social integration of persons with a disability, it is necessary to sanction all forms of discrimination affecting this process [...]. [I]f a worker is penalised professionally due to his association with a disabled person, he suffers indirectly the disadvantages linked to the disability, whereas the Directive is intended to eradicate such disadvantages. The prohibition must therefore be invocable by all persons who are subject to a decision or harassment by their employer, even where it is based on the disability of another individual” (Cavallini, J., op. cit., p. 25). “[W]hat matters, ultimately, is that the disability is the grounds for and lever of the discrimination, irrespective of whether the disability affects the worker himself or somebody close to him. After all, the Directive is not intended to protect set categories of individuals but rather to prohibit the use of a number of discrimination grounds. Indeed, this is the approach favoured by the Commission in its 2005 annual report on equality and discrimination [...]. Just because the Directive includes a few provisions devoted exclusively to disabled persons does not mean that the remaining provisions should not be read in a

broader sense” (Le Barbier-Le Bris, M., op. cit., p. 884). “Moreover, the system within which the Directive is situated militates for a broader understanding of the notion of direct discrimination on the grounds of disability, whether it be Article 13 of the EC Treaty, which serves as the legal basis for the Directive and which gives the Community the power to combat all forms of discrimination, including on the grounds of disability, or the Community Charter of the Fundamental Social Rights of Workers referred to in the 6th recital of the Directive” (Driguez, L., op. cit., p. 27).

“The knock-on effect of discrimination by association could raise doubts as to its nature, i.e. whether direct or indirect discrimination. Since the Directive, under certain conditions, allows “the employer to sidestep the prohibition on indirect discrimination [...] [the] issue at stake [was] important” (Cavallini, J., op. cit., p. 25). Having understood this fact, and no doubt having wished to accord maximum protection to victims of this kind of discrimination, the Court held that this was indeed “direct discrimination, and thus absolutely prohibited, and not justifiable by any test of legitimacy or proportionality, since discrimination is deemed to have taken place whenever a person is treated unfavourably on the grounds of ‘a’ disability, not necessarily his or her own” (Le Barbier-Le Bris, M., op. cit., p. 884)). As to the “hypothesis of indirect discrimination by association”, although this also remains “conceivable” (ibid.), the Coleman judgment contains no indications in this respect. “One could argue that the Court should, given the opportunity, interpret the prohibition of indirect discrimination as covering those who experience discrimination on the grounds that they associate with a disabled person - on the grounds that this would be in line with the broad purpose of the [Directive], even though it would not be in accordance with a literal interpretation of the wording. However, this would probably be a rather ‘ambitious’ interpretation by the Court” (Waddington, L., op. cit., p. 676). This is a point picked up by another author: “Moreover, there would be a risk of further excesses in protection from discrimination if one sought to extend the protection from disadvantage on the grounds of association to cases of indirect discrimination. Apparently neutral rules, such as the core working hours of an operating unit –, which particularly disadvantage workers due to their association with a disabled person e.g. because the home care required by the

third party in the early afternoon means that the worker cannot work the hours in question –, would meet the criteria for indirect discrimination. The ECJ did not need to address this issue in the Coleman judgment. It is right that an extension of protection against discrimination by association to these cases be refused. Such an extensive interpretation of indirect discrimination would be barely reconcilable with the purpose of the Directive [...] Moreover, it would no longer be covered by the wording of Directive, which is narrower in relation to indirect discrimination: it is not discrimination ‘on grounds of disability’ which is prohibited, but merely discrimination towards ‘persons with a particular disability’” (Leder, T., *EWiR*, 2008, p. 603, on p. 604).

“Following the conclusions of the Advocate General on this case, the promotion of disability by association has been recognised as the mark of a broad approach to the principle of equality promoted by Community law, with some authors going so far as to suggest that the [Court] should enshrine discrimination by association not only in the field of disability but also in relation to other discrimination factors (cf., in particular, Omarjee, L. and Baron, F., “Dialogue autour de l'égalité dans le droit social de l'Union européenne”, *LPA*, No. 140, 2008, p. 7). It would appear that they have been fully heard” (Boujeka, A., *op. cit.*, p. 872), since the Coleman judgment “admittedly relates in the present case to discrimination on the grounds of disability, but it does of course have a broader calling to be applied to all levers of discrimination prohibited by Community law (Le Barbier-Le Bris, M., *op. cit.*, p. 884; in the same vein, cf. also Leder, T., *op. cit.*, p. 604). “At a conceptual level, Coleman lays the groundwork for the future interpretation of discrimination [by association] also on the other grounds listed in Article 13 EC. Thus, very soon discrimination by association will also be discussed with regard to the suspect classifications such as sex, racial or ethnic origin, religion or belief, age or sexual orientation. In this way Coleman might lead to a knock-on effect which provides for a reform of anti-discrimination rules far beyond the field of disability discrimination” (Toggenburg, G., “Discrimination by association: A notion covered by EU equality law?”, *European Law Reporter*, 3/2008, p. 82, on p. 84). “[Whereas] in light of the Court’s reasoning [...], it is probable that direct discrimination and harassment by association are [...] prohibited

[...] for all Article 13 EC grounds [...] there are, in the background, at least two warning bells which suggest one should be slightly cautious in claiming [this] [...]. First, the Court seemed to place a great deal of emphasis on the nature of the relationship between Ms. Coleman and her son, and, in particular, the fact that she was his primary carer. Whilst the Court certainly did not hold that the closeness of the relationship, and the level of dependency of the child, were determinant for finding that protection existed from discrimination by association, a very narrow reading of the judgment could lead one to conclude that not all levels of association would merit equal protection. If one were to argue in favour of such an interpretation, one could perhaps find support in the fact that a limited number of EC Member States have chosen to prohibit explicitly discrimination by association on the grounds of disability, whilst not paying similar attention to discrimination by association on other grounds [...]. Secondly, if Coleman is to be read as also establishing a prohibition of discrimination on the grounds of sex, it sits uneasily with the [...] earlier judgment in Grant [judgment of 17 February 1998, C-249/96, ECR I-621] [where the Court] held that EC law did not require an individual with a same sex partner be treated in the same way as an individual with a heterosexual partner. Nevertheless [...], it seems likely that Coleman should be read as establishing the general principle, applicable to all EC equality directives, that direct discrimination and harassment by association are prohibited. The use of the same language, with all directives prohibiting discrimination ‘on the grounds’ of the relevant characteristic, rather than explicitly requiring that claimants possess that characteristic themselves, is the strongest argument in support of this position” (Waddington, L., *op. cit.*, pp. 673-674). This being said, the fact that the Court does not seem to have precisely defined the nature of the relationship required to be able to invoke the existence of discrimination by association does raise some questions. “The ECJ does not rule on the scope of the protected third parties, so it is not clear how close the connection between the employee and the person with the disability must be. In fact, it only specifies that less favourable treatment based on the disability of ‘a child’ is prohibited. [...] However, it clearly did not mean to suggest that employees can be given less favourable treatment if the disabled person is not their child but “only their spouse, life partner,

sibling or parent. Rather, any close relationship between the employee and the third party should suffice” (Bayreuther, F., “Drittbezogene und hypothetische Behinderungen”, *Neue Zeitschrift für Arbeitsrecht*, 2008, p. 986).

If the Court’s reasoning seems able to “be transposed to all the other criteria prohibited by the Directive [...] 2000/78” (Cavallini, J., op. cit., p. 25), the Coleman judgment is also significant insofar as it clears up a priori any doubts that might have remained after the *P. v. S. and Cornwall County Council* judgment (judgment of 30 April 1996, C-13/94, ECR I-2143) and the *Mangold* judgment (judgment of 22 November 2005, C-144/04, ECR I-9981; see *Reflets no. 2/2007*, p. 28 [only available in French]) as to the existence in European Union law of a general principle of equality, irrespective of the grounds for discrimination provided for in Article 13 EC and in secondary law. “[T]he ECJ followed the [...] direction [...] of limiting the scope of the protection [...] to the suspect grounds of discrimination [...]. In this sense, the ruling closes some expectations that followed *Mangold* that the ECJ would be turned into a self-righteous body destined to protect against all forms of discriminations and achieve at the judicial level what could not be achieved at the national political level” (Mestre, B., “Discrimination by association: protected by EU law but limiting the scope of *Mangold*”, *European Law Reporter*, 9/2008, p. 300, on p. 304).

Ultimately, “the Coleman judgment undeniably represents [...] a considerable contribution to the Community mechanism for combating discrimination, both direct and indirect, and harassment” (Le-Barbier-Le Bris, M., op. cit., p. 884). “[T]he criterion for unfavourable treatment, namely the disability, [is] trans-individualised. The individual receiving unfavourable treatment does not have to be disabled himself: rather, disability is present where the criterion of ‘disability’ is met and is present in another person” (Lindner, J. F., “Die Ausweitung des Diskriminierungsschutzes durch den EuGH”, *Neue Juristische Wochenschrift*, 2008, p. 2750). “Although disability is undoubtedly about individuals, i.e. those affected by it, it is also – and to a greater extent – about situations and environments. Although disabled persons must be at the heart of mechanisms for combating disability-based discrimination, it is quite clear that discrimination may also affect those close

to them, who therefore also merit protection (Boujeka, A., op. cit., p. 871). “This form of discrimination is potentially widespread, and the Court’s judgment is to be welcomed for the protection it confers on vulnerable individuals” (Waddington, L., op. cit., p. 681). “[Coleman] however will not be the end but rather the beginning of the discussion surrounding discrimination by association [...]. [As] the Coleman case might have considerable economic impacts [and as] [a]fter disability, the concept of discrimination by association will spill over into other areas of discrimination [...], the question the Court will have to answer [...] in future cases is whether [...] there should be a single approach for all areas of discrimination covered by Article 13 EC and whether the Member States should have a margin of appreciation in this area” (Toggenburg, G., op. cit., pp. 85 and 87).

[PC] [AGT] [TLA]

E. Brief summaries

* *International Court of Justice*: For the first time ever, the Hague-based International Court of Justice (hereafter referred to as “the ICJ”) was asked to rule on a dispute between two State parties to the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters. The dispute in question is between the main shareholders in the company Sabena, which is now bankrupt, and the Belgian State and three companies in which the Belgian State holds all the shares (hereafter referred to as “the Belgian shareholders”). The Sabena shareholders involved in the dispute are Swissair and its subsidiary SAirLines (hereafter referred to as “the Swiss shareholders”). The ICJ was asked to rule on the matter because the Lugano Convention does not contain a clause according competence to settle disputes to the European Court of Justice or to any other court. The dispute relates to the refusal of the Swiss Federal Court, in a judgment issued on 30 December 2008, to recognise within the framework of the Swiss system for the order of priority of creditors the Belgian courts’ decisions to intervene with regard to the Swiss shareholders’ civil responsibility towards the Belgian shareholders, and to its refusal to stay proceedings, by virtue of Article 21 of the Lugano Convention until the decisions of the Belgian courts are adopted. According to the Belgian government, the first refusal breaches Article 1(2)(2) – the applicability of which

was never checked by the Swiss Federal Court – and Articles 16(5), 26(1) and 28 of the Lugano Convention. Belgium also claims that this same refusal means that Switzerland is violating the rule of general international law according to which all State authority, particularly in the judicial domain, must be exercised in a reasonable manner. Finally, with regard to the Swiss Federal Court's refusal to stay proceedings in the disputes between the parties, which the Belgian courts had already been asked to rule on, the Belgian government argued that Switzerland had violated Article 1(2)(2) and Articles 17, 21 and 22 of the Lugano Convention and Article 1 of Protocol no. on the uniform interpretation of the Convention.

The proceeding is currently at the appeal stage, so there are no new developments to report yet.

International Court of Justice, Kingdom of Belgium v. Swiss Confederation, application initiating proceedings, www.icj-cij.org

[RA]

* *Human Rights Committee*: The views delivered on 20 July 2009 concluded that the Czech Republic had violated Article 26 of the International Covenant on Civil and Political Rights. In this matter, the appellants claimed that they had been victims of discrimination and argued that using citizenship as a criterion for restitution of property, as under the Czech national law no. 87/1991, violated the Covenant.

In the case in point, the Committee reiterated the views adopted in various cases relating to the restitution of property in the Czech Republic, where it held that Article 26 had been violated, and that it would be incompatible with the Covenant to require the appellants to obtain Czech citizenship as a condition for the restitution of their property or, alternatively, for the payment of appropriate compensation. Given that the appellants' right to request the restitution of their property was not based on their citizenship, the Committee concluded that the

Communication no. 1574/2007, Slezák, <http://tb.ohchr.org/default.aspx>

[SEN]

* *Committee against Torture*: In a decision handed down on 8 May 2009, the Committee

against Torture strongly criticised the Republic of Serbia for violating several provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 16(1), 12 and 13).

The appellant, Mr Osmani, a Serbian citizen of Roma origin, claimed that he had been a victim of police brutality during the execution of an eviction order. Moreover, he maintained that he had not been able to obtain redress and compensation. With regard to the legal definition of the treatment that the appellant was subjected to, the Committee held that the infliction of physical and mental suffering, aggravated by the complainant's particular vulnerability, due to his Roma ethnic origin and unavoidable association with a minority historically subjected to discrimination and prejudice, reaches the threshold of cruel, inhuman or degrading treatment or punishment.

Communication no. 261/2005, Osmani, <http://tb.ohchr.org/default.aspx>

[SEN]

* *Special Tribunal for Lebanon*: The Special Tribunal for Lebanon officially began work on 1 March 2009. Its purpose is to prosecute those responsible for the attack of 14 February 2005 that killed former Lebanese Prime Minister Rafiq Hariri and killed or injured other people besides. The Tribunal, which was created jointly by Lebanon and the UN, is the first international tribunal with the specific purpose of prosecuting people responsible for political crimes.

The Tribunal will have a mixed composition with the participation of Lebanese and international judges, as well as an international prosecutor. The applicable law for the Special Tribunal is national and international in character. The Statute stipulates that the Special Tribunal shall apply provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism and crimes and offences against life and personal integrity (excluding punishments such as the death penalty and forced labour). The Special Tribunal's standards of justice, including principles of due process of law, will be based on the highest international standards of criminal justice as applied in other international tribunals.

www.stl-tsl.org/action/home

[SEN]

**Germany*: The Bundesgerichtshof (Federal Supreme Court) decided that if a contract for a consumer good is terminated, the seller can require the consumer to pay compensation for use of the good. Nevertheless, the Bundesgerichtshof pointed out that a distinction had to be made between the termination of a contract where the purchase price must be reimbursed to the consumer and the termination of a contract where goods not in conformity must be replaced. Only the latter case is covered by the European Court of Justice's judgment in *Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände* (judgment of 17 April 2008, C-404-06, Rec. p. I-2685), in which the Court decided that a national legal provision allowing sellers to require that consumers pay compensation for the benefits gained through use of the good was not compatible with Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 (see *Reflets no. 2/2009* [only available in French]). It should be noted that there are currently two other cases underway with regard to the admissibility of provisions of German civil law in view of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 (C-65/09, *Gebr. Weber GmbH v. Jürgen Wittmer and C-87/09, Ingrid Putz v. Medianess Electronics GmbH*).

Bundesgerichtshof, judgment of 16 September 2009, VIII ZR 243/08

IA/32424-A

[AGT]

* *France*: A father has asked the director of the Caisse des depots et consignations (Consignments and Loans Fund) to revise his retirement pension so that he can receive service credits for his four children.

After the director of the Caisse des depots et consignations rejected his request and the rejection was confirmed by the Grenoble Administrative Court, the father turned to the Conseil d'État (Council of State) to request the reversal of service credits for children. The appellant argued that Article 48 of the law of 21 August 2003 reforming the pensions system and Article L 12 of the Civil and Military Retirement Pensions Code are incompatible

with the principle of equal pay as interpreted by the European Court of Justice in its judgment on the *Griesmar* case (judgment of 29 November 2001, C-366/99, Rec. p. I-9383).

The Conseil d'État reiterated that the purpose of the service credit of one year's seniority per child, awarded to state employees under Article L 12 of the Civil and Military Retirement Pensions Code, is to compensate for any career disadvantages caused by having to stop work due to birth, adoption or child-rearing. Since both men and women are eligible for such service credits, the provisions cited are not incompatible with the principle of equal pay for men and women as set down by Article 141 of the Treaty establishing the European Union and interpreted by the European Court of Justice in its judgment of 29 November 2001. With regard to the service credits, the principle of equal pay does not prevent the application decree from stating that employees must stop work for at least two months to be eligible. The application decree also names maternity leave as one of the statutory positions granting entitlement to such service credits. Given that other forms of leave are optional and mostly unpaid and that men cannot always take them as soon as their children are born, the new system will mainly benefit female state employees.

Conseil d'État, judgement of 11 March 2009, no. 296363, Vallant v. Caisse des dépôts et consignations, www.legifrance.gouv.fr

IA/32072-A

[VMD]

The company Temis is headquartered in Belgium and acquired usufruct of a building in France in 1997. Since Belgium and France have signed an agreement containing an administrative assistance clause (in the aim of combating tax fraud and tax evasion), the French tax authorities ordered the company to submit declarations relating to the 3% annual property tax on the building by sending out two notices, one to the French address and one to the Belgian address. The latter notice was not answered, so the tax authorities ordered the company to pay the 3% property tax for the years 1998 to 2002.

With a view to cancelling the taxation procedure, the Cour d'appel d'Aix-en-Provence (Aix-en-Provence Court of Appeal) argued that in its judgment of 11 October 2007 (Elisa,

C-451/05, Rec. p I-8251), the European Court of Justice had stated that the nationality-based exemption system violated European law as all companies should be allowed to prove that their objective is not tax evasion. The Cour de cassation (Court of Cassation) decided that by making this ruling, the Cour d'appel was going against Articles 990 D and 990 E of the General Tax Code. Indeed, where a legal entity headquartered in a state with which France has concluded an administrative cooperation agreement or non-discrimination treaty is concerned, the system created by Articles 990 D and 990 E of the General Tax Code, in their applicable version, do not contravene Article 73 B (now Article 56) of the Treaty establishing the European Union as it allows companies to be exempted from the 3% property tax, regardless of the circumstances, if they can submit the declarations relating to the 3% property tax described in Article 990 E2 of the General Tax Code or if they are covered by the commitment outlined in Article 990 E 3 of the same Code.

Cour de cassation, commercial chamber, judgment of 29 September 2009, no. 08-14538, www.legifrance.gouv.fr

IA/32071-A

[VMD]

The Cour administrative d'appel de Nantes (Nantes Court of Appeal) confirmed, at appeal stage, the judgment of the Tribunal administratif de Rennes (Rennes Administrative Court), handed down on 25 October 2007 (*Reflets no. 1/2008*, IA/30650-A [only available in French]) on the spread of green algae in Brittany.

The Court held that, given the number and significance of the algae, France's delays and failings in implementing Council Directive 75/440 of 16 June 1975 on the required of surface water intended for the abstraction of drinking water in the Member States and Council Directive 91/676 of 12 December 1991 on the protection of waters from pollution caused by nitrates from agricultural sources constituted a "wrongful failure" on the part of the State as regards the application of these rules. Given the serious nature of the pollution in some places in Brittany, and the long-term imbalance that this

causes in the protection and management of water resources, the Court of Appeal found that the environmental organisations that were the plaintiffs in the first instance had been victims of a "significant violation of the joint environmental interests" that they aimed to defend and that this violation constituted "non-material damage for which compensation could be awarded". Finally, the Court considerably increased the amount of compensation to be paid to the environmental organisations in question.

Cour administrative d'appel de Nantes, judgment of 1 December 2009, no. 07NT03775, unpublished. Can be viewed on LexisNexis and Jurisclasseur

IA/32070-A

[VGP]

In a judgment handed down on 23 March 2009, the Cour administrative d'appel de Nancy (Nancy Administrative Court of Appeal, hereafter referred to as "the CAA") ruled that a foreign appellant living in French territory and represented by a lawyer from an EU Member State was exempt from the requirement to take up residence within the jurisdiction of the administrative court before which he or she intends to contest the legality of an action performed by a French administrative authority.

In the case in point, a German national asked the Tribunal administratif de Strasbourg (Strasbourg Administrative Court) to rule on a request to overturn a decision by the prefect of Bas-Rhin, according to which he would be banned from driving on French territory for five months. The court threw out his request, saying that it was clearly inadmissible since he had not taken up residence within the court's jurisdiction, despite an application for regularisation. The CAA found that this order was vitiated by an error of law "to the extent that the dispute in question was not a civil dispute requiring legal representation before the regional court in relevant area of residence by a lawyer known to the court.... (The appellant), who was represented by a lawyer from a Member State of the European Community, acting by virtue of the combined provisions of Articles 202-I of 27 November 1991 and R 431-2 of the Code of Administrative Justice, was exempt from the requirement to take up residence within the jurisdiction of the court."

Cour administrative d'appel de Nancy, judgment of 23 March 2009, Blinn, no. 08NC01725, AJDA 2009, p. 1063

IA/32319-A

[NRY]

In a judgment handed down on 10 November 2009, the Cour d'appel de Paris (Paris Court of Appeal) annulled in its entirety the decision of the Conseil de la concurrence (French Competition Council, decision No. 06-D-04 *bis* of 13 March 2006) on price-fixing in the luxury perfume industry, in which 13 perfume manufacturers and three national retail chains had been ordered to pay fines of €45.4 million. For the first time ever, the decision was overturned solely on the grounds of the excessive duration of the proceedings; previous case law had consistently held that, in the event of proceedings lasting an excessive length of time, the sanction incurred by the Council's failure to meet its obligation to issue a decision in a reasonable time was not the annulment or reopening of the proceedings but rather reparation of any damage incurred through the breach of said obligation. In the case in question, the Cour d'appel held that "it has been proven that there was an irremediable, real and concrete violation of the rights of the defence owing to the exceeding of a reasonable length of time between the date of the contested behaviour and the day on which the companies knew that they would have to account for it; this violation will result in the annulment, not of the investigation, which is itself largely immune from these requirements, but of the prosecution and the contested decision, which failed to meet the requirements for a fair trial."

Cour d'appel de Paris, 10 November 2009, Pôle 5 - Chambres 5-7, No. 80

IA/32067-A

[THF]

* *Italy*: In a judgment dated 19 May 2009, the Consiglio di Stato (Council of State) upheld the decision by the Tribunale Amministrativo Regionale per la Puglia (Regional Administrative Court of Puglia) rejecting an action for annulment of administrative acts by which a licence application for an undertakers business was turned down on the grounds that the quota for such businesses had been reached.

As regards the argument put forward that the administrative decisions to refuse the licence

application had violated Community law, the Council of State reiterated the following rules:

a) In the case of illegality on the grounds of violation of Community law, for an administrative act to be annulled it must be contested within the relevant time frame. In such a case, the administration concerned is obliged to enforce the illegal act, unless it chooses to eliminate it from the legal order by using its power to withdraw it.

b) In the case of an administrative act that is non-existent or invalid (for example, where an administration adopts an act without having the power to do so), the violation of Community law is perpetrated via a provision of national law which grants a power to the administration concerned but which is unenforceable due to its incompatibility with Community law.

The Council of State deemed that the case in question fell within the illegal/annullable category. The violation of Community law was perpetrated directly by administrative acts. Accordingly, the deadlines having passed and the administration having decided not to withdraw its acts, illegality can no longer be raised at the appeal stage.

Consiglio di Stato, judgment of 19 May 2009, No. 3072 www.giustizia-amministrativa.it

IA/32322-A

[VBAR

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* *Lithuania*: Questions about the spelling of names and family names in the passports of citizens of the Republic of Lithuania, which form the subject of Case C-391/09 recently submitted to the Court, were also the subject of a judgment dated 6 November 2009 by the Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania, hereafter 'KT'), in which the KT ruled on the interpretation of sundry points in its ruling of 21 October 1999. In the latter ruling, the KT declared that "the name and family name of an individual must be written in the state language [in the citizen's passport]" and that, otherwise, "not only the constitutional principle of the state language would be denied but also the activity of state and local government institutions, that of other enterprises, establishments and organisations would be disturbed". According to the ruling of 6 November 2009, these findings do not preclude the citizen's name

and family name from being transcribed in characters other than Lithuanian characters and in non-grammaticised form (omitting Lithuanian endings, for example) in the “other entries” section of his/her Lithuanian passport, where the person in question so requests and his/her name and family name are already indicated in the same passport in the state language.

The KT specified that such a transcription of the citizen’s name and family name in the “other entries” section of the Lithuanian passport did not have the same value as the entry in the state language.

Lietuvos Respublikos Konstitucinis Teismas, ruling of 6 November 2009, No. 14/98,
www.lrkt.lt

IA/31682-A

[LSA]

* *Netherlands*: In a case relating to the question of whether the Minister of Agriculture, Nature and Food Quality had been right to decide that the appellant’s animals were probably affected by a zoonosis and should be eliminated, the College van Beroep voor het bedrijfsleven (Trade and Industry Appeals Tribunal) ruled on the question of whether the dispute had taken place within a reasonable time, as provided for by Article 6 of the European Convention on Human Rights.

The tribunal held that the proceedings in the case in question had lasted for eight years and one month. In its view, three years might be considered a reasonable time for proceedings in this instance, given that the case concerned the appearance of a zoonosis. Consequently, it found that the time had been substantially exceeded. Nonetheless, given that the proceedings had been suspended for three years and 10 months pending the Court of Justice’s response in two other cases, the tribunal ruled that the time had only been exceeded by one year and three months. Given that the Court of Justice’s response in these cases was also important to the case in question and that the appellant had agreed to the suspension, the period of three years and 10 months should not be taken into account in calculating by how much a reasonable time had been exceeded.

College van Beroep voor het bedrijfsleven, 25 June 2009, appellant v. Minister van Landbouw, Natuur en Voedselkwaliteit

www.rechtspraak.nl, LJN BJ2560

IA/31842-A

[SJN]

* *United Kingdom*: In a judgment given on 1 December 2009, the Supreme Court was required to rule on the interpretation of Article 12(3) of Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, known as ‘Brussels II Revised’. In proceedings other than divorce proceedings, the article in question provides for a prorogation of jurisdiction in favour of courts of the Member State with which the child has a substantial connection, on condition that the parties have accepted said jurisdiction. The Supreme Court held that, given the absence of territorial limitation in Article 12, there was nothing to preclude it from being applied to a child residing in a third State (Pakistan, in the case in question).

Supreme Court, judgment of 1 December 2009, Re I (A Child) [2009] UKSC 10,
www.bailii.org

IA/31685-A

[PE]

In a decision dated 18 June 2009, the Court of Appeal ordered the first juryless criminal trial in England and Wales in 400 years. The four defendants are accused of an attempted armed robbery at London’s Heathrow Airport in 2004. The decision exploits the possibility offered by a provision that entered into force in 2006, which allows a trial to be heard by a judge alone if there is evidence of a real and present danger that jury-tampering would take place and where additional measures to prevent it would not fully succeed. In the case in question, three attempts to form a jury had already failed, at a cost to the taxpayer of GBP 22 million. The trial opened at the High Court on 12 January 2010.

Court of Appeal (Criminal Division), judgment of 18 June 2009, R v Twomey (John) [2009] 3 All ER 1002, www.bailii.org

IA/31686-A

Following a partial rejection by the Court of Appeal, in a judgment dated 2 December 2008 (see *Reflète No. 1/2009*, p. 36-37 [only available in French]), of an appeal by the Barclay brothers aimed at establishing the inadequacy of constitutional reforms on the island of Sark, the Supreme Court has now also found against the billionaires. It ruled that the presence in Sark's parliament of two unelected observers did not impair the right to regular, free and fair elections, as guaranteed by Article 3 of Protocol 1 of the European Convention on Human Rights. Nor was a rule preventing foreigners from standing for legislative elections incompatible with the aforementioned right.

Supreme Court, judgment of 1 December 2009, R (on the application of Barclay and Others) v The Lord Chancellor and Secretary of State for Justice and Others [2009] UKSC 9, www.bailii.org

IA/31687-A

Notice

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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 NOTES internal database.

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