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R E F L E T S

Legal developments

of interest to the European Union

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

Preface

In this issue of the *Reflets no. 3/2014* Bulletin, we focus especially on two rulings of the ECtHR. The first decision is related to the compliance, as concerns Article 8 of the ECHR (respect of privacy and family life), of the refusal by the Dutch authorities to authorise a Suriname citizen, mother of three children of Dutch nationality, to reside in the Netherlands (pg. 6-7). The other decision of the ECtHR that is of particular interest to the laws of the Union concerns the consequences, with respect to Article 3 of the ECHR, of the possible return of persons requesting asylum by the Swiss authorities to Italy without being first assured that the Italian authorities will take care of the children and will preserve the family unit (pg. 7-9). This issue also mentions a ruling of the Permanent Court of Arbitration concerning Russia's expropriation of the investments of the shareholders of the company Yukos (pg. 11-12). Next, the Irish Supreme court gave an interesting ruling (pg. 28-30) related to medically assisted procreation, a subject that was earlier the subject matter of decisions made by the ECtHR (refer to *Reflets no. 2/2014,* pg. 7) and by the Court of Justice (rulings C.D., C-167/12, EU:C:2014:169, and Z., C-363/12, EU:C:2014:159). Moreover, this issue also describes Chinese legislation that aims to implement measures meant to improve compliance with the commitments given by the People's Republic of China to the WTO (pg. 62). Finally, the Doctrinal echoes (pg. 63-71) concerns remarks related to the ruling of the Court of justice in the affair of the *Association de médiation sociale* (C-176/12, EU:C:2014:2). This ruling concerns the question of the ability to rely on, by itself or in combination with directive 2002/14/EC, Article 27 of the Charter, pertaining to employees' rights to information and consultation within a company, as part of a dispute between individuals.

Please note that the *Reflets* Bulletin is available for a short period of time under the section "What's new" of the intranet of the Court of Justice as well as permanently on the Curia site (www.curia.europa.eu/jcms/jcms/Jo2_7063).

The Bulletin is also available in English on the website of the ACA (http://www.aca-europe.eu/index.php/en/).

A. Case law

I. European and international jurisdictions

European Court of Human Rights

ECHR - Law governing the respect of privacy and family life - Suriname national, previously a citizen of The Netherlands, currently staying illegally - Mother of three children of Dutch nationality - Refusal to grant a residence permit - Best interests of the child - Violation of Article 8 of the ECHR.

In its Grand Chamber ruling, the ECtHR ruled by majority vote that The Netherlands violated Article 8 of the ECHR, in the sense that the Dutch authorities refused to grant residence in the Netherlands to the Suriname petitioner.

Mrs. Jeunesse, a Dutch citizen by birth who became a citizen of Suriname after it gained independence, was staying illegally in The Netherlands ever since her tourist visa, issued in 1997, expired. However, even though the petitioner did not comply with her obligation to leave the territory, the authorities nevertheless tolerated her presence and allowed her to build up her family life. The petitioner, married to a Dutch citizen, is a mother to three children, who are also Dutch citizens.

The ECtHR stated that the ECHR does not oblige the contracting States to admit foreign nationals to their territory unless it is impossible for the family to live outside the territory of the State in question. Moreover, the Court stated that, if the couple has built a family life, even after being notified that it is in a precarious situation as concerns the immigration laws, a deportation decision does not constitute a violation of Article 8 of the ECHR, except in exceptional circumstances.

As concerns the reference to the ruling of Ruiz Zambrano (C-34/09, EU:C:2011:124) made by the petitioner, the ECtHR stated that it does not have the required jurisdiction to apply the rules of law of the Union or to examine alleged violations of the said rules. Nevertheless, it highlighted the framework specified in the Dereci ruling (C-256/11, EU:C:2011:734), in which the Court of Justice stated that even if the law of the Union does not oblige the Member States to admit a citizen of a non-member country, this is without prejudice to the question of knowing whether the law governing the respect of family life is an obstacle to refusing a right of residence.

The ECtHR took into consideration the fact that all of the family members of the petitioner are Dutch citizens and that at birth, the petitioner herself was a Dutch citizen. With this in mind, the ECtHR considered that, taking into account the margin of appreciation granted to the contracting States as concerns immigration, the key question was that of knowing whether the State maintained a proper balance between the interests of the petitioner and her family, and those of the State's public policy in controlling immigration. Taking into account the special circumstances applicable here, the ECtHR ruled that the Dutch authorities did not give sufficient importance to the best interests of the children and that the general considerations of the immigration policy cannot, by themselves, justify the refusal to grant the right of residence. Consequently, the ECtHR concluded that this was a violation of Article 8 of the ECHR.

In a common dissenting opinion, three judges believed that the Dutch authorities

had correctly balanced the interests in play, and that the opinion of the majority retained in the ruling of the ECtHR grants an unfair advantage to citizens of non-member countries who do not comply with the immigration laws of the contracting States.

It is also necessary to draw one's attention to two other recent decisions pertaining to Article 8 of the ECHR, one of which was the Smith / Ireland case in which the ECtHR ruled over the situation of a Nigerian citizen who was repatriated to Niger by the Irish authorities. The petitioner, a father to four children, one of which was an Irish citizen, is married to a Nigerian citizen, all of whom live in Ireland. In its judgment produced on 24 June 2014, the fifth section of the ECtHR unanimously declared that the application was manifestly unfounded. The ECtHR took into consideration that, on the one hand, Mr Smith was not part of the family life for long periods and, on the other hand, that he had a criminal history in the United Kingdom. In these circumstances, the ECtHR decided that the repatriation of Mr Smith was compliant with the margin of appreciation given to the national authorities.

Moreover, in its decision dated 20 May 2014 in the E.B. / United Kingdom case, the fourth section of the ECtHR also declared that the application of a Polish citizen residing in the United Kingdom, whose return was demanded by Poland via a European arrest warrant filed against her, was manifestly unfounded. The petitioner wished to obtain the declaration of a violation of the law governing the respect of family life if she was repatriated to Poland, on the grounds that she is a mother of five children, four of whom are minors. Taking into account the fact that the minors were subject to a care order by the local authorities for reasons not related to the European arrest warrant, and that the eldest child was independent, the ECtHR decided that the repatriation did not constitute an obstacle to the family life of the petitioner.

European Court of Human Rights, ruling dated 03.10.14, Jeunesse / the Netherlands (petition no. 12738/10),
European Court of Human Rights, decision dated 24.06.14, Smith et al / Ireland (petition no. 52223/13),
European Court of Human Rights, decision dated 20.05.14, E.B. / United Kingdom (petition no. 63019/10),
www.echr.coe.int

IA/34034-A
IA/34035-A
IA/34036-A

[IGLESSA] [GARCIAL]

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ECHR - Ban on inhuman and degrading treatment - Right to effective recourse - Possible return of persons seeking asylum by the Swiss authorities to Italy on the basis of the Dublin III regulation - No prior guarantee given by the Italian authorities on taking care of the children and preserving the family unit - Possible violation of Article 3 of the ECHR.

In a ruling dated 4 November 2014, Tarakhel / Switzerland, the Grand Chamber of the ECtHR judged, via a majority vote, that there would be a violation of Article 3 of the ECHR (ban on inhuman and degrading treatment) if the Swiss authorities sent the petitioners back to Italy, pursuant to the regulation no. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining a request for asylum submitted in one of the Member States by a foreign national or a

stateless person (Dublin III regulation) [1], without having first obtained an individual guarantee from the Italian authorities concerning first, taking care of the children according to their age and second, the preservation of the family unit.

The case concerned the refusal of the Swiss authorities to rule on the asylum request made by a couple of Afghan citizens with their six children and the decision to send them back to Italy, the first Member State in which they disembarked when coming from Turkey. Pursuant to the Dublin III regulation, which is applicable to Switzerland due to an association agreement with the European Union, Italy was the State responsible for reviewing this application.

The ECtHR adopted a provisional measure, obliging the Swiss authorities to not deport the petitioners to Italy for the duration of the proceedings in the ECtHR.

The petitioners believe, especially if they are sent back to Italy "without an individual guarantee of providing care", that they will be victims of inhumane and degrading treatment linked to the existence of "systemic failures" in the reception arrangements for those seeking asylum in this country. They also believe that the Swiss authorities have not examined their personal situation with due care and that they have not taken their family situation into account.

The ECtHR stated that, falling under the "category of the population that is particularly underprivileged and vulnerable", the petitioners for asylum require "special protection" pursuant to Article 3 of the ECHR. This "special protection" requirement for the asylum seekers is even more important when the persons concerned are children, even if they are accompanied by their parents.

In particular, the ECtHR deemed that, taking into account the current situation of the reception system in Italy and the absence of detailed and reliable information concerning the specific destination reception structure, the Swiss authorities do not have enough information to be sure that if the petitioners are sent back to Italy, they will be taken care of in a manner suitable to the age of the children. Nevertheless, the ECtHR stated that the current situation of the reception system in Italy is not comparable to that of Greece, which the ECtHR had examined as part of the M.S.S. / Belgium and Greece case (ruling dated 21 January 2011, petition no. 30696/09, refer to *Reflets no. 1/2011,* pg. 1-3) as well as the Court of Justice as part of the N.S. case (C-411/10, EU:C:2011:865).

Considering that the petitioners benefited from effective recourse related to their grievance based on Article 3 of the ECHR, the ECtHR rejected their grievance drawn from Article 13 of the ECHR combined with Article 3 on the grounds of its clearly unsubstantiated nature.

The ECtHR sentenced Switzerland to pay EUR 7000 to the petitioners for fees and expenses.

Three judges of the ECtHR expressed a separate opinion, in which they specify that, in this case, the risk for the petitioners to be subject to inhuman or degrading treatment is not sufficiently real to justify Switzerland being responsible for violating Article 3 of the ECHR.

[1] The Dublin III regulation replaces the regulation (EC) no. 343/2003 of the Council dated 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining a request for asylum made in one of the Member States by a citizen of a non-member country.

European Court of Human Rights, ruling dated 04.11.14, Tarakhel / Switzerland (petition no. 29217/12),
www.echr.coe.int

IA/ 34049-A

[NICOLLO]

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ECHR - Right to life - Ban on torture and inhuman or degrading treatment - Procedural aspects - Absence of an effective investigation following the suppression of the demonstrations in June 1990 against the regime in place - Violation

In its Grand Chamber ruling, the ECtHR made a judgement on the investigation and the duration of the proceedings following up on the violent suppression of the demonstrations that occurred in June 1990 at Bucharest against the regime that was in place at that time. During this suppression, the spouse of one of the petitioning parties was killed in firing. Another of the petitioners was questioned and mistreated by the police, and several premises of political parties as well as members of non-governmental organisations, including those of the petitioning organisation, were damaged.

The case raises sensitive questions that fall under Articles 2 (right to life) and 3 (ban on torture and inhuman or degrading treatment) of the ECHR, especially those related to the *ratione temporis* applicability of the ECHR and the alleged lateness of the complaint of the petitioner alleging a violation of Article 3. The petitioner submitted a complaint with the national authorities 11 years after the denounced events and took the matter to the ECtHR more than 18 years after the events in question.

With respect to the *ratione temporis* applicability of the ECHR, after having acknowledged that four years passed between the events and the entry into force of the ECHR with respect to Romania on 20 June 1994, the ECtHR stated that the major part of the procedure and the most important procedural measures took place after this date. Consequently, the Court declared that it is of competent jurisdiction to examine the grievances raised pursuant to the procedural aspect of Articles 2 and 3 of the ECHR, insofar as these grievances relate to the criminal investigation conducted after 20 June 1994.

As concerns the passivity of the petitioner who alleged a violation of Article 3 of the ECHR, the ECtHR was particularly attentive towards the extraordinary political context of the dispute. It therefore believed that the vulnerability and sentiment of powerlessness, which he shared with several other victims, constitutes a plausible and acceptable explanation for his inactivity.

On this basis, the ECtHR sanctioned the excessive duration and the absence of the independent nature of the investigations, which were partially conducted by military prosecutors, including the one concerning the death of the spouse of the petitioner claiming a violation of Article 2 of the ECHR, while still in Romania. It deemed, via majority vote, that there was a violation of the procedural aspects of Articles 2 and 3 of the ECHR. Moreover, it unanimously decided that there was a violation of Article 6, paragraph 1 (right to due trial within a reasonable time) of the ECHR.

European Court of Human Rights, ruling dated 17.09.14, Mocanu et al. / Romania

(application nos. 10865/09, 45886/07 and 32431/08),
www.echr.coe.int

IA/34039-A

[CLU]

**** Briefs (ECHR)***

By its judgment produced on 15 April 2014, the fifth section of the ECtHR declared the application of the company Rutar Marketing DOO, based on the absence of a reference for a preliminary ruling before the Court of Justice, among others, to be manifestly unfounded. The petitioning company was fined by the Slovenian authorities under consumer protection, due to the sale of furniture with the instructions for use in English, German, Dutch and French, but not in the Slovenian language. The petitioning company contested the fine in the first instance, by asserting that the instructions for use in question, which included diagrams and pictograms, were compliant with the Slovenian law on consumer protection, which was specifically modified to adapt to the case law of the Court in this respect (refer to the rulings of Commission / Belgium, C-217/99, EU:C:2000:638, Meyhui, C-51/93, EU:C:1994:312, Colim, C-33/97, EU:C:1999:274 and Piageme e.a., C-85/94, EU:C:1995:312). The first court having rejected the appeal, the petitioning company filed a complaint of unconstitutionality, which was also rejected, in which it repeated the same aforementioned arguments, while adding that the fact that not submitting a preliminary question before the Court of Justice has resulted in a violation of the right to effective judicial protection. In view of these circumstances, the ECtHR first highlighted the fact that the ECHR does not guarantee a right to reference for a preliminary ruling before the Court of Justice and that the petitioner did not request for such a reference during the proceedings at first instance. Next, concerning the proceedings in the Constitutional Court, the ECtHR highlighted the fact that the petitioner had not explained the reasons justifying the necessity of a referral for a preliminary ruling and that the appeal, too, did not contain any indications on the possible incompatibility of the national law with that of the Union.

European Court of Human Rights, decision dated 15.04.14, Rutar Marketing D.O.O. / Slovenia (petition no. 62020/11),
www.echr.coe.int/echr

IA/34037-A

[IGLESSA]

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In its Grand Chamber ruling, given on 16 July 2014, the ECtHR unanimously concluded that Serbia and Slovenia were in violation of Article 1 of Protocol no. 1 (conservation of property) and Article 13 (Right to effective recourse) of the ECHR. The case concerned the inability of the petitioners, Bosnian citizens residing in Germany, to recover the funds and savings in foreign currency deposited in two banks located in the current territory of Bosnia and Herzegovina, which have been frozen ever since the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). The Grand Chamber confirmed the conclusion of the Chamber and ruled that there were sufficient grounds to charge Slovenia and Serbia with the responsibility of the debts contracted by Ljubljanska Banka Sarajevo and by Investbanka from the petitioners. In this respect, the ECtHR, while highlighting the singular nature of this case, specified that these conclusions are limited to the facts of

this case that that they do not imply that it is impossible for the contracting States to restructure defaulting banks without being held responsible for their debts. Moreover, the ECtHR believed that the Serbian and Slovenian authorities did not maintain a proper balance between the general interest and the ownership right of the petitioners, and that the petitioners were not subject to effective recourse. Finally, the ECtHR concluded, via a majority decision, that there is a systemic problem and requested Serbia and Slovenia to take, within one year and under the supervision of the Committee of Ministers, all possible measures, including legislative measures, which will allow the petitioners, as well as all others in the same situation, to recover their foreign currency funds, while unanimously deciding to suspend the investigation of all similar requests for a period of one year.

European Court of Human Rights, ruling dated 16.07.14, Ališić et al. / Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia (petition no. 60642/08),
www.echr.coe.int/echr

IA/34038-A

[IGLESSA]

EFTA Court

European Economic Area (EEA) - Proceedings for annulment of a decision of the Surveillance Authority - Representation before the EFTA Court - Criteria

In its ruling dated 29 August 2014, the EFTA Court ruled on the obligation as regards the independence of lawyers representing petitioners within the meaning of Article 17 of its Statutes, which pertains to the same point in Article 19 of the Statutes of the Court of Justice.

A professional and employers' association (Abelia), member of the Confederation of Norwegian Enterprises (NHO), had filed an appeal against a decision of the EFTA Surveillance Authority to close a State aid case without opening the formal procedure of investigation.

The petitioner was represented by two lawyers, introduced as employees of the NHO. The Surveillance Authority asserted that the said representatives were not independent from the petitioner, within the meaning of the case law pertaining to Article 19 of the Statutes of the Court of Justice. According to the Surveillance Authority, this independence requirement will exclude the existence of an employment relationship between the representative and the petitioner or an entity related to the petitioner. The EFTA Court rejected this argument after having analysed the relationships of the two lawyers with the petitioner. It stated that the fact that one of the lawyers manages a legal department (Business Legislation department) of the NHO does not constitute a violation of Article 17 of the Statutes insofar as this person has no administrative or financial responsibility within Abelia. Moreover, it could not be established that the NHO, having 1250 member companies and 21 federations of various sectors, and Abelia have common interests. Concerning the second lawyer, the Court observed that she had always been employed by an independent law firm that placed her at the service of the NHO, while continuing to pay her a salary for the duration of this "provisional assignment".

Nevertheless, the Court declared the appeal to be inadmissible for a different reason.

EFTA Court: Abelia / EFTA Surveillance Authority,
EFTA Court, Order of 29.08.14 in case E-8/13,
www.eftacourt.int

IA/33950-A

[SIMONFL]

Permanent Court of Arbitration

Permanent Court of Arbitration - Obligations resulting from the Energy Charter treaty - Russia - Expropriation of investments - Refusal to exempt VAT due to an alleged stratagem of tax evasion - Absence of information constituting an abuse - Inadmissibility

By its decisions on 18 July 2014, the Permanent Court of Arbitration sentenced Russia to pay 50 billion dollars (37.2 billion euros) to the former shareholders of Yukos, a petroleum company founded by Mr M. Khodorkovsky. The Court estimated that Russia violated its obligations resulting from the Energy Charter treaty, especially Article 13, paragraph 1 of the said treaty, which forbids the expropriation of the investments of an investor of one contracting party.

One of the arguments put forward by Russia was based on its right to impose the payment of VAT on Yukos (refusal to exempt VAT), due to a tax evasion ploy that the latter allegedly implemented. In this context, Russia referred to the ruling of the Court of Justice in the case of R. (C-285/09, EU:C:2010:742), which pertained to the refusal of VAT exemption as part of fraud control, tax evasion and possible abuse.

The Permanent Court of Arbitration rejected this argument by stating that the massive VAT debts imposed on Yukos by Russia could not be justified by the aforementioned case law of the Court of Justice, because, firstly, the tax optimisation strategy of Yukos did not contain elements constituting an abuse of the VAT system and, secondly, the imposition of VAT, in this case, was not in proportion, with the tax authorities having already imposed on Yukos all of the taxes based on income that are due by commercial entities.

It must be noted that the ECtHR, in a ruling dated 31 July 2014 (petition no. 14902/04), also noted Russia's obligation to pay the shareholders of Yukos who were part of the capital when the company was liquidated and, if applicable, their legal heirs and successors, the sum of 1,866,104,633 euros for tangible damages. The ECtHR stated that there were violations of Article 1 of Protocol no. 1 of the ECHR and Article 6, paragraphs 1 and 3, subsection b), of the said Convention.

Permanent Court of Arbitration, decisions dated 18.07.14, Hulley Enterprises Limited, Yukos Universal Limited, Veteran Petroleum Limited / Russia, AA 226, AA 227 and AA 228,

www.italaw.com/sites/default/files/case-documents/italaw3278.pdf

IA/34045-A

www.italaw.com/sites/default/files/case-documents/italaw3279.pdf

IA/34046-A

www.italaw.com/sites/default/files/case-documents/italaw3280.pdf

IA/34047-A

[BORKOMA]

II. National courts

1. Member states

Germany

Freedom of establishment - Freedom to provide services - Direct life assurance - Directives 90/619/EEC and 92/96EEC - Right of cancelling a policy holder who was not informed of the said right - Terms of conclusion of the insurance contract provided under national law - The so-called "policy delivery" model - Compliance with the life insurance directives

In a ruling dated 16 July 2014 falling under the context of a request to refund insurance contributions, the Bundesgerichtshof (BGH) ruled on the compatibility of German regulations pertaining to the terms of concluding insurance contracts with the second and third life insurance directives (directives 90/619/EEC and 92/96/EEC coordinating the legal, regulatory and administrative provisions concerning direct life assurance).

In this case, the petitioner, a policy holder subscribing from the party defendant, invoked the invalidity of the insurance contract established according to the so-called "policy delivery" model (Policenmodell), as provided by the former Article 5bis of the law governing insurance contracts (Versicherungsvertragsgesetz, hereinafter referred to as the "VVG"). According to this model, the application for guarantee, introduced by the policy holder, constitutes the contractual offer. The insurer accepts the said offer by sending to the policy holder, along with the insurance policy, the general conditions of insurance and the information note required pursuant to the life insurance directives, for the purpose of concluding the contract. The contract is then "deemed" to be concluded after the expiry of a period of fourteen days from the submission of the documents. Until this period expires, it was normal, according to constant jurisprudence, to consider the contract as "temporarily without validity", such that it was not yet perfect. The so-called "policy delivery" model was removed when the insurance contract law was reformed in 2007, but continues to apply to a large number of life insurance contracts that were concluded before this date.

In this respect, Advocate General Sharpston considered, in his conclusions given in the Endress case (C-209/12, EU:C:2013:472) that, insofar as, within the context of the so-called "policy delivery" model, the policy holder was informed of his cancellation right provided under Article 15, paragraph 1 of the second life insurance directive only after having made his offer and having thus chosen an insurer and a contract, this model was contrary to the objectives of Article 31, paragraph 1 of the third life insurance directive (points 59 to 64 of the said conclusions). According to this provision, the information on the cancellation right and on the terms of exercising this right must be communicated before concluding the contract.

In its ruling dated 16 July 2014, the BGH, adjudicating at last instance by a referral in "Revision" and having analysed the said conclusions of the Advocate General as well as the pertinent German doctrine, concluded that the former Article 5bis of the VVG was

compliant with the requirements resulting from the life insurance directives. In support of this observation, the German judges mainly invoked the ruling given by the Court in the aforementioned Endress case (EU:C:2013:864), in which it mentioned the need to communicate the required information "before the contract is concluded" (point 25 of the ruling). With this criterion being fulfilled, according to the BGH, by the so-called "policy delivery" model, which specifically states that the contract is "deemed" concluded only after the information is communicated. Whereas, on the one hand, within the framework of the aforementioned Endress case, The Court was not called to decide upon the question of whether the said model of entering into contract, in its entirety, is compliant with the life insurance directives (point 20 of the Endress ruling) and that, on the other hand, according to the specifications of the Court of Justice, the Member States are required, by adopting the rules related to the terms of exercising the cancellation right, to ensure that the effectiveness of the life insurance directives are ensured (point 23 of the Endress ruling), the BGH believes it to be justified, on this basis, to conclude that the law of the Union is compliant with the former Article 5bis of the VVG.

As regards the possibility of submitting this question to the Court of Justice via a reference for a preliminary ruling, the BGH specified firstly that the chosen result clearly resulted from the wording of the pertinent provisions of the life insurance directives and the case law of the Court and that, secondly, the question of the compliance of the model in question with the directives was not a determining factor in solving the dispute, once the petitioner was, in any case, barred from invoking a possible invalidity of the contract in question. In this respect, the BGH especially indicated that the policy holder was barred, under the principle of good faith, from filing a petition for refunding the contributions, since it was, for several years, compliant with the insurance contract, which would have resulted in the manager of the insuring company to have a legitimate confidence in the validity of this contract.

Bundesgerichtshof, ruling dated 16.07.14, IV ZR 73/13,
www.bundesgerichtshof.de

IA/34104-A

[BBER]

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Obligation of reference for a preliminary ruling - Existence of an "acte clair" - Access to the court of the Union and the national fundamental right to the natural court - Confirmation of the application of primary law by a national court that reported an absence of harmonisation at the level of the Union.

By its order dated 28 August 2014, the Bundesverfassungsgericht (Federal Constitutional Court) rejected an individual constitutional appeal against a ruling of the Bundesverwaltungsgericht (Federal Administrative Court) dated 18 June 2009, which ended a dispute among the administrative courts that started in 2006.

In this case, a private company in the business of collecting old paper on the basis of contracts concluded directly with property management companies, found its activity barred by the city of Kiel on the grounds that German waste law provides an obligation of holders of waste from private households to yield this waste exclusively to the statutory bodies responsible for waste

management, and the said company is not part of these bodies.

Hearing the dispute for a final time, without possible appeal, the Federal administrative court, contrary to the appellate decision, ruled in favour of the city of Kiel, mainly considering that such an interpretation of German law was not contrary to the law of the Union. It considered, on the one hand, that the directive 2008/98/EC pertaining to waste as well as the regulation (EC) no. 1013/2006 concerning the transfer of waste did not contain provisions applicable to the collection of waste comprising a single component, such as old paper. On the other hand, it estimated that the application of the competition law of the Union was excluded in view of Article 106, paragraph 6 of the TFEU, which stated that this does not apply to companies in charge of managing services of general economic interest if it is proven to be a hindrance to completing the special mission entrusted to them. The Federal administrative court judged that this would be the case if the obligation to yield old paper did not apply in this case, believing that the Court of Justice had already deemed that the collection and treatment of waste is a service of general interest.

Consequently, the petitioning company brought the case before the Bundesverfassungsgericht, mainly arguing a violation of its right to a natural court due to the absence of any reference for a preliminary ruling by the Federal administrative court.

The Bundesverfassungsgericht rejected this claim, in this case applying its case law concerning the obligation of referral. It stated that by itself judging the dispute that was brought before it at last instance, the Federal administrative court was not required, pursuant to German constitutional law, to carry out a reference for a preliminary ruling before the Court of Justice, since its interpretation of the law of the Union, the material provisions as well as Article 267 of the TFEU, complies with the room for manoeuvre granted to the national courts by the Court of Justice under "acte clair".

Bundesverfassungsgericht, order dated 28.08.14, 2 BvR 2639/09, Juris,

IA/34101-A

[KAUFMSV]

**** Briefs (Germany)***

Through a ruling dated 9 July 2014, the Bundesverwaltungsgericht (Federal administrative court) confirmed the cancellation of the ban, placed by the defending authority on a private operator of sports information services, on advertising games of chance on the Internet. It considered, on the one hand, that this ban should be qualified as an attack on the freedom to provide services, pursuant to Article 56, paragraph 1 of the TFEU and, on the other hand, that no justification for this attack is possible due to the systematic inequality of treatment between private operators, such as the petitioner, and public operators. While, pursuant to the German laws applicable at the time of the events, the defending authority systematically banned private operators from any advertising activity on the Internet, it did not intervene against public operators unless their advertising activity was not compliant with the requirements pertaining to advertising activity conducted through traditional channels.

Without ruling on the compliance of the legal basis of the advertising ban on the Internet with the law of the Union, and with

the appellate court observing that the ban in itself was contrary to the consistency principle, the Bundesverwaltungsgericht sanctioned the administrative practice of the competent authority, in this case applying its own case law on the matter and also referring to the case law of the Court of Justice (rulings on Carmen Media, C-46/08, EU:C:2010:505, and Zeturf, C-212/08, EU:C:2011:437).

Bundesverwaltungsgericht, ruling dated 09.07.14, 8 C 36/12 (ECLI:DE: BVerwG:2014:090714U8C36.12.0), www.bundesverwaltungsgericht.de

IA/34102-A

[KAUFMSV]

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In a ruling dated 18 September 2014 pertaining to an opposition to the registration of a colour mark, the Bundesgerichtshof (BGH) stated that, contrary to the assumption underlying a preliminary case brought before the Court of Justice (Oberbank case, C-217/13, EU:C:2014:2012), Germany made use of the option provided in Article 3, paragraph 3, second sentence of directive 2008/95/EC, reconciling the legislations of the Member states on trademarks. According to this provision, the Member States can ensure that a trademark is not declared void, even if its distinctiveness has not been acquired until after the registration request or after the registration. In the order of reference filing the Oberbank case, concerning another dispute in the main proceedings, the Bundespatentgericht (Federal patents court) emphasised the fact that Germany did not make use of the said option. On the other hand, in this case, the BGH, acting as the superior court of record, from then on chose an interpretation contrary to national law.

While, in the aforementioned Oberbank ruling, the Court of Justice especially specified that it is the duty of the owner of the earlier, contested brand to prove that this trademark has acquired a distinctiveness before the date of submission of the registration application, the scope of this provision with respect to German law remains uncertain, since it is designed to apply only when the Member State concerns has not used the option provided in Article 3, paragraph 3, second sentence of directive 2008/95/EC.

Consequently, in this case, the owner of the later trademark that is opposed cannot invoke the Oberbank case in support of its request to suspend the case until a decision is pronounced in a collateral proceeding pertaining to the challenging of the earlier trademark. Therefore the probability required to cancel the earlier, contested trademark cannot be established in order to justify the requested suspension.

Bundesgerichtshof, ruling dated 18.09.14, I ZR 228/12, www.bundesgerichtshof.de

IA/34106-A

[BBER]

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In a ruling dated 26 June 2014, the Bundesgerichtshof (BGH) examined the German provision defining detention conditions for the purposes of transferring persons seeking international protection to another Member State, namely Article 62, paragraph 3, number 5 of the law governing establishment and residence (Aufenthaltsgesetz). The BGH deemed that this was incompatible with regulation (EC) no. 604/2013 establishing the criteria and

mechanisms for determining the Member State responsible for examining a request for international protection filed in one of the Member States by a foreign national or a stateless person (revised) (Dublin III regulation), insofar as, contrary to Article 2, subsection n) of this regulation, the objective criteria that allow establishing a risk of flight are not determined by this law. Therefore, since a risk of flight cannot be established on the basis of sufficiently specific legal criteria, the conditions provided in Article 28, paragraph 2 of the same regulation cannot, according to the BGH, be fulfilled.

As a result, the application of Article 62, paragraph 3, point 5 of the aforementioned law must be suspended and any detention measure based on the existence of a risk of flight must be excluded until objective and accurate criteria are defined by the German legislative body.

Bundesgerichtshof, ruling dated 26.06.14, V ZB 31/14,
www.bundesgerichtshof.de

IA/34105-A

[BBER]

Spain

Social policy - Prohibition of discrimination of part-time workers - Calculation of permanent disability and retirement pensions - National regulation providing a system for integrating periods without contributing to the social security scheme - Regulation referring, for this calculation, to the minimum subscription bases applicable to the period of work prior to the contribution-free period - Absence of violation of the constitutional principles of equality and prohibition of any arbitrary action by the public authorities

Ruling on a question of constitutionality brought forward by the Tribunal supremo (Supreme Court), the Constitutional Court confirmed, in its ruling dated 25 September 2014, the constitutionality of the additional provision 7ª, no. 1, rule 3, subsection b) of the general law on social security (GLSS). This provision, which also appears among the provisions that are the subject matter of the case C-527/13, Cachaldora (refer to the conclusions of Advocate General Bot, pronounced on 9 October 2014) that is currently pending before the Court of Justice, provides that, for the purpose of calculating the permanent disability and retirement pensions, the periods in which there was no contribution obligation shall be integrated in the calculation of the minimum contribution base from among the bases applicable to each period, corresponding to the latest number of hours worked. The Constitutional Court deemed that this provision does not oppose the principle of equality (Article 14 of the Constitution), nor does it oppose the prohibition of any arbitrary action by the public authorities (Article 9, paragraph 3 of the Constitution).

In fact, the Constitutional Court considers that the provision in question establishes a fiction of law that allows integrating non-contribution periods and results in part-time workers being subject to the same principles applicable to full-time workers. The unequal treatment therefore results not from the contested provision, but from the fact that the rules determining the contribution base, pursuant to the principle of proportionality. As it so happens, the Constitutional Court highlighted that it is not its responsibility to determine whether a system that takes into consideration the entire professional career of a worker is more just, and states that the citizens' rights as regards social security constitute rights that are configured by the

legislator. In this respect, the inherent redistributive nature of the social security system sometimes causes the legislator to drift away from the principle of proportionality between contributions and services, without necessarily violating the principle of equality. Thus, the Constitutional Court concluded that the situations of part-time and full-time workers are not comparable. Next, concerning the prohibition of any arbitrary action by public authorities, the Constitutional Court believes that the provision in question is not unreasonable and that it is justified.

The ruling was accompanied by a dissenting opinion in favour of the unconstitutionality of the provision being disputed, due to its indirectly discriminatory nature with respect to female workers. The ruling of the Constitutional Court did not cover this problem, since the petitioner of the main issue was a male worker. In this respect, the dissenting opinion believes that the ruling of the majority was based on a confusion between an objective element (the point of connection that determines the pertinence of the provision in question) and a formal element (the reasons that may determine unconstitutionality). Thus, the dissenting judge emphasised that if the indirectly discriminatory nature was examined independently of the petitioner's gender, the declaration of the unconstitutionality of the measure could have benefited male as well as female workers.

Constitutional Court, ruling no. 3361/2012, dated 25.09.14,
www.tribunalconstitucional.es

IA/33941-A

[IGLESSA]

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Environment - Assessment of the impacts of certain plans and programmes on the environment - Inspection of the compatibility of the national regulations granting a petroleum exploration licence with the environmental regulations of the Union - Refusal to file a preliminary question

The Supreme court rejected the appeal for annulment made against the royal decree no. 1462/2001 due to the petroleum exploration licences granted beforehand without provisions for a transparent assessment of the repercussions of the said activities on the environment.

The royal decree no. 1462/2001 authorised the granting of a petroleum exploration licence to the company Repsol Investigaciones petrolíferas S.A. in the waters of the Atlantic Ocean, off the coasts of Lanzarote (an island classified as a Biosphere reserve) and Fuerteventura. These licences were granted under law no. 34/1998 dated 7 October 1998 pertaining to the oil sector. The royal decree no. 1462/2001 did not provide for any condition to be fulfilled as regards the environment, and neither an environmental impact assessment nor any report on the environment protection measures was presented.

The petitioners highlighted the obligation for petroleum exploration licences concerning international waters, as well as for related activities, to be subject to an environment impact assessment in compliance with the international treaties and conventions. According to the petitioners, these activities pose a great risk to fishing, to the biodiversity of the ocean and to the coasts of the Canary Islands. Therefore, the directive 2001/42/EC pertaining to the impacts assessment of certain plans and programmes on the

environment, similarly to the royal legislative decree no. 9/2000 dated 6 October 2000, imposes an obligation of assessing the environmental impact of any project extracting petrol and natural gas for commercial use. According to the petitioners, the royal decree no. 1462/2001 would constitute a violation of the said directive since it does not impose the execution of a transparent assessment of the repercussions on the environment caused by the activities of prospecting, exploration and drilling, prior to granting any licence.

Due to this argument, the petitioners requested the Supreme court, before ruling on the cancellation of the said decree, to file a reference for a preliminary ruling before the Court of Justice on the question of whether a national regulation, such as the royal decree 1462/2001, is compliant with the directive 2001/42.

The Supreme court refused to file such a preliminary question, as it believed that there was no conflict with the European regulations that were cited. It states that this directive, according to the case law of the Court of Justice, does not reference special projects that do not include regulatory aspects, as is the case here, even if they are to be developed in multiple phases. This case concerns a specific project, applicable to predetermined geographical coordinates for a temporary duration, which is also defined.

However, two judges presented a dissenting opinion, in which they suggested filing these preliminary questions before the Court of Justice in the hope of reversing the case law of the Supreme court, according to which the environmental impact assessment of the activities to be executed after obtaining the exploration licence are planned at the time of the issue of the said licence, pursuant to the royal decree, and not at the effective start of these activities.

These judges believe that a preliminary question should have been filed pertaining to the compliance, with respect to directive 2008/56/EC, establishing a community action framework in the domain of the marine environment policy ("marine environment strategy" framework directive) and directive 2011/92/EU, concerning the impact assessment of certain public and private projects on the environment, of a national regulation pertaining to a research project in the oil sector that postpones the environment impact assessment to the time of the effective execution of the petroleum prospection activities.

Supreme court, ruling nos. 2539/2014, 2746/2014, 2747/2014, Sala de lo Contencioso, dated 30.06.14,
www.poderjudicial.es

IA/33934-A
IA/33935-A
IA/33936-A

[NUNEZMA]

**** Briefs (Spain)***

In its ruling dated 16 July 2014, the Constitutional Court rejected the appeal of unconstitutionality that was initiated by the Parliament of Navarre against several articles of law 3/2012 dated 6 July, pertaining to emergency reform measures for the job market. One of the controversial provisions is Article 4, paragraph 3 of law 3/2012, which introduces a new contractual figure called the "open-ended contract in support of entrepreneurs". This law provides, among other things, the application of a probationary period of one year, by derogation to the general workers' status scheme, and introduces the possibility

for the National Advisory Commission on collective agreements to allow, in certain circumstances, the non-enforcement of the contents of a collective agreement. The Constitutional Court considered that this provision does not constitute a violation of the rights to work, to collective bargaining and to effective judicial protection, nor does it violate the principle of equality, as guaranteed by the Constitution. Effectively, it believes that this measure is a short-term legislative measure adopted in the context of a serious economic crisis. Moreover, the Constitutional Court also confirmed the constitutionality of the modifications made to the collective bargaining scheme. On the contrary, in a dissenting opinion, three judges voted in favour of the unconstitutionality of the controversial provision of law 3/2012. It must be highlighted that the provision concerning the application of a probationary period of one year was subject to a reference for a preliminary ruling before the Court of Justice (pending case C-117/14, Nisttahuz Poclava), which calls into question the compatibility of this period with the fundamental right guaranteed in Article 30 of the Charter of Fundamental Rights, and with directive 1990/70/EC concerning the framework agreement of the ESC, UNICE and CEEP on fixed-term employment contracts.

Constitutional Court, ruling no. 119/2014, dated 16.07.14,
www.boe.es/diario_boe/txt.php?id=BOE-A-2014-8748

IA/33942-A

[IGLESSA]

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In its ruling dated 30 May 2014, the Supreme court allowed the contentious administrative appeal filed by the company "Vidacord, S.L.", which aimed at repealing the royal decree 1301/2006, establishing quality and safety standards for donating, obtaining, inspecting, transforming, preserving, storing and distributing human tissues and cells, and approving the standards on the coordination and functioning of this activity for human use. This decree constitutes a transposition of directive 2004/23/EC pertaining to the establishment of quality and safety standards for donating, obtaining, inspecting, transforming, preserving, storing and distributing human tissues and cells, and of directive 2006/17/EC, on the implementation of directive 2004/23/EC. The Supreme court repealed the royal decree 1301/2006 for infringing on the law, on the basis of Article 43 of the Constitution, which obliges the public authorities to organise and protect public health, since the rights and duties in this respect are established by the law. To determine whether the decree in question constitutes a regulation of elements that are essential for human health, the Supreme court referred to the provisions of directive 2004/23/EC, and moreover stated that it does not result in an obligation to introduce a national regulation, insofar as its Article 4, paragraph 3 establishes that it does not infringe on the decisions of the Member States prohibiting the donation, obtaining, inspection, transformation, preservation, storage, distribution or use of any specific type of human tissues or cells or of cells from a particular source, including when these decisions also concern imports of the same type of human tissues and cells. Consequently, the decision to adopt or reject a regulation of the aforementioned activity depends on the national legislator.

Moreover, even if the petitioner requested a reference for a preliminary ruling, the

Supreme court did not make a pronouncement on this question.

Supreme court, ruling no. 2253/2014, dated 30.05.14,
www.poderjudicial.es

IA/33944-A

[IGLESSA]

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The Spanish Constitutional Court allowed an appeal of unconstitutionality filed by the Spanish central government against law 1/2013 of the Autonomous community of Cantabria, which prohibited hydraulic fracturing as a non-conventional technique for using and extracting gas.

With reference to the law of the Union, the Constitutional Court mentioned an information note dated 10 August 2012 from the Commission and two resolutions of the European Parliament ([2011/2308(INI)] and [2011/2309(INI)]), in which the European institutions acknowledge the competence of the Member States to legislate on the matter of energy resources. The Constitutional Court also referred to recommendation 2014/70/EU of the Commission, pertaining to the minimum principles of hydraulic fracturing, the primary objective of which is the protection of the environment and health, and stated that, in spite of the precautionary principle, the law of the Union does not prohibit the hydraulic fracturing technique. Concerning the conflict of jurisdiction between the Autonomous community of Cantabria and the Spanish central government, the Constitutional Court stated that law 1/2013 of the Autonomous community of Cantabria, which banned hydraulic fracturing, is contrary to Article 9 of law 17/2013 pertaining to the provision of electric systems, thus resulting in the nullity and unconstitutionality of law 1/2013.

In a dissenting opinion, three judges expressed reserves, among other things, on the accounting of the risks of hydraulic fracturing and the interpretation of the precautionary principle chosen by the ruling of the Constitutional Court. Moreover, they believed that the ruling should have mentioned that, in recommendation 2014/70/EU, the Union invites to, on the one hand, establish restrictions on resorting to hydraulic fracturing and, on the other hand, demarcate zones in which this technique is banned.

Constitutional Court, ruling no. 106/2014, dated 24.06.14,
www.tribunalconstitutcional.es

IA/33943-A

[IGLESSA] [GARCIAL]

Finland

Visa, asylum, immigration - Asylum policy - Exclusion of the refugee status - Belonging to an organisation that committed acts that could be qualified as crimes against humanity - Conditions - Several liability of the person referred to in the execution of the said acts.

In its ruling dated 25 August 2014, the Supreme administrative court applied the exclusion clause of the refugee status, stating that there were serious reasons to believe that the petitioner had committed a crime against humanity. It must be specified from the outset that the exclusion clauses in the national provision basically correspond to those in Article 1, section F of the Geneva convention pertaining to the status of refugees and in Article 12, paragraph 2 of directive 2004/83/EC pertaining to the

minimum standards related to the conditions that must be fulfilled by citizens of non-member countries or stateless persons for them to be eligible for the refugee status or by persons who, for other reasons, require international protection, and pertaining to the contents of these statutes. Thus, while interpreting these national provisions, the Supreme administrative court mainly based its decision on the different documents drafted by the United Nations High Commissioner for refugees, on the Rome Statute of the International Criminal Court and on the ruling of the Court of Justice in the related cases B and D (C-57/09 and C-101/09, EU:C:2010:661).

In the main case, the national immigration office (Maahanmuuttovirasto) rejected the request for a residence permit of the petitioner, an Afghan citizen, on the grounds that there were serious reasons to believe that the petitioner had committed a serious non-political crime outside Finland before being admitted as a refugee, but nevertheless granted him a temporary residence permit. The administrative court of Helsinki having rejected the petitioner's appeal against the said rejection, the Supreme administrative court ruled that the effects of the judgement were to be maintained, but, on the other hand, stated that the facts of the case were based more on the concept of a crime against humanity rather than a serious non-political crime.

The petitioner acted as a spy and informant for the Afghan security service, Khadamate Ettelaate Dowlati (KhAD), from 1963 to 1992, which was responsible for arrests, disappearances, torture, inhuman and degrading treatment and punishments as well as civilian executions. The Supreme administrative court believed that these human rights violations committed by the KhAD should be qualified as crimes against humanity rather than serious non-political crimes, since it acted as a national government security body.

Next, with respect to the question of whether it would be possible to charge the petitioner with a part of the responsibility for the acts committed by the KhAD during the period for which he was a member, the Supreme administrative court carried out an individual investigation of the facts. In this respect, it noted that the petitioner was aware of the crimes committed by the KhAD and that he contributed to these crimes significantly through his actions as a spy and informant of the KhAD that lasted for several decades. Having infiltrated terrorist groups, the petitioner received training and acted as a commander of these groups. While the petitioner could not predict what would happen to the persons that he informed about, it is evident that he was aware of the fact that certain of them would be executed. Finally, the fact that the petitioner contributed to acts constituting a crime against humanity as part of his work or an infiltration mission had no effect on the assessing his responsibility.

Korkein hallinto-oikeus, ruling dated 25.08.14, KHO:2014:131,
www.kho.fi

IA/33949-A

[PEDERVE]

France

Asylum and immigration - Immigration policy - Implementation of directive 2008/115/EC by the Member States - Right to be heard, as sanctioned by Article 41 of the Charter - Principle of compliance with the laws of defence

In a ruling dated 4 June 2014, the Council of State made a ruling on the possibility of an illegally staying foreign national to assert his/her observations before the national authorities before they take any repatriation decision against him/her, pursuant to directive 2008/115/EC pertaining to the common standards and procedures applicable in the Member States for repatriating illegally staying foreign nationals.

The case concerned a citizen of Comoros who illegally entered the territory of France and was refused a residence permit as a parent of a French child. The refusal decision came with an obligation to leave French territory within one month. The person concerned contested the ruling of the administrative court of appeal, which rejected his appeal against these decisions, before the Council of State. He claimed that the prefect of Rhône was ignored his right to be heard by, on the one hand, not informing him before pronouncing the expulsion measure that if his application for a residence permit was rejected, there was a possibility of him being forced to leave the territory of France and, on the other hand, by not allowing him to formulate his observations.

Referring to the rulings of the Court in the cases M. (C-277/11, EU:C:2012:744) and G. and R. (C-383/13 PPU, EU:C:2013:533), the Council of State affirmed that, given that the obligation to leave the territory of France necessarily results from rejecting a residence permit application, when the expulsion decision was made at the same time as the refusal to issue the residence permit, the right to be heard, as sanctioned by the Charter, does not imply that the administration is obliged to allow the person concerned to present his observations specifically on the decision obliging him to leave the territory of France, so long as he had recourse to a hearing before the decision rejecting his residence permit application was made.

The validity of this interpretation was confirmed by the ruling of the Court of Justice in the Mukarubega case (C-166/13, EU:C:2014:2336), which was based on a comparable question. In this ruling, the Court deemed that the right to be heard in any procedure, as applicable pursuant to directive 2008/115 and especially to Article 6 of the said directive, must be interpreted in the sense that it does not oppose a national authority from not having a hearing for a foreign national specifically on the subject of a repatriation decision if, after having affirmed the illegal character of his/her stay in the national territory through legal proceedings that fully complied with his/her right to be heard, it takes a repatriation decision against him/her, irrespective of whether or not this repatriation decision comes after a refusal to grant a residence permit.

Council of State, subsections 2 and 7 combined, decision dated 04.06.14, no. 370515,
www://legifrance.gouv.fr/

IA/33640

[SIMONFL]

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Harmonisation of legislations - Intellectual property - Trademarks - Customs seizure of counterfeit toys - Criminal action against the retailer and importer for the crime of trademark infringement - Absence of damage to the essential function of the trademark - Concept of illustration - Action in tort for unfair competition and

parasitical business practices - Absence of risk of confusion.

A case concerning criminal proceedings for the import, possession and sale of counterfeit toys was subject to two rulings in the criminal division of the Court of cassation, the first dated 2 May 2012 and the second dated 24 September 2014.

Customs officials confiscated 4,600 miniature cars, 18 cm in length, from a Lorraine importer, which were manufactured in Hong Kong. After the customs seizure of the counterfeit objects (miniaturised models of cars with the logos and heraldry of Renault and Ferrari, subject to figurative community trademarks covering toys, games and miniature models), the customs administration prosecuted the importer and the retailed for trademark infringement. The criminal court of Sarreguemines, and then the court of appeal of Metz, pronounced a fine amounting to a total of approximately €36,000 against the defendants and upheld the confiscation of the toys. The Court of cassation reversed the ruling of the court of appeal of Metz on the grounds that the judges neglected to verify whether it effectively caused damage to the function of the trademarks in question. Infringement in defined, in directive 2008/95/EC harmonising the legislations of the Member States on trademarks, as the use of the trademark in the course of trade, damaging the essential role of the trademark, i.e. guaranteeing the origin of a product or service under the said trademark. The judge of the Union also highlighted in several decisions that a trademark effectively allows "*to identify the product or service designated by the trademark as coming from a given company and to therefore distinguish this product or service from those of other companies*".

The Court of cassation confirmed, ruling at second instance in the same case, as part of an appeal made against the ruling of the court of appeal of Paris that deemed that the affixing of the Renault and Ferrari trademarks on miniaturised models, which were sold under the "*Aglow label*", visible on the packaging, merely constitutes an illustration. The position adopted by the court of appeal confirmed that the affixation therefore does not damage the function of the trademark, which is to inform the consumer on the origin of the products, when taking into consideration, among other things, the presence of the trademark of the company Aglow on the packaging. The requests for conviction formulated by the customs administration in these criminal proceedings were all rejected.

At the same time, Ferrari came before the civil courts to present requests based on the grievance of unfair competition, resulting from the reputation of its trademarks. The court of appeal of Metz deemed that these requests should be rejected since the invoked parasitical business practice was not proved, taking into consideration the poor quality of the miniaturised model of cars, which prevented any confusion among the purchasers and moreover stated that invoking the reputation of a trademark is not sufficient to characterise parasitical business practices.

The use of the concept of illustration is rare and allows rejecting appeals based on counterfeiting through imitation. It is clear that the presence of the importer's trademark on the packaging and the poor quality of the miniature models were taken into consideration to prevent any risk of confusion. In the case of a reproduction of a trademark, either identically or via imitation, a risk of confusion is prevented if there is no doubt possible on the origin of the products.

Court of cassation, criminal division, ruling dated 24.09.14, appeal no. 13-83490,
http://legifrance.gouv.fr/

IA/33641-A

Court of cassation, criminal division, ruling dated 02.05.12, appeal nos. 11-84161 and 11-84162,
http://legifrance.gouv.fr/

IA/33642-A
IA/33645-A

Court of Appeal of Metz, 10.04.13, RG 13/00212,

IA/33644-A

[ANBD]

**** Brief (France)***

In a case that was already subject to a remand after the Court of cassation, the criminal division of the Court of cassation finally came to a decision. The origin of this case was an order of the judge of liberties and detention of the Paris Regional Court authorising the competition, consumer and fraud suppression administration to execute operations of inspection and seizure of documents from banking establishments, for searching for proof of anti-competitive practices contrary to Article 101 TFEU.

The banks that were subjected to the inspections brought their case before the judge of liberties and detention in order to have the operations in question, executed in their premises, declared null and void. They stated that the operations hindered the presence of their lawyers and that the rights of defence were not complied with. The sitting judge dismissed all of their claims.

In its first referral, the Court of cassation censured the decision of the judge of liberties and detentions on the grounds that he was not authorised to pronounce on the validity of the order in question and that only the first president of the court of appeal under the purview of the judge that authorised the inspection or seizure operations would have jurisdiction to hear an appeal pertaining to their execution. The case was therefore brought before the first president of the court of appeal of Paris, which deemed the operations to be lawful.

As part of a new seizure of referral, the Court of cassation reversed the decision submitted to it, on the basis of the principle of the rights of defence, by stating that in procedures based on the violation of the competition law, the obligation to ensure the exercising of the rights of defence must be complied with from the preliminary investigation stage. According to the Court of cassation, as soon as there was an obstacle in the presence of the lawyers called to assist with the domestic seizures, the principle of the rights of defence was not complied with. The Court of cassation did not refer the case, deeming that it was capable of directly applying the rule of law and ending the dispute; it therefore overturned the decision under appeal.

Court of cassation, criminal division, ruling dated 25.06.14, appeal no. 13-81471,
http://legifrance.gouv.fr/

IA/33643-A

[ANBD]

Greece

European Union - Currency union - Public deficits - Decision 2012/211/EU - Reduction of special salaries and

Memorandum between Greece and certain countries of the Euro zone for the purpose of facing an excessive public deficit - Non-compliance with the Constitution - Inadmissibility - Primacy of the Constitution over the decision issued by the EU Council.

In decision 2192/2014 dated 13 June 2014, the Plenary Assembly of the Symvoulio tis Epikrateias (Council of State, SE), ruling on the proceedings for annulment filed by associations of retired military force members, declared, among other things, that a decision of the Council of the Union does not release the legislator from its obligation to comply with the Constitution. This case concerns decision 2012/211/EU[2], which was used as a legal basis for the decision of the Finance Minister to reduce the retirement pensions of members of the armed forces. Affirming that this decision is contrary to the Constitution, the SE declared that it was null and void. In this case, pursuant to the repealed decision, the persons benefiting from certain retirement pensions would have to return a part of their pension, labelled as unfairly received, to the State. The decision of the SE rendered this partial restitution null and void and obliged the State to pay back the portion of the returned pension to the beneficiaries.

From a substantive point of view, the measure in question conflicts with the Constitution, as a consequence of decision 2012/211, first, due to the mission of the armed forces. Pursuant to Article 45 of the Constitution, this mission consists of protecting public peace as well as defending national independence, and therefore invests the armed forces with safeguarding competences that are inherent to the very concept of the State.

Second, the SE believes that this special mission justifies the implementation of a special professional and political system for members of the armed forces; a system that involves more responsibilities as well as more restrictions with respect to those of civil officers, on the one hand, and citizens, on the other hand, and which moreover justifies a preferential salary system for these persons. This, members of the armed forces do not benefit from the permanent character of the function of civil officers, as guaranteed by Article 103, paragraph 4 of the Constitution. Moreover, military force members do not have the right to strike, nor can they belong to political parties, unlike other workers and citizens, who benefit from these pursuant to the Constitution. In addition, they are subject to a harsher disciplinary system that that of common law and, for the most part, are subject to the jurisdiction of special courts (Article 94, paragraph 4, subsection a) of the Constitution) as well as to certain special criminal offences. The task of these special personnel requires a continuous availability and state of alert, taking increased risks, frequent professional transfers and the prohibition to exercise any paid private activity.

Also, the SE affirmed that a certain number of salary reductions have already been applied to members of the armed forces pursuant to different measures, including decision 2012/211 of the Council that is aimed at correcting the excessive deficit of Greece. While the SE acknowledges that such reductions can be decided as part of a programme for the betterment of public expenses, it nevertheless believes that limits

[2] Decision of the Council dated 13 March 2012, modifying decision 2011/734/EU addressed to Greece for the purpose of strengthening and deepening budgetary oversight and giving Greece formal notice to take measures to reduce the deficit, deemed necessary to remedy the situation of excessive deficit.

need to be applied pursuant to the principles of proportionality, equality and the respect for human dignity. These principles impose the distribution of expenses equitably and proportionally to the means and requirements of everyone. Also, according to the SE, the ministerial decision in question did not take into account the special mission or the previous salary and pension cuts of these personnel. Moreover, it did not ensure that the remuneration of the persons concerned was sufficient to guarantee a decent standard of living. The SE concluded that the contested measure was disproportionate with respect to the underlying purpose and that it did not comply with the principles of equality of treatment and proportionality. It received the appeal of the petitioners on these grounds.

Symvoulio tis Epikrateias, Plenary Assembly, ruling dated 13.06.14, no. 2192/2014,
www.lawdb.intrasoftnet.com/nomos

IA/34050-A

[RA]

**** Brief (Greece)***

In a ruling dated 27 January 2014, the administrative court of first instance of Athens forced the application of the provisions of law no. 4072/2012, which transposed directive 2010/24/EU, pertaining to mutual assistance as regards the recovery of debts related to taxes, levies, duties and other measures. The dispute concerned a Greek national of the Hellenic State and more specifically, the tax authority, wherein the latter refused to issue the former a certificate attesting the settlement of his taxes on the grounds of unpaid debts to the State of Germany. The said debts amount to approximately two million Euros.

The petitioner, citing the principle of economic liberty, stated that the said certificate should have been issued to him since, according to him, the certificate exclusively pertained to his debts to the State of Greece and not to any possible debts to other Member States. Accordingly, he petitioned for the revoking of the tax authority's decision. The administrative court specified that the aforementioned national regulation, in accordance with directive 2010/24/EU, aims at facilitating mutual assistance between the Member States for the purpose of recovering their respective receivables. It also aims at preventing loss of tax revenue related to cross-border transactions and at preventing the risk of tax evasion, while contributing to the proper functioning of the domestic market.

In order to achieve the objective of the said mutual assistance, the court fictitiously assimilated, on a legal standpoint, the debts of the petitioner with the debts to State of Greece and thereby rejected the request of the petitioner by deeming that the competent national authorities may apply all possible recovery measures available to them pursuant to national law.

Dioikitiko Protodikeio Athinon, ruling dated 27.01.14, no. 277/2014,
www://lawdb.intrasoftnet.com.nomos2.han3.ad.curia.europa.eu/nomos/1_news_fp.php (NOMOS database)

IA/34040-A

[GANI]

Hungary

Preliminary questions - Interpretation - Effects of interpretive judgements over time - Retroactive effect - Absence - Revision of a final ruling - Exclusion

The court of appeal of Budapest, as well as the Constitutional Court, examined the legal consequences resulting from a final ruling given by a court of a Member State in violation of the law of the Union. The question, to which the Hungarian courts responded in the negative, aimed at knowing whether a case that was definitely closed, and the ruling of which proved to be contrary to later case law of the Court of Justice pertaining to the interpretation of a rule of law of the Union that served as its legal basis, can be subject to an appeal for reversal.

Pursuant to the rules of Hungarian civil and administrative proceedings, it is possible to revise proceedings due to, among other things, the occurrence of a new fact or proof that would exercise a decisive influence and which was not known, before the ruling was pronounced, to the court and the party that appealed for the reversal.

In this case, the appeal for reversal concerned the ruling of the administrative court, through which it refused a taxable person's right to deduct VAT, due to irregularities committed by another operator that intervened further upstream in the chain of services. Subsequently and as part of other cases, the Hungarian courts submitted preliminary questions before the Court of Justice, pertaining to the interpretation of the VAT directive concerning the right to deduct VAT.

In the ruling of Mahagében and Dávid (joined cases C-80/11 and C-142/11, EU:C:2012:373), the Court of Justice deemed the national practice refusing the right of deduction to a taxable person to be inadmissible when the latter does not have indices justifying suspicion of the irregularity or fraud of the issuer of the main issue or one of its service providers. The taxable person, on the basis of this preliminary ruling, petitioned for his case to be reopened, pursuant to the rules of court of revision.

The administrative courts of first and second instance deemed that the conditions of admissibility of a reversal petition were not met in this case. The court of appeal of Budapest highlighted that the preliminary ruling of the Court of Justice was delivered as part of a legal procedure that was separate from that of the main case, and neither the legal findings of this preliminary ruling nor the arguments of the Court can be considered a new fact with respect to the proceedings of the main issue.

Following this decision, the taxable person submitted a constitutional appeal before the Constitutional Court of Hungary, invoking a violation of his rights to judicial protection and a fair trial, and a violation of the obligations of Hungary as a Member State of the European Union.

The Constitutional Court rejected the appeal by Order, since the conditions of admissibility were not fulfilled. It affirmed that the exercise of discretion of a court for assessing the admissible nature of an appeal for reversal is not constitutional in nature and therefore, is not within its scope of jurisdiction. On this occasion, the Constitutional Court stated that the rulings of the Court of Justice, given in interpretation of the rule of law of the Union, only produce ex nunc effects with respect to national courts.

Alkotmánybíróság, ruling dated 07.07.14, no. 3203/2014 (VII. 14.),
www.kozlonyok.hu/kozlonyok/Kozlonyok/1/PDF/2014/20.pdf

IA/33947-A

[VARGAZS]

**** Brief (Hungary)***

The Constitutional Court deemed, as part of proceedings related to the constitutionality of the rules of law, that certain provisions pertaining to the law on the European arrest warrant, governing the terms of execution of a temporary surrender, do not violate constitutional rights.

A European arrest warrant, issued by a Netherlands court for executing a custodial sentence, is the origin of the said constitutional proceedings. The Hungarian criminal court, acting as the executing judicial authority, stated doubts on the subject of the constitutionality of the regulations pertaining to temporary surrender, insofar as it decrees the mandatory detention of the accused. Nevertheless, the Hungarian criminal proceedings have access to alternatives to preventive detention, which are less restrictive in terms of deprivation of liberty.

The Constitutional Court first highlighted the difference between a European arrest warrant issued for the execution of a sentence and an arrest warrant issued for prosecution. It then stated that in this case, the European arrest warrant was issued for the execution of a custodial sentence. In this context, it deemed that the mandatory detention complies with the principles of necessity and proportionality and is therefore not contrary to the right to liberty or to the proportionality of sanctions, nor to the principle of equality.

Alkotmánybíróság, ruling dated 11.02.14, no. 3025/2014 (II. 17.), *www.kozlonyok.hu/kozlonyok/Kozlonyok/1/PDF/2014/5.pdf*

IA/33948-A

[VARGAZS]

Ireland

Family Law - Medically assisted procreation - Surrogacy contract - Registration of the name of the genetic mother or the surrogate mother - Constitutional definition of the term "mother" - Absence - Inapplicability of the maxim "mater semper certa est" - Legislative gap - Obligation incumbent on the legislator

On 7 November 2014, the Supreme Court, in a majority vote of six against one, gave a ruling overturning the decision of the High Court, which deemed that the *mater semper certa est* (the mother is always certain) maxim can be refuted. The case concerned twins born from a surrogate, who is the sister of the genetic mother of the twins, since the latter was incapable of bearing children. After the twins were born, the Registrar of Births refused to register the genetic mother on the birth certificate of the children born under this surrogacy contract.

Before the High Court, it was stated that the *mater semper certa est* maxim has received constitutional approval in the pro-life amendment of the Constitution. Article 40.3.3 states that "*The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right*". It was also stated that according to the Constitution, the term "mother" refers only to the woman who carried the unborn child. However, the judge of the High Court considered that, taking into account the post *in vitro* fertilisation situation, the presumption of

mater semper certa est maxim, taken from old Roman law, is no longer applicable. In the pursuit of equity and constitutional and natural justice, the High Court concluded that the genetic mother must be registered as the mother of the twins, in pursuance of the Civil Registration Act, 2004. Finally, the High Court believed that maternity is based on genetic relations rather than gestational relations, assimilating genetic relations with blood relations in the establishment of parenthood.

In an appeal, filed by the State, the Supreme Court declared that the essential question raised by this case is the registration of the term "mother" pursuant to the Civil Registration Act, 2004. This case included ruling on the right of the genetic mother to see her maternity stipulated on the birth certificate and on the right of the twins to see their relation with their genetic mother recognised by law.

Since the Irish Constitution does not provide any definition for the term "mother", the Supreme Court turned towards the *mater semper certa est* maxim. In this respect, the Chief Justice concluded that this maxim is not part of Irish common law and that these terms simply recognise the fact that, without taking into account the scientific progress in the domain of medically assisted procreation, the woman who gives birth to a child is recognised as the mother of the said child. On this point, the Chief Justice concluded that the maxim is not pertinent for solving the dispute.

The Chief Justice concluded that there is a gap in the law and that it is incumbent on the legislator, and not the courts, to fill it. In conclusion, she stated the declaration of Lord Simon in *Ampthill Peerage* [1977] AC 547: "*Legitimacy is a status: it is the condition of belonging to a class in society the members of which are regarded as having been begotten in lawful matrimony by the men whom the law regards as their father. Motherhood, although also a legal relationship, is based on fact, being proven demonstrably by parturition. Fatherhood, by contrast, is a presumption*". She highlighted that this declaration is a reflection of an obsolete society, one that does not take into account the scientific progress and moderns medicines developed in the domain of medically assisted procreation and that nothing in the Constitution prevents the development of appropriate laws on surrogacy. The appeal against the State was received by a majority in the Supreme Court.

It must be noted that a few days before the judgment, the Department of Justice published the "*Draft Heads of a General Scheme of a Children and Family Relationships Bill, 2014*", part 5 of which concerns provisions on surrogacy contracts.

It must also be mentioned that the increased judicial attention given to this question is a subject of supranational relevance. In fact, the questions examined by the Irish higher courts were also examined by Advocate General Wahl in his conclusions, during a recent Irish request for a preliminary ruling (case Z, C-363/12, EU:C:2013:604). Moreover, a large number of appeals were made on this legal question before the ECtHR (Mennesson/France, ruling dated 26 June 2014, petition no. 65192/11; Labassee/France, ruling dated 26 June 2014, petition no. 65941/1; D and R/Belgium, ruling dated 8 July 2014, petition no. 29176/13).

M.R. and D.R. (suing by their father and next friend O.R.) & ors. / An tArd-Chláraitheoir & ors,

High Court, 05.03.13, [2013] IEHC 91, www.courts.ie
Supreme Court, 07.11.14, [2014] IESC 60, www.supremecourt.ie

IA/33428-A

[CARRKEI]

Italy

Law of the Union and international law - Ne bis in idem principle - Person having been judged for the final time, for the same events, in a foreign State - Principle of conventional nature - Application pursuant to the Convention implementing the Schengen Agreement

By a ruling dated 8 July 2014, the Court of cassation pronounced on the application of the *ne bis in idem* [no double prosecution] principle in the case of citizens of non-member countries convicted overseas for crimes committed in Italy.

The Court of cassation declared the appeal presented by the Attorney General of the court of appeal of Trieste against the decision of the court of assizes of Trieste, dismissing the need to adjudicate on the case of a citizen of Montenegro who was already sentenced by the Tribunal of Podgorica (Montenegro), to be well founded. According to the Court of assizes, it is not possible to open proceedings against the said foreign national in Italy pursuant to the application of the *ne bis in idem* principle.

The Court of cassation, refusing to agree to this interpretation, stated that the holding of proceedings against a foreign defendant does not prevent repeating this in Italy, since in the Italian legal system, the *ne bis in idem* principle is not applicable in such a context. Moreover, Article 11 of the criminal code provides for the possibility of restarting the proceedings when the original action or omission of the crime was performed partially or entirely in the territory of the State.

According to it, even though the *ne bis in idem* principle is one that the international legal system draws inspiration from and though it responds to the need to protect individuals from the accumulation of the "punitive power" of the States, it does not constitute a general principle of law that can automatically be applied within the meaning of Article 10 of the Italian Constitution, but is rather a principle of conventional nature.

Even if, within the meaning of Article 54 of the Convention implementing the Schengen Agreement, proceedings cannot be implemented against a person who has already been judged for the final time, for the same facts in another contracting State, the *ne bis in idem* principle may not be taken into account when the decision in question was made by a non-member country.

The Court thus specified that the application of the *ne bis in idem* principle cannot be extended to relations with States that are not part of the Convention implementing the Schengen Agreement. A legal procedure that took place in a State with which an agreement, such as the Convention, allowing the exemption of the rule provided by Article 11 of the criminal code, has not been concluded, does not prevent opening a new procedure.

Corte di Cassazione, first criminal division, ruling dated 08.07.14, no. 29664, www.dirittoegiustizia.it/allegati/15/0000066020/Corte_di_Cassazione_sez_I_Penale_se

ntenza_n_29664_14_depositata_l_8_luglio.html?cnt=376

IA/34042-A

[GLA]

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Law of the Union - Principles - Fundamental rights and right to the judicial protection of these rights - Crimes against humanity committed in the territory of Italy by German forces during the second world war - Actions for the compensation of damages against Germany filed by victims of these crimes - Ruling of the International Court of Justice that recognised the jurisdictional immunity of Germany and the incompetency of the Italian courts to hear and determine these actions - Law of enforcement of the Statutes of the United Nations providing the obligation for Italy to comply with the decisions of the International Court of Justice - Law concerning the accession to the United Nations Convention on the jurisdictional immunities of States and their property - Non-compliance of these laws with the Constitution

In its ruling dated 22 October 2014, the Corte Costituzionale (Constitutional Court) pronounced on the compatibility of the Italian legislation transposing the standards of international law with the fundamental rights granted by the Constitution.

This ruling is part of the litigation pitting the Italian Republic against the Federal Republic of Germany on the right to compensation for the crimes against humanity committed by the German forces in Italian territory during the Second World War.

Several Italian courts have recognised their competence to hear and determine civil actions against Germany, filed by persons who were imprisoned in Italy and deported to German concentration camps. The Corte di Cassazione (Court of cassation) confirmed this competence (ruling no. 5044/2004 and ruling nos. 14199-14212/2008. Refer respectively to *Reflets no. 3/2004* and *Reflets no. 3/2008*).

Subsequently, Germany brought the issue before the International Court of Justice (ICJ). In a ruling dated 3 February 2012, the ICJ deemed that, by allowing actions for the compensation of damages against Germany, Italy has failed its obligation to respect the immunity granted to Germany under international law (refer to *Reflets no. 1/2012*).

Following this ruling, Italy adopted law no. 5/2013 acceding to the United Nations Convention on the jurisdictional immunities of States and their property. This law specifically provides for the obligation, for all Italian courts and irrespective of the stage of the proceedings and the level of jurisdiction, to comply with the rulings of the ICJ, which excludes the competence of the Italian courts to hear and determine civil actions against other States. The obligation to comply with the decisions of the ICJ is also provided under law no. 848/1957 pertaining to the execution of the United Nations statutes.

Called, following this ruling of the ICJ, to pronounce again as part of the cases for compensation brought against Germany, the Court of cassation suspended the competence of an Italian court (ruling no. 32139/2012, refer to *Reflets no. 3/2012*).

Other cases for compensation were later brought before the Tribunale di Firenze

(Court of Florence). This court requested the Constitutional Court to pronounce on the compliance of law no. 5/2013 and no. 848/1957 with Articles 2 (inalienable rights) and 24 (access to the courts) of the Constitution.

In its ruling, the Constitutional Court stated that the fundamental principles, similarly to inalienable human rights, play a vital role in the internal legal order. They limit the insertion of international standards and those of the Union in the internal legal order if these standards are contrary to the said fundamental right and principles.

In this respect, the Constitutional court mentioned the rulings of the Court of Justice (Kadi / Council and Commission, C-402/05 P, EU:C:2008:461, and Al Barakaat International Foundation / Council and Commission, C-415/05 P, EU:C:2008:461) according to which the obligations resulting from an international agreement cannot consequently result in the violation of fundamental rights and especially, such as in this case, of the right to effective judicial protection.

Moreover, the Constitutional Court specified that even though pursuant to Article 10 of the Constitution, Italy is obliged to comply with international law, the effective judicial protection of fundamental rights constitutes one of the supreme principles of the Constitution.

Also, the international standard on the immunity of jurisdictions, as interpreted by the ICJ, results in completely bypassing the right to judicial protection of the victims of crimes against humanity, which were committed *iure imperii* (with sovereign immunity) by Germany. In addition, the Constitutional Court denied the existence of a greater public interest that could justify this gap.

Therefore, the Court deemed that the provisions of the aforementioned laws obliging the Italian judge to comply with the decision of the ICJ to be contrary to the Constitution, said decision suspending the competence of Italian courts to hear and determine actions for compensation that were brought against Germany for the crimes of the Nazis.

Constitutional court, ruling dated 22.10.14, no. 238,
www.cortecostituzionale.it

IA/34048-A

[BITTOGI]

**** Briefs (Italy)***

In a ruling dated 2 September 2004, the Court of cassation examined the criteria for accessing a public function, namely nationality.

The issue was brought before the Court by a handicapped Albanian citizen, lawfully residing in Italy, who was excluded from a drive organised by the minister of Economy for an open-ended recruitment of handicapped persons. The minister had effectively limited the drive to Italian citizens and citizens of the other Member States of the Union.

The Italian high court stated that, despite the social evolution and homogenisation of ethnicities and nationalities, the legislator decided to retain the criterion of nationality. According to it, this is a political choice compliant with the Constitution and also compatible with international law and the law of the Union.

In this respect, the Court of cassation stated that the legislator wished to grant access to the public function to certain categories of citizens of non-member countries, such as refugees, long-term residents and beneficiaries of subsidiary protection, thus complying with directives 2004/38/EC, 2004/83/EC and 2003/109/EC. However, it noted that the regulations of the Union do not provide for the obligation of equality of treatment between citizens of non-member countries and citizens of the Union, except for certain specific categories of persons, thus confirming the possibility of excluding citizens of non-member countries that do not belong to these categories. Moreover, it specified that the law of the Union confirms the details of the scheme used to access the public function related to the characteristics of the exercised function.

Corte di Cassazione, labour division, ruling dated 02.09.14, no. 18523,
www.dirittoegiustizia.it/allegati/12/0000066365/Corte_di_Cassazione_sez_Lavoro_sentenza_n_18523_14_depositata_il_2_settembre.html

IA/34041-A

[GLA]

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In its ruling dated 2 July 2014, the Court of cassation declared an argument made for the first time at last instance to be admissible, which was drawn from the violation of the law of the Union, following a ruling of the Court of Justice.

The main issue concerned the importing of frozen meat from non-member countries and its objective was a statement from the customs agency, refusing access to the benefit of reduced taxation.

The petitioner, in his appeal for annulment, invoked the incompatibility of the national law with the law of the Union, resulting from the Sopropè ruling (C-349/07 EU:C:2008:746), insofar as the taxpayer's right to be heard in the administrative proceedings was not respected.

This ruling of the Court was given after the decision at first instance and was not mentioned by the petitioner during the appeal stage.

According to the Court of cassation, there is no peremptory time limit to raise the question of the compatibility of national law with the law of the Union, as part of an appeal for annulment.

In fact, it is also the responsibility of the judge at last instance to verify the compatibility of the domestic law with the law of the Union, according to the interpretation indicated in the ruling of the Court of Justice.

On this basis, the Court of cassation deemed the argument to not be well-founded, insofar as the petitioner had effectively exercised his rights of defence.

Corte di Cassazione, ruling dated 02.07.14, no. 15032,
www.iusexplorer.it/Dejure/Sentenze?idDocMaster=4238188&idDataBanks=2&idUnitaDoc=0&nVigUnitaDoc=1&pagina=1&NavId=246962563&pid=19

IA/34044-A

[RUFFOSA]

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The Constitutional Court declared a law of the autonomous region of the Aosta Valley, making the access to social housing

conditional to prolonged residence in the region for a period equal to or more than 8 years, to be contrary to the Constitution.

The said law was declared to be contrary to Articles 3 and 117 of the Constitution, due to violating Articles 21 TFEU, 24 of directive 2004/38/EC, pertaining to the rights of citizens of the Union and of members of their family to travel and live freely within the territory of the Member states, and 11 of directive 2003/109/EC, pertaining to the status of citizens of non-member countries who are long-term residents, and to the principle of equality of treatment between, on the one hand, the citizens of the Union and long-term residents who are citizens of non-member countries and, on the other hand, Italian citizens and residents of the autonomous region.

In fact, the Court considered that the provision in question resulted in a restriction on the freedom of movement and the freedom of residence of the citizens of the Union, with respect to the regional community and to Italian citizens.

As regards citizens of non-member countries, the Constitutional Court stated that the minimum duration of residence required for accessing the social housing is manifestly disproportionate to the conditions that allow recognising a long-term residency status, which is granted, pursuant to directive 2003/109, to those who reside legally in the territory of a Member State for an uninterrupted duration of at least five years.

In support of its reasoning, the Court referred to Article 34 of the Charter, establishing the right to housing aid meant to ensure a dignified existence to all those who do not have sufficient resources, and to several rulings of the Court of Justice (Stewart, C-503/09, EU:C:2004:172, Collins, C-138/02, EU:C:2004:172, and Allué, C-259/91, EU:C:1993:333).

Constitutional court, ruling dated 11.06.14, no. 168,
www.cortecostituzionale.it

IA/34043-A

[RUFFOSA]

Latvia

Freedom of establishment - Freedom to provide services - Credit institutions - Deposit guarantee schemes - Exclusion of managers of the credit institution - Compliance with the principle of equality of treatment - Admissibility

By its ruling dated 13 June 2014, the Constitutional Court pronounced on the question of the compliance of Article 14, point 4 of the law on deposit guarantees, providing in particular the possibility of excluding the managers of the credit institution from the said scheme, with Article 91, first paragraph of the Constitution pertaining to the principle of equality of treatment. The disputed provision of the law of deposit guarantees transposes an exception under point 7, appendix I of directive 94/19/EC, pertaining to deposit guarantee schemes.

The case concerned the refusal of the Financial and capital market commission to recognise the petitioner, director of a bank, as an applicant having the right to compensation pursuant to Article 17, point 4 of the law on deposit guarantees, by sole virtue of her post. As the petitioner's appeal against this decision was rejected by the administrative court, she subsequently filed an individual constitutional appeal for the

court to pronounce on the constitutionality of the said Article.

First, the Constitutional Court deemed that this provision is compatible with the principle of equality because even if it provides for a difference in treatment, the protection of the well-being of people and the society, among others, is a legitimate objective justifying such a difference in treatment. According to the Constitutional Court, this restriction of the rights of managers is also compliant with the principle of proportionality.

Second, the Constitutional Court noted that the deposit guarantee scheme, provided by national law, transposes the requirements provided especially by directive 94/19/EC. The Constitutional Court stated that it is necessary to take into account the rules of law of the Union, provided that they do not contravene the basic principles of the Constitution, in the process of applying and interpreting national law, while avoiding any contradictions between national law and the law of the Union. However, the Constitutional Court believed that the aforementioned directive provides a margin of appreciation to the Member States as concerns categories of persons that can be excluded from the deposit guarantee scheme.

According to the Constitutional Court, by refusing the protection guaranteed by the scheme to certain categories of persons, it is possible to ensure the rational and effective use of the resources of the deposit guarantee funds and budgetary resources in case of insufficient resources.

The Constitutional Court considered that the creditworthiness of the credit institution remains the main objective of the activities of the managers, and the legislator has established the presumption of the joint and several liabilities of all managers, regardless of the manner in which the obligations have been distributed amongst themselves.

The Constitutional Court also highlighted the specific character of the commercial activities of credit institutions when these institutions operate with the funds that have been entrusted to them by their customers.

Latvijas Republikas Satversmes tiesa, ruling dated 13.06.14, 2014-02-01, www.satv.tiesa.gov.lv/upload/spriedums_2014_02_01.pdf

IA/33946-A

[BORKOMA]

**** Brief (Latvia)***

The case concerns the dismissal of a government official that reached the age of retirement. She had worked in the Latvian tax administration till 21 September 2012, when, on the basis of Article 41, paragraph 1, subsection f) of the law on public service, she was dismissed due to the fact that she had reached the age of retirement. This provision states that a person who has reached the age of retirement is dismissed from his/her posts unless it is in the interest of the service to keep him/her in his/her post.

The petitioner contested this decision before the district administrative court, which partially allowed her appeal. The regional administrative court also partially allowed the petitioner's appeal and asked the tax administration to reintegrate her in the service based on, among other things, the fact that before the dismissal of the petitioner, the party defendant did not perform an assessment of her work pursuant to the instructions on the assessment of

government official, not did it duly assess the necessity of adopting measures to guarantee a balance between government official, regarding their age.

The Supreme court, ruling on the appeal for annulment filed by the party defendant, overruled the ruling of the regional administrative court. It first concluded, based on the case law of the Court of Justice (refer to, in particular, the rulings of Georgiev, C-250/09 and C-268/09, EU:C:2010:699, and Fuchs and Köhler, C-159/10 and C-160/10, EU:C:2011:508) and of the Constitutional Court, that the promotion of recruitment incontrovertibly constitutes a legitimate objective of the social or employment policy of the Member State in question. Moreover, according to the Supreme Court, the courts do not have jurisdiction to determine the staff policy of the public administration.

The Supreme Court referred, among other arguments, to directive 2000/78/EC, pertaining to the creation of a general framework in favour of equality of treatment as concerns employment and work, in particular, and to Article 6 of this directive, which provides justifications for differences in treatment based on age.

Latvijas Republikas Augstākās tiesas Senāts, ruling dated 27.08.14, SKA-409-14 (A420322813),
www.at.gov.lv

IA/33945-A

[BORKOMA]

The Netherlands

Border checks, asylum and immigration - Asylum policy - Common procedures for granting and withdrawing international protection - Directive 2013/32/EU - Right to effective recourse - Obligations of Member States during the transposition period.

In its ruling dated 2 July 2014, the Dutch Council of State deemed that the obligation resulting from the ruling of the court in the Wallonie Inter-Environment case (C-129/96, EU:C:1997:628), according to which "during the transposition period set by the directive for it to be implemented, the Member State to which it is addressed abstains from making provisions that would seriously compromise the execution of the result prescribed by the said directive", implies only that Article 46 of directive 2013/32/EU, pertaining to the common procedures for granting and withdrawing international protection (revised) be already applied before the expiry of the transposition date. This provision provides, in particular, that the Member States should ensure that the petitioners have a right to effective recourse before a court against an act rejecting their request for asylum.

Effectively, when the decision was taken to rejection the request for asylum made by the citizen in question of a non-member country, on the grounds of a lack of credibility of the said request, the aforementioned directive had come into force, but the transposition was not yet complete.

In the first instance, the judge in chambers exercised marginal scrutiny on the report of the Dutch competent authorities that the account of the asylum seeker in question was not credible.

However, according to the citizen of the non-member country, by invoking Article 46 of the aforementioned directive, the said judge should have, in this case, exercised full scrutiny instead of a marginal scrutiny.

The Council of State stated that the fact that the judge in chamber exercised, in this case, the aforementioned marginal scrutiny does not imply that the Dutch judge cannot, in other disputes and after the expiration of the transposition period, exercise a more complete scrutiny if the directive requires it. However, it cannot be concluded, according to the Council of State, that the judge in chambers, via his marginal scrutiny, seriously compromised the execution of the result prescribed by directive 2013/32/EU.

Raad van State, ruling dated 02.07.14, 201311213/1/V2, ECLI:NL:RVS:2014:2552, www.rechtspraak.nl,

IA/34203-A

[SJN] DEBRUGU]

**** Brief (The Netherlands)***

The Dutch legislation provides, for the purpose of examining requests to grant a residence permit, tax laws containing higher amounts, incumbent on citizens of non-member countries, than those incumbent on citizens of the Union under similar circumstances.

The Court of Justice deemed in the Commission / The Netherlands case (C-508/10, EU:C:2012:243), that "by applying to citizens of non-member countries who request for the status of a long-term resident in The Netherlands and to those who, having acquired this status in a Member State other than The Netherlands, request to exercise the right of residence in this Member State as well as to members of their family who request to be allowed to accompany to rejoin them, excessive and disproportionate tax laws, likely to create an obstacle to the exercising of the rights conferred by directive 2003/109/EC pertaining to the status of citizens of non-member countries who are long-term residents, The Netherlands has failed to fulfil its obligations pursuant to this directive.

The Council of State deemed, in this case, that the amount of 130 euros that the Dutch competent authorities claim to be owed by a citizen of a non-member country in order to obtain a limited-duration residence permit is not contrary to the aforementioned directive.

However, the Council of State stated that the amount of 520 euros, i.e. four times the amount of 130 euros, that was to be paid each year in order to obtain such a residence permit for the four members of a family is likely to create an obstacle in exercising the rights conferred by the aforementioned directive, insofar as this amount can have a considerable financial impact on the said citizens of non-members countries.

This statement should not be called into question, according to the Council of State, by the fact that the citizens of the non-member countries had the possibility, pursuant to Dutch legislation, to request for a tax exemption, based on Article 8 of the ECHR.

Raad van State, ruling dated 17.06.14, 201401261/1/V1, ECLI:NL:RVS:2014:2359, www.rechtspraak.nl

IA/34204-A

[SJN] [DEBRUGU]

**** Briefs (Poland)***

In a ruling dated 12 June 2014, the Sąd Najwyższy (Supreme Court) stated that the installation of "suitable sleeping facilities" on board a vehicle for drivers, far from where they are based during their road transport activity, does not constitute free

accommodation, within the meaning of paragraph 9, section 4 of the regulations of the labour ministry and the social policy of 19 December 2002. In these conditions, the driver should have the right to compensation of the accommodation costs for the nights spent in his vehicle.

In this case, the Sąd Najwyższy referred to the provisions of regulation (EC) no. 561/2006, pertaining to the harmonisation of certain provisions of social legislation in the domain of road transport, and in particular, to its Article 8, paragraph 8, which provides the possibility for the driver to take his rest periods on board his vehicle, provided that it is equipped with suitable sleeping facilities. According to the Sąd Najwyższy, even though the said provision aims at guaranteeing, in particular, adequate rest for drivers, it does not provide for the compensations that should be granted to them if they accept to spend their rest periods in their vehicle. In this respect, the Polish high court noted that the Court of Justice never interpreted the concept of "suitable sleeping facilities" on board the vehicle, which may give rise to a risk of disparities between the social legislations of the Member States with respect to road transport.

Sąd Najwyższy, ruling dated 12.06.14, II PZP 1/14,
www.sn.pl/orzecznictwo

IA/33937-A

[CZUBIAN] [JURAGAD]

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The Naczelny Sąd Administracyjny (Supreme Administrative Court) gave two rulings dated 3 June 2014 and 7 August 2014, the first regarding taxes on capital contributions to the constitution or to the modification of the constitutional instrument of a partnership limited by shares (SCA), and the second regarding taxes on contributions for increasing the assets of a SCA.

In these two cases, the tax administration provided an interpretation according to which the said contributions should be taxed, insofar as a SCA is considered to be a general partnership pursuant to Polish law related to taxes on civil law transactions. Notwithstanding this qualification by the law, which results from an incorrect transposition of directives 69/335/EEC and 2008/7/EC, pertaining to indirect taxes on raising of capital, the Naczelny Sąd Administracyjny directly applied the pertinent provisions of these directives, pursuant to which a SCA is considered to be a joint-stock company. Therefore, it deemed that a SCA should be exempted from taxes on the aforementioned contributions.

By invoking the rulings of van Gend en Loos (26/62, EU:C:1963:1) and Simmenthal (106/77, EU:C:1978:49), the Naczelny Sąd Administracyjny confirmed that the pertinent provisions of the aforementioned directives must be directly applied in the case of an incorrect transposition into national law, pursuant to the principles of primacy of the law of the Union and of direct effect.

Naczelny Sąd Administracyjny, ruling dated 03.06.14, II FSK 1545/12,
Naczelny Sąd Administracyjny, ruling dated 07.08.14, II FSK 1980/12,
www://orzeczenia.nsa.gov.pl

IA/33938-A
IA/33939-A

[CZUBIAN] [JURAGAD]

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In a ruling dated 11 June 2014, the Naczelny Sąd Administracyjny (Supreme Administrative Court) pronounced on its own refusal to refer a preliminary question to the Court of Justice, the referral having been requested by the petitioner of the main case.

In this case, the petitioner filed an appeal before the Naczelny Sąd Administracyjny in order to contest the illegality of a previous ruling, given by the said court, pertaining to the determination of the amount of a customs debt related to the taxation of sodium sulphate. The petitioner especially stated that the refusal of the Naczelny Sąd Administracyjny to refer a preliminary question to the Court of Justice constitutes a violation of the law of the Union. According to it, the Naczelny Sąd Administracyjny, as the court against whose decisions there is no judicial remedy, was obliged to make a reference for a preliminary ruling.

The Naczelny Sąd Administracyjny first stated that the conditions of referral of a preliminary question were not met in this case. According to the Polish high court, it is seen from the purposive interpretation of Article 267 TFEU that a reference for a preliminary ruling by a national court, against whose decisions there is no judicial remedy according to national law, only occurs in case of justified doubts about the exact interpretation of the provisions concerned. Contrary to the statements of the petitioner, this kind of national court is not required to bring an issue before the Court, even when one party to the main issue expressly requests it, in the case of a request for interpreting the law of the Union that does not leave any place for doubt. Upholding the position of the petitioner will result in voiding the possibility, for national courts of final resort, of making rulings in matters of the law of the Union.

Naczelny Sąd Administracyjny, ruling dated 11.06.14, I GNP 2/14, www://orzeczenia.nsa.gov.pl/doc/D072FADE1A

IA/33940-A

[MOMA]

Portugal

Fundamental rights - Right to freedom of religion - National legislation providing time off from work, for religious reasons, to only workers subject to flexible timing schemes - Prejudice to the exercising of the right to freedom of religion - Balancing the rights to freedom of religion and to the employer's economic initiative - "Reasonable accommodation" between the rights in question

By its ruling no. 544/2014, dated 15 July 2014, the Tribunal Constitucional (Constitutional Court) pronounced on the constitutionality of a provision of national legislation on religious liberty. The said provision grants government officials and employees, under certain conditions and on request, the benefit of time off from work for religious reasons during weekly days off, days of festivities and certain hours prescribed by their religious denomination. These conditions are as follows: the workers concerned must *i)* work with flexible timings; *ii)* be members of a church or a religious community that, each year, informs the competent member of the government about the days and time slots concerned; and *iii)* fully compensate for the period of work in question.

An appeal was brought before the Constitutional Court by a worker of a private-sector undertaking, who was fired on the grounds that he refused to work, for religious reasons, on certain days of the week and for certain hours during his rotating shift.

In its ruling, the Constitutional Court stated that the right to freedom of religion, granted by Article 41 of the Portuguese Constitution, is not an absolute right and that it may, in certain cases, be necessary, when other constitutionally protected rights or liberties are also present, to establish a proper balance - based on the criteria of proportionality - between the said right to freedom of religion and the other rights or liberties in play.

From this reasoning, it can be stated that when the legislator balances, on the one hand, the right to freedom of religion, and on the other hand, the employer's economic initiative right, it must not recognise the supremacy of the latter or impose an excessive or disproportionate sacrifice of the right to freedom of religion. On the contrary, it must verify whether these two rights can be reconciled and "reasonably accommodated", within the meaning of the principle developed by North-American case law and similar reflections found in the case law of the ECtHR (refer to the Francesco Sessa / Italy ruling dated 3 April 2012, petition no. 28790/08, common dissenting opinion of judges Tulkens, Popović and Keller, points 9 and 10), in order to allow the government officials or employees concerned to effectively exercise their right to freedom of religion without necessarily causing excessive inconvenience or damage to their employer. While balancing these rights, the legislator must therefore find an equilibrium that imposes the least possible limits on the different interests in play and guarantee the full effectiveness of the right to freedom of religion, so as to allow every person to not only freely express his religious convictions but also to freely exercise the activities corresponding to the expression of his religion.

Taking into account the facts and considerations mentioned hereinabove, the Constitutional Court deemed that the first condition of the provision in question must be interpreted in the sense that the right to request for time off from work for religious reasons may not be given only to government officials or employees with flexible timings in the strict sense, but also to those whose work timings allow the employer to be fully compensated for the time off that was taken. This is especially the case for those whose working hours fall under, as in this case, shift work, but also for those who benefit from part-time work, working time exemptions and other methods of adjusting working hours, which allow fully compensating the employer for the absence.

In this ruling, the Constitutional Court mainly proceeded with a broader interpretation of Article 41 of the Portuguese Constitution on the right to freedom of religion than that resulting from the case law of the ECtHR concerning Article 9 of the ECHR. In fact, according to this case law, the dismissal of a worker on the grounds of his absence from work during certain hours for religious reasons does not constitute a violation of the right to freedom of religion, nor, consequently, a discrimination based on the religious beliefs of the workers. It only constitutes a failure to fulfil the contractual obligations, assumed voluntarily by the worker, who may, at any time, resign or terminate the labour contract in order to fully exercise his religious freedom.

Tribunal Constitucional, ruling dated 15.07.14, no. 544/2014, available at: www.tribunalconstitucional.pt/tc/acordaos/20140544.html

IA/33952-A

[MHC]

Czech Republic

Judicial cooperation in civil proceedings - Recognition and execution of the decisions of courts of non-member States - Decision granting punitive damages for sanctioning a prejudice resulting from an attack on personality rights committed on the Internet - Grounds for refusal - Incompetency of the court concerned to issue the contested decision pursuant to the lex fori rules of jurisdiction and violation of the lex fori public policy

By a ruling dated 22 August 2014, the Nejvyšší soud (Supreme Court) interpreted certain grounds for refusal to recognise and execute decisions issued by courts of non-member States. In the case that gave rise to this ruling, an appeal for annulment was brought before the Nejvyšší soud, filed by an individual sentenced by an American court (Superior Court of the State of Arizona in and for the County of Maricopa) to pay punitive damages of USD 100,000 for defamation committed on the Internet. The court concerned, in its decision rendered in absentia, deemed that the website, created by the appellant in cassation with the help of an Arizonian company, damaged the personality rights of the victim, one of the managers of a large Czech and Slovakian financial group. This decision was subsequently subject to a request for recognition and execution filed by the victim before the Czech courts.

According to Czech law, the recognition and execution of foreign decisions are dismissed if, pursuant to the rules establishing the competence of Czech courts, the foreign court is not competent to render the contested decision. In this respect, the Nejvyšší soud stated that the *lex fori* rules also comprise the rules resulting from the law of the Union, as well as those contained in the international agreements. Therefore, in matters relating to tort, delict or quasi-delict, such as in this case, Article 5, paragraph 3 of the regulation (EC) no. 44/2001, concerning the judicial jurisdiction, the recognition and execution of decisions in civil and commercial matters (Brussels I regulation), is applicable. While, pursuant to this provision, the competent jurisdiction is that of the place where the damaging event occurred or risks occurring, it is still necessary for the defendant to be a resident in the territory of one of the Member States. Thus, according to the Nejvyšší soud, pursuant to the Brussels I regulation, the Arizonian court would not have jurisdiction unless the defendant, as an appellant in cassation, had resided in the territory of Arizona, or of the United States of America.

The Nejvyšší soud also pronounced on the public policy exception raised by the appellant in cassation. According to the latter, the said exception would oppose the recognition and execution of the contested decision insofar as they would result in the issuance of excessive punitive damages that are 20 to 50 times the amount of the damages that the Czech courts would have sentenced him to pay, if the dispute was brought before them.

In this respect, the Nejvyšší soud first stated that Czech private law does not allow punishing a person responsible for a prejudice, since the sanctions are strictly reserved to the domain of public law. Next,

it stated that the opinions of the courts of the other Member States diverge on the point of determining whether or not the issuance of punitive damages is contrary to public policy and that the law of the Union also does not give any clear answer to this question. Finally, it deemed that, in spite of the fact that Czech law does not recognise punitive damages, their issuance by a foreign decision is not, in itself, contrary to public policy, and therefore it would not automatically justify the Czech courts refusing to recognise and execute the foreign decision. According to the Nejvyšší soud, the issuance of punitive damages would be contrary to public policy only if their amount is manifestly disproportionate to the prejudice to be compensated.

As the appeal judges did not examine the question of the residence of the appellant in cassation, the Nejvyšší soud overruled their ruling and referred the case to itself for a second investigation.

Nejvyšší soud, ruling dated 22.08.14, 30 Cdo 3157/2013,
www.nsoud.cz

IA/33951-A

[KUSTEDI]

United Kingdom

Judicial cooperation in civil proceedings - Competence, recognition and execution of decisions in matrimonial matters and matters of parental responsibility - Regulation (EC) no. 2201/2003 - Concept of custodial right - Broad interpretation to include persons not recognised as legal guardians of the child

In a ruling dated 15 May 2014, the Supreme Court considered that the concept of custodial right, as provided by the Hague Convention on the civil aspects of international child abduction and by regulation (EC) no. 2201/2003, pertaining to the jurisdiction, recognition and execution of decisions in matrimonial matters and in matters of parental responsibility (Brussels II bis regulation), must be interpreted in the sense that it includes "implicit" custodial right, a concept recognised by case law, allowing certain parties, who are not recognised as legal guardians of the child but are actively involved in raising children who have been removed to or retained abroad, to assert a request for return on the basis of the Convention.

Born in Lithuania in 2005, the child at the heart of the dispute had been entrusted by its mother, shortly after its birth, to the care of its maternal grandparents. The mother later settled down in Northern Ireland. The mother and the maternal grandparents had agreed to a temporary custody order issued in Lithuania. However, the order was revoked after the mother returned to Lithuania in 2012, who later unlawfully removed the child to Northern Ireland. The grandparents then filed a case in a Northern Irish court, asking it to declare the illicitness of the removal, on the grounds that it prejudiced their custodial right, as well as to order the child to be returned to Lithuania.

Having the case brought before it after several judicial appeals, the Supreme Court was called to decide upon the question of recognising whether the grandparents were entitled to a custodial right on the basis of the Convention and the Brussels II bis regulation, in that they held primary responsibility for the child and therefore benefitted from an "implicit" custodial right with respect to the child. In this respect, the Supreme Court observed that the wording of the regulation is more restrictive than that of the Convention, and that the possibility of

implicit custodial right could be excluded here. However, the Supreme Court considered that since the objective of the regulation was to update and strengthen the Convention, and even though the definition of custodial right in the regulation is more restrictive that that in the Convention, the broader definition must be applied in this case.

Thus, the Supreme Court believed that the concept of "implicit" custodial right was recognised in case law if the person invested with the legal guardianship abandons the child or delegates the custodial right to another. Moreover, the judge Lady Hale stated that the concept of "custodial right" must be interpreted independently and strictly with respect to the Convention. Also, she believes that it would be preferable if the "broad" interpretation adopted by the Supreme Court is also applied by the other States that are party to the Convention and the regulation.

Lady Hale clarified the cumulative criteria that must be fulfilled for a person to be granted an implicit custodial right. First, this person must have assumed the parental responsibility of the child, which is not shared with the person having a legally recognised right. Next, the latter must have abandoned the child or have delegated the parental responsibility to another person. Then, the status of the person who assumed parental responsibility must be legally recognised in his/her country of origin. Finally, all the facts must point to the fact that, if this person requests the protection of the courts in his/her country of origin, the status quo should be maintained, at least until the question of the best interests of the child has been determined.

Supreme Court, ruling dated 15.05.14, Re K (A Child) (Northern Ireland), [2014] UKSC 29,
www.bailii.org

IA/33426-A

[PE] [DANNRAN]

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Constitutional law - Fundamental rights - Interdependence between the ECHR and common law - Restoration of the central position of common law by British judges

In the Kennedy / The Charity Commission ruling, which concerns a request for access to information filed by a journalist pursuant to the law of freedom of information (Freedom of Information Act), the Supreme Court examined the link between the ECHR and common law. Although the petitioner claimed only his rights guaranteed by Article 10 of the ECHR, the Supreme Court deemed that Mr. Kennedy would be better served by invoking the principles of common law rather than the provisions of the ECHR. The Supreme Court deemed that a recourse to common law would not have placed Mr. Kennedy in a position less favourable than if he had invoked only the rights guaranteed by the ECHR. Even if the Supreme Court decided on the case on the basis of the principles of common law, it believed that Article 10 of the ECHR does not grant the right to obtain information from public authorities. However, via a dissenting opinion, two judges stated that they would have allowed Mr. Kennedy's request, deeming that Article 10 of the ECHR grants this access right.

Similarly, in its ruling dated 8 May 2014, in the A/BBC case concerning the protection of the anonymity of one party to a dispute, the Supreme Court deemed that the principles of

common law remain applicable even when similar rights guaranteed by the ECHR apply. In order to examine the relationship between such principles and the ECHR, the Supreme Court conducted an in-depth analysis of Scottish constitutional law and examined several rulings of United Kingdom courts that highlighted the principles of common law rather than the ECHR.

With respect to the link between the ECHR and United Kingdom law, the president of the Supreme Court, Lord Neuberger, in a discourse on the role of the judge in the domain of human rights pronounced before the Supreme Court of Victoria, Melbourne, recently declared that the British judges should be more willing to distinguish themselves from the decisions of the ECtHR (e.g. refer to the McLoughlin case, *Reflets n° 2/2014*, pg. 43-44). He thus stated that, since the United Kingdom does not have a Constitution, it is not possible to justify the non-enforcement of a decision of the ECtHR on the grounds that it violates the Constitution, as was claimed by certain German courts. Lord Neuberger believes that, ever since the ECHR came into force, common law was left neglected, but that recently, the judges have attempted to return it to a central position, a trend which he is in full support of.

Supreme Court, ruling dated 26.03.14, Kennedy v The Charity Commission [2014] UKSC 20,
Supreme Court, ruling dated 08.05.14, A v British Broadcasting Corporation (Scotland) [2014] UKSC 25,
www.supremecourt.uk

IA/33423-A
IA/33424-A

[HANLEVI]

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

In a ruling dated 29 July 2013, the Court of Appeal declared the transposition regulation of directive 2002/15/EC, pertaining to the organisation of the working hours of persons executing mobile activities of road transport, to be compliant with the law of the Union, despite the fact that this regulation does not provide the possibility for truck drivers to legally assert their right to benefit from rest time.

In this respect, the Court of Appeal believed that there is no violation of the principle of efficacy if a truck driver, who is asked to work in violation of the rules pertaining to working hours, files a complaint with the competent governmental agency. Moreover, the person concerned can rely on the system applicable to protected denunciation, by virtue of which a dismissed person, after having disclosed information regarding an act of his employer, may invoke the abusive nature of the dismissal. The request of the petitioning trade union in this proceedings to file an appeal before the Supreme Court was rejected by the said Court on 17 March 2014.

Court of Appeal (Civil Division), ruling dated 29.07.13, R (on the application of United Road Transport Union) v Secretary of State for Transport [2013] EWCA Civ 962,
www.bailii.org

IA/33422-A

[PE]

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In a case concerning the rights of termination of a consumer who concluded a contract with a trader at his residence, the Supreme Court deemed that the trader's

obligation to inform the consumer of his right of termination is not an essential prerequisite for exercising his rights. In this case, the petitioner wished to terminate a contract established at his home with a removal company, but the latter contested the application of national regulation of transposition of directive 85/577/EC, concerning the protection of consumers in the case of contracts negotiated outside commercial establishments. In this respect, the other contracting party stated that the fact of not informing a consumer of his right of termination pursuant to the transposition regulation, resulted in the fact that the termination period did not start and therefore, the question of the consumer's right of termination does not enter into the picture.

The Supreme Court rejected this reasoning by stating that the obligation of informing about the possibility of termination must be read in the light of directive 85/577/EC. Hence, the right of termination is a fundamental aspect of this protection. Therefore, the obligation to inform was a means of informing the consumer of his rights and not an essential condition for exercising these rights. Such a notification would trigger the termination period, during which the consumer has the right to terminate. If not informed, the consumer can terminate at any time.

Supreme Court, ruling dated 09.09.14, Robertson v Swift, [2014] UKSC 50, *www.bailii.org*

IA/33427-A

[PE] [DANNRAN]

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In a case concerning a request for compensation for the damage suffered due to agreement, in violation of Article 81, paragraph 1 of the TFEU, the Supreme Court pronounced on the concept of "decision of the Commission".

The Supreme Court was moved to determine whether the request for compensation, filed before the Competition Appeal Tribunal on 15 December 2010 by the party defendant, should be rejected on the grounds that it was filed after the expiration of the period fixed by national legislation (Competition Act 1998). The latter provides a period of two years after the end of the period to contest the decision of the Commission.

Although most of the members to the agreement filed an appeal before the General Court of the European Union against the decision of the Commission dated 3 December 2003 declaring an agreement, the petitioning party did not contest it. In fact, as a whistleblower in a leniency programme, the latter was not fined and therefore, had no interest in filing such an appeal.

The Court of Appeal deemed the decision of the Commission to have been taken against all of the members of the agreement. Thus, the two-year period provided by national law started from the last date to form a possible appeal against the ruling of rejection of the Court dated 8 October 2003, i.e. from 18 December 2008. The request for compensation was therefore considered to have been filed within this period.

On the other hand, on an appeal, pursuant to the rulings of Commission/AssiDomän Kraft Products e.a, (C-310/97 P, EU:C:1999:407) and Galp Energia España e.a./Commission, (T-462/07, EU:T:2013:459), the Supreme Court decided in favour of the party defendant, deeming the decision of the Commission as having been taken only against the petitioning party, since this party

was the sole member of the agreement that was the subject of the appeal before the Supreme Court. The two-year period therefore expired in February 2006, i.e. two years after the last date for the petitioning party to file an appeal before the General Court of the European Union.

Supreme Court, ruling dated 09.04.14, Deutsche Bahn AG & Ors v Morgan Advanced Materials Plc [2014] UKSC 24, www.supremecourt.uk

IA/33425-A

[HANLEVI]

Sweden

Social security of migrant workers - Accommodation allowance - Conditions - Right of residence - Residence - Regulation (EC) no. 883/2004 - Family allowances - Right to family allowances in the country of origin during parental leave - Right to additional family allowances in the country of residence during this same period

Two cases of social law, recently examined by the Swedish courts, contributed to clarifying the situation of citizens of the Union claiming the right to be included in the Swedish social security scheme.

In the first case, the Högsta förvaltningsdomstolen (the Supreme court, HFD) deemed that the right to accommodation allowance in Sweden was not conditional to a right of residence. In this case, a British couple living in Sweden for two years was refused an accommodation allowance by the Swedish social security agency, on the grounds that the spouses, insofar as they did not exercise any professional activity in Sweden and did not have sufficient means to financially support themselves, did not benefit from a right of residence in Sweden. Therefore, they could not be considered to be residents in the country, a prerequisite for obtaining the allowance in question. The HFD affirmed that the pertinent Swedish legislation, here the social security code, states that the aforementioned allowance is a benefit granted on the basis of the residency of the person requesting for the allowance in question, and is only for the housing which the said person inhabits and which is registered as his/her place of residence in the population register. However, the HFD stated that, for the purpose of granting this allowance, this code does not provide conditions related to the right of residence in Sweden. Certainly, from 1 January 2014, the law on registering in the Swedish population register requires, for this registration, that the conditions of obtaining a right of residence must be fulfilled by foreign nationals who depend on this right in Sweden. However, in this case, the British couple was effectively registered in the said register when the agency refused their request. Despite the fact that the spouses did not benefit from a right of residence in Sweden when the contested decision was adopted, they were residents of Sweden and were therefore eligible for this allowance.

In the second case, which concerns the right to family allowances, a Latvian citizen came to live in Sweden with her son on 14 August 2010, from when she was given parental leave by her employer in Latvia. The employment contract of the petitioner ended in October 2011. During the employment period, she received family allowances in Latvia for her son. Meanwhile, the petitioner also submitted a request for family allowances in Sweden, which was rejected by the social security agency on the grounds that a person who, pursuant to the provisions of regulation (EC) no. 883/2004, falls under the social legislation of another Member

State, is not insured for such benefits in Sweden if they correspond to the benefits provided by the said regulation. The HFD first stated that according to Article 68, paragraph 1, subsection a) of regulation no. 883/2004, the person fell under the scope of the Latvian scheme during the period concerned, and was therefore not eligible for the right to family allowances according to the Swedish code. However, the HFD deemed, in light of the case law of the Court of Justice (rulings of Bosmann, C-352/06, EU:C:2008:290, and Hudzinski and Wawrzyniak, C-611/10, EU:C:2012:339), that the Swedish code was not compatible with the law of the Union and that she could not be completely refused the right to family allowances in Sweden during the period concerned. The HFD concluded that the son of the petitioner was entitled to the aforementioned family allowances, at an amount corresponding to the difference between the family allowances provided by Swedish legislation and those granted in Latvia, calculated for the period mentioned above.

Supreme administrative court, rulings dated 15.04.14, case 2785-13, and dated 02.07.14, case 7017-13,
www.hogstaforvaltningsdomstolen.se/

IA/33953-A
IA/33954-A

[JON]

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Taxation - Value added tax - Modified taxation rate - Adjustment - Reduction of output tax - Corresponding reduction of the input tax

The Swedish Supreme administrative court (HFD) examined three cases in 2014 concerning a purchaser's obligation to pay the National treasury a part of the input value added tax, in response to a tax adjustment of the supplier's output value added tax by the Swedish tax administration. The tax administration, pursuant to a case law of the Court of Justice (Graphic Procédé ruling, C-88/09, EU:C:2014:16), adopted a lowering of the rate of taxation of reprography activities from 25% to 6%, for certain provisions. This adoption required the tax administration to make corrections for certain persons liable for tax, consisting of a reduction of the output tax for suppliers, as well as the input tax for purchasers by a corresponding amount.

Several cases were brought before the HFD, in which the purchasers contested the decisions of reducing their input tax, especially by stating that the tax adjustment concerning them was contrary to the principle of legitimate expectations and manifestly disproportionate, in that the suppliers did not reimburse the tax collected from the National treasury to the purchasers and that this tax could therefore cause a rise in costs for the latter. The HFD stated that first, in Swedish procedural tax law, a tax adjustment can only be made if it is not manifestly disproportionate. Next, the HFD stated that, according to Swedish law on VAT and the case law of the Court of Justice (Genius Holding ruling, C-342/87, EU:C:1989:635), input tax and output tax amount, by definition, to the same and that the input tax must be limited in order to correspond to the output tax, provided that the procedural provisions allow such a correction. Given the formal and material links, in this case, between the output tax debited by the supplier and the input tax paid by the purchaser, implying that the tax adjustment for the supplier has immediate consequences on the input tax, the HFD deemed that the conditions for a tax adjustment targeting the purchaser are met

and, taking into account the requirements resulting from the case law of the Court of Justice (Reemtsma Cigarettenfabriken ruling, C-35/05, EU:C:2007:167), the HFD stated that the transactions concerned were made between suppliers and purchasers fully liable for VAT, and that the purchasers, without it being impossible or too difficult, had the possibility of asking the suppliers for a compensation for the input tax paid, due to which the adjustment was not considered to be manifestly disproportionate by the HFD. Therefore, this court confirmed the adjustment decisions for the purchasers.

Supreme administrative court, rulings dated 26.02.14, cases 3291-13 and 3499-13, and dated 20.10.14, case 3290-13,
www.hogstaforvaltningsdomstolen.se

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IA/33956-A
IA/33957-A

[JON]

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Fundamental rights - Ne bis in idem principle - Administrative and penal consequences - Fiscal and accounting provisions - Provisions of the law on the land use planning and development - Road-related provisions and provisions on carrying weapons

The Swedish courts recently examined a few cases concerning the compatibility of national laws with the principles given in Article 4 of Protocol no. 7 of the ECHR and in Article 50 of the Charter of Fundamental Rights of the European Union (*ne bis in idem*).

The Swedish Supreme Court deemed, in a ruling dated 25 April 2014, that the fact that a tax penalty was imposed on a natural person as an individual entrepreneur for not having declared his income in the form of monthly deposits to a foreign bank account (Jersey), does not prevent this person from being brought later before the criminal courts for accounting fraud. The Supreme Court stated that the omission of entering the deposits in the accounts was certainly motivated by the taxpayer's wish to hide a subsequent tax fraud (failure to make a declaration). However, according to this same court, the tax penalty requires yet more factual findings, in addition to the omission of entering information in the records, namely the failure to make a declaration of income, and the facts that resulted in the penalty and the fraud respectively, were not deemed to be indissolubly linked in time and space, which is a prerequisite according to the case law of the ECtHR (refer to Zolotoukhine / Russia, ruling dated 10 February 2009, petition no. 14939/03, point 84).

In a ruling given by the upper chamber for environmental affairs of the court of appeal of Svea (the Mark- och miljööverdomstolen) on 5 June 2014, it deemed that an administrative sanction (byggsanktionsavgift) imposed for a violation of Swedish provisions of law on land use planning and development (Plan- och bygglag) concerning the failure to request a construction permit, does not prevent imposing a penalty payment for not executing an order for demolishing the unauthorised construction. According to the court judging the case, by referring to the criteria identified in the ruling of the Swedish Supreme Court dated 11 June 2013 (case no. B 4946-12, refer to *Reflets no. 1/2014*, pg. 43 and 44 for a brief description of the reversal made by the Supreme Court, in this ruling, of its previous case law following the Court of Justice's application of the ECHR and of Article 50 of the

Charter in the Åkerberg Fransson ruling, C-617/10, EU:C:2013:105), both the administrative sanction as well as the penalty payment fall under the concept of penalty in the ECHR. However, the chamber believed that the fact on not requesting the authorisation concerned and of not demolishing the unauthorised construction do not constitute the same infraction, but two different infractions, and that therefore, the penalties concerned were not imposed for a set of concrete, factual circumstances inextricably interlinked in time and space and involving the same violator, due to which the two penalties do not fall under the *ne bis in idem* principle. Therefore, the penalty payment was deemed compatible with the already imposed sanction.

It must be noted that the Swedish government has modified the pertinent law in 2011 for complying with the provisions of Article 4 of Protocol no. 7 of the ECHR. In fact, according to the preparatory work for the law concerned, the said administrative sanction and the penalty payment, based on the same facts, therefore fall under the concept of "double penalty". Consequently, since the modification of the aforementioned law, the administrative sanction can no longer be applied if a penalty payment was imposed for the same facts.

Having an appeal brought before it, the court of appeal of Upper Norrland was also able to rule on the question of determining whether the withdrawal of a driver's licence and a gun licence following the police booking the holder of the said licences for an advanced state of inebriation, is compatible with the *ne bis in idem* principle, insofar as the holder was later sentenced to a month in prison for the same conduct. Referring to the criteria identified in the aforementioned ruling of the Swedish Supreme Court dated 11 June 2013, the court of appeal concluded that the withdrawal of the two licences constituted or could constitute a penalty and that the administrative and penal sanctions were imposed for the same facts, by different authorities, in different proceedings. Nevertheless, according to the court of appeal, there was a close temporal and factual link between these administrative and penal sanctions, due to which the accused was not subjected to two different unlimited investigations, and the withdrawal of the aforementioned licences therefore does not prevent the appellant from being sentenced later to a criminal sanction for the same facts. Finally, it must be noted that the Högsta förvaltningsdomstolen (Supreme administrative court), in a decision dated 23 January 2014 (case no. 6907-13), declared a case related to the withdrawal of a driver's licence followed by a sentencing to a penalty for driving a vehicle in a state of inebriation to be admissible before the lower court, on the grounds that the investigation of this case has a stake in the application of Swedish law, with respect to the recent development in the domain of laws according to Article 4 of Protocol no. 7 of the ECHR.

Supreme court, ruling dated 25.04.14, no. B 5191-13,
www.hogstadomstolen.se

IA/33958-A

Upper chamber for environmental affairs of the Court of Appeal of Svea, ruling dated 05.06.14, no. P 11322-13,
www.markochmiljooverdomstolen.se

IA/33959-A

Court of Appeal of Upper Norrland, ruling dated 13.05.14, no. B 1001-13,
www.hovrattenovrenorrland.domstol.se

IA/33960-A

[JON]

2. Other countries

Liechtenstein

European economic area (EEA) - Pending dispute before a court of Liechtenstein - Directive 2002/47/EC - Financial collateral arrangements - Conditions for a reference for a preliminary ruling before the EFTA Court - Lack of pertinence of the dispute to resolve the dispute

By a ruling dated 7 April 2014, the Staatsgerichtshof (Constitutional Court) of Liechtenstein rejected an appeal filed by a borrower as part of a dispute against a Liechtenstein bank that, due to an overdraft of the petitioner, executed his rights of lien related to transferable securities and serving as financial securities. In his argument, the petitioner especially invoked certain provisions of directive 2002/47/EC concerning financial collateral agreements.

Liechtenstein is a member of the European Free Trade Association (EFTA) and the European Economic Area (EEA), the latter including Liechtenstein, Iceland, Norway as well as the Member states of the Union for the purpose of implementing a domestic market. Pursuant to the Agreement instituting an EFTA surveillance authority and a Court of Justice, concluded between the three aforementioned States, the EFTA Court has the jurisdiction to interpret acts of the Union applicable to the EEA, including directive 2002/47/EC, transposed into Liechtenstein law.

Thus being called to pronounce on a possible referral of the question of including the petitioner in the personal scope of application of directive 2002/47/EC before the EFTA Court, the Staatsgerichtshof deemed that the question of applicability of the said directive was not pertinent in solving the dispute on the main issue and that therefore, there was no need to refer to the EFTA Court on this point for a preliminary question.

Staatsgerichtshof Liechtenstein, ruling dated 07.04.14, StGH 2013/172,

IA/34103-A

[KAUFMSV]

Switzerland

Accord between the European Community and its Member States, on the one hand, and Switzerland, on the other hand, on the free movement of persons - Restrictions on accessing the Swiss labour market concerning Romanian and Bulgarian citizens - Conditions - Workers and dependent activity - Concept - Interpretation in light of the law of the Union - Prostitution activity - Existence of a subordinate connection - Inclusion

By a ruling dated 4 September 2014, the Swiss Federal Court confirmed the refusal of the competent authority of the Canton of Lucerne to grant a residence permit to a Romanian citizen who wished to exercise a prostitution activity in Switzerland, on the grounds that it was not proved that the activity in question, which is legal in Switzerland, could not be exercised by a Swiss citizen.

Pursuant to the agreement on the free movement of persons (ALCP) concluded between the Union and Switzerland, the latter can maintain, till 31 May 2016, restrictions on accessing its labour market

for workers, especially those coming from Romania. Under these restrictive measures applicable to dependent activities, the Swiss migration authorities check the priority given to the worker integrated in the regular labour market.

The Federal Court considered that the concept of the worker, within the meaning of the ALCP, must be assessed in light of the law of the Union and the case law of the Court of Justice, especially the Jany e.a. ruling (C-268/99, EU:C:2001:616), in which it established a set of criteria that allow determining if a prostitution activity comes under the economic activities exercised as an independent. On this basis, the Federal Court concluded the existence of a subordinate connection between the petitioner and the club in which she worked, and especially stated that the petitioner was in a situation of organisational and economic dependency with respect to the said club.

Federal Court, ruling dated 04.09.14, 2C_772/2013,
www.bger.ch

IA/34107-A

[KAUFMSV]

B. Practice of international organisations

World Trade Organization

WTO - GATT 1994 - Protocol on the accession of the People's Republic of China dated 10 November 2001 - Measures pertaining to the exports of rare earth elements, tungsten and molybdenum

At its meeting on 29 August 2014, the Dispute Settlement Body adopted the report of the Appellate Body, pertaining to certain measures adopted by China related to the exports of various forms of rare earth elements, tungsten, molybdenum, which are raw materials used in the manufacturing of various types of electronic products.

Japan filed a complaint against these measures, alleging that they were incompatible with Articles VII, VIII, X and XI of the General Agreement on Tariffs and Trade of 1994 (GATT), as well as with the provisions of the protocol of accession of China to the WTO. To be more specific, the plaintiff alleged that the measures in question comprised three categories of restrictions: an imposition of duties on the exports of various forms of these materials; an imposition of quantitative restrictions on the quantity of materials that may be exported over the course of a given period; and certain procedural and/or administrative restrictions on trade imposed on the companies authorised to export these materials.

The plaintiff stated that these measures were incompatible with China's obligations to the WTO as, in section 11.3 of its protocol of accession, China undertook to remove all export duties, except for those imposed on a certain number of products listed in appendix 6 of China's protocol of accession. Since the products in question were not given in appendix 6, Japan stated that China therefore does not have the right to impose export duties on these products. Similarly, China undertook, in its protocol of accession, to remove all quantitative restrictions as well as trade restrictions. China attempted to justify the imposition of export duties on the basis of Article XX, subsection b) of the GATT (general exception necessary for the protection of the health and lives of persons and animals or the preservation of plants), and of quantitative restrictive measures and trade restrictions on the basis of Article XX, subsection g) of the GATT (general

exception necessary for the conservation of an exhaustible natural resource). In this case, China stated that its measures were necessary pursuant to the aforementioned provisions of Article XX of the GATT.

While rejecting the arguments made by China, the Special Group, established by the Dispute Settlement Body to rule on this case, stated that the general exceptions granted by Article XX of the GATT could not be invoked to justify a violation of the obligation to remove export duties given in China's protocol of accession. As regards Article XX, subsection b) of the GATT, the Special Group indicated that, even if it can be used to justify the export duties imposed by China, these duties were not necessary for the protection of the health and lives of persons and animals or for the preservation of plants. As regards Article XX, subsection g) of the GATT, the Special Group stated that the measures in question are aimed at fulfilling objectives in matters of industrial policy other than conservation, and that China did not satisfactorily explain the manner in which the quantitative restrictive measures and trade restrictions are justified under this provision. In these circumstances, it was stated that the three measures imposed by China were incompatible with its obligations as part of the WTO.

Essentially, China appealed against the limited aspects of interpretation and application of Article XX, subsection g) of the GATT by the Special Group, with respect to the statements according to which the quantitative restrictive measures in question were not measures related to the conservation of exhaustible natural resources, and were not jointly applied to the restrictions on production and national consumption. Contrary to what China alleged, the Appellate Body confirmed the observations of the Special Group, in that the latter considered that the analysis must be based on the design and structure of the measures rather than their effects on the market. The Appellate Body also rejected several allegations of China, according to which the Special Group did not fulfil its duty, pursuant to Article 11 of the memorandum of agreement on the settlement of disputes, in conducting an objective evaluation of the questions put forward in this case.

Consequently, the Appellate Body confirmed the observations of the Special Group, according to which the quantitative restriction measures of China pertaining to rare earth elements, tungsten and molybdenum were not justified pursuant to Article XX, g) of the GATT.

Report of the WTO Appellate Body, adopted on 29.08.14, case DS433, www.wto.org/

[LOIZOMI]

C. National legislations

1. Member states

Austria

Consumer law reform

The law transposing directive 2011/83/EU pertaining to consumer rights entered into force in June 2014, introducing positive changes for consumers. The main objectives of the said directive are the consumer protection as well as the revival of the economy, by removing obstacles to cross-border trade. The transposition of the said directive resulted in the modification of Austrian laws concerning different matters, such as consumer protection, the civil code and distance selling.

The most important modifications concern the extension of the entrepreneurs' obligation to give information, the right of cancellation and the right of recourse of consumers. The transposing law in particular granted an option for a right of cancellation for consumers in case of distance selling, by introducing a standard cancellation form as well as a cancellation period of 14 days. Moreover, the transfer of risks concerning all of the sales operations was also modified to the benefit of the consumer. While before this new law entered into force, the risks of deterioration or loss of goods were transferred before the goods were handed to the supplier for the purposes of delivery, pursuant to the new law, the risk is now transferred when the goods are delivered to the consumers.

Law no. 33/2014 dated 26.05.14, on the transposition of the directive pertaining to consumer rights (Verbraucherrechte-Richtlinie-Umsetzungs-gesetz) (Official Gazette 33, dated 26.05.14), www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2014_I_33/BGBLA_2014_I_33.pdf

[FUCHSMA]

Belgium

Simultaneous preliminary proceedings before the Constitutional Court and before the Court of Justice

The special law of 4 April 2014, modifying the law of 6 January 1989 on the Constitutional Court, modified and clarified certain parts of the national procedure governing the reference for a preliminary ruling before the Court of Justice, when a case pending before the ordinary or administrative courts raises questions on the interpretation of rights guaranteed by the Belgian Constitution as well as by the law of the Union. This legislative change aims at ensuring the compatibility of the pertinent provisions of Belgian procedural law with the requirements of the law of the Union, as specified by the Court of Justice in the Melki and Abdeli ruling (C-188/10 and C-189/10, EU:C:2010:363) and in the Chartry ruling (C-457/09, EU:C:2011:101).

When the case brought before the ordinary or administrative court requires an inspection of the legislative standards with respect to the fundamental rights guaranteed by the Belgian Constitution, the obligation incumbent on the trial judge, pursuant to Article 26 of the law dated 6 January 1989 on the Constitutional Court, is to refer the question for a preliminary ruling to the Constitutional Court, apart from the exceptions given in paragraphs 2 to 4 of the said Article. Moreover, since the trial judge has the possibility, and indeed the obligation, where applicable, of bringing before Court of Justice any question related to the interpretation of the law of the Union that it deems necessary, a combination of preliminary proceedings before the Constitutional Court and before the Court of Justice may occur when a case raises questions on the interpretation of the fundamental rights guaranteed by the Belgian Constitution as well as by the law of the Union.

The rule of priority is determined by Article 26, paragraph 4 of the law dated 6 January 1989. In its older version, this provision provided priority to the question of constitutionality, and the ordinary or administrative court was therefore required to first submit the preliminary question on the constitutionality before the Constitutional Court. Yet, following the aforementioned Melki and Abdeli ruling as well as the Chartry ruling, the compatibility

of such a system of the priority of constitutionality with that of the law of the Union was hotly debated.

Even if results from the statement of reasons of the proposal of the special law dated 4 April 2014 that Article 26, paragraph 4 of the law dated 6 January 1989, in its old version, was likely to be subject to an interpretation compliant with the law of the Union, the Belgian legislator decided to modify the wording of the said Article in order to exclude any possible discussion in this respect. For this purpose, the new version of the said paragraph 4 provides that the obligation of the court of first instance to first submit a preliminary question before the Constitutional Court when a case raises questions on the interpretation of the fundamental rights guaranteed by both - the Belgian Constitution as well as the law of the Union - does not prevent it from submitting, either simultaneously or at a later date, a preliminary question before the Court of Justice.

Special law dated 04.04.14 modifying the law dated 06.04.89 on the Constitutional Court, M.B. 15.04.14,
www.ejustice.just.fgov.be/loi/loi.htm

[EBN]

Croatia

Law on civil partnership between persons of the same sex

In order to strengthen the right of homosexual couples to private and family life, the Croatian parliament, on 15 July 2014, adopted a law related to partnerships between persons of the same sex. This aims at partnerships registered before the registrar of births, deaths and marriages as well as unregistered partnerships.

Its purpose is to guarantee, for unions between persons of the same sex, the majority of the statutory rights that married couples are entitled to, especially the rights concerning social security, right to work, right of inheritance, tax law and the possibility of obtaining Croatian citizenship. On the other hand, marriage and adoption of children remain forbidden to homosexual couples.

Nevertheless, the law governs certain relationships between the children of homosexual partners, since it especially provides a specific status for the partner, i.e. the non-biological parent, residing under the same roof as the child. This specific status, granted via an adjudication process, does not in any way abrogate the legal relationships existing between the child and its biological parents.

Moreover, in order to transpose directive 2004/38/EC pertaining to the right of citizens of the Union and members of their family to freely move and reside in the territory of the Member States, the Croatian law provides equality before the law between marriages of partners of the same sex or partnerships registered in the Member States of the Union and those established in Croatia.

Note that, in a referendum conducted last year, the Croatian population pronounced in favour of revising the Constitution to prevent same-sex marriages.

Law dated 15.07.14 on partnerships between persons of the same sex (Official Gazette, no. 92/14, dated 28.07.14),
www.nn.hr

[IDU]

Spain

Modification of the general law on social security

The fourth final provision of the law 22/2013, on the general budget of the State of Spain of 2013, modified the general law on social security by limiting the benefits of social security as regards Spanish unemployed persons not having their habitual residence in Spain, with effect from 1 January 2014. Thus, starting from this date, being a habitual resident in Spain constitutes a necessary condition for benefitting from certain economic and health allowances of the social security, for which residing in Spain constitutes a prerequisite. Pursuant to the sixty-fifth additional provision of the said law, the allocation of the status of a habitual resident in Spain ends if a person resides in another country for more than 90 days. Moreover, the law 16/2003, pertaining to the cohesion and quality of the national healthcare system, was modified by the law 2/2012 on the general budget of the State. Thus, from 1 January 2014, the status of "national healthcare system contributor" is now granted to unemployed persons only if they are habitual residents in Spain. Even here, the allocation of the status of a habitual resident in Spain ends if a person lives in another country for more than 90 days.

Law 22/2013 on the general budget of the State, modifying the general law on social security, Royal Decree 1/1994 dated 20 June,
www.boe.es/buscar/pdf/2013/BOE-A-2013-13616-consolidado.pdf

Law 2/2012 on the general budget of the State, modifying the law 16/2003 on the cohesion and quality of the national healthcare system,
www.boe.es/boe/dias/2012/06/30/pdfs/BOE-A-2012-8745.pdf

[IGLESSA] [GARCIAL]

France

Law governing the conditions for the distance selling of books

The law no. 2014-779 dated 8 July 2014, modifying the law no. 81-766 dated 10 August 1981, pertaining to the price of books, translates the will of the State to support the retail sale of books.

The book has a special status in France ever since the application of the law dated 10 August 1981, the 1st Article of which provides that every publisher must determine the selling price to the public for each work. Retailers are required to comply with the price set by the publisher, but are authorised to apply a maximum discount of 5%. Since the legislation is less specific as concerns the invoicing of delivery charges, certain e-commerce platforms would double the authorised discount with free delivery. The French legislator wished to fight against the competition brought on by the e-commerce of books by restricting the conditions of the distance selling of books.

The law dated 18 July 2014 modifies the law of 1981 by prohibiting the stacking of the two commercial benefits, which are the 5% discount and the free delivery charges. Thus, according to this law, books ordered online, if they are not taken from a retail business, cannot benefit from the legal discount. Booksellers can thus have the possibility of offering cheaper books in physical sales on applying this discount. As concerns e-commerce, the competition between the vendor sites can only concern delivery charges. Thus, the law of 2014 provides that

Article 1 of the law of 1981 is updated in the following manner: "*when the book is shipped to the purchaser and is not taken from a retail bookselling business, the selling price is the one set by the publisher or the importer. The retailer may apply a discount of up to 5% of this price on the delivery service rate that it establishes, without being able to offer this service for free*".

Moreover, the law authorises the government, pursuant to the conditions provided in Article 38 of the Constitution, to give rulings for taking all measures to modify the Intellectual Property Code related to the publishing agreement. This authorisation can be used by the government to regulate the digital publishing of works.

Pursuant to the provisions of the law of 2014, one of the main online booksellers can no longer offer the 5% discount, but instead offers its customers a delivery service at 1 cent.

Law no. 2014-779 dated 08.07.14, governing the conditions of the distance selling of books and authorising the Government to modify, via rulings, the provisions of the intellectual property code pertaining to publishing agreements, French Official Gazette no. 0157 dated 09.07.14, pg. 11363, http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029210814&categorieLien=id

[ANBD]

Ireland

Law establishing the Court of Appeal

On 20 July 2014, a law came into force, creating the Court of Appeal. This law follows the referendum dated 4 October 2013, which paved the way for the thirty-third revision of the Irish Constitution, providing the establishment of the Court of Appeal between the High Court and the Supreme Court. The Court of Appeal, comprising ten judges and simultaneously seating three judges in chambers, had its first session on 5 November 2014.

The primary objective of this reform of the Court of Appeal is to quickly take charge of the backlog of cases before the Supreme Court, which has caused a saturation, due to the fact that till now, the Supreme Court was the sole avenue of redress for all decisions made by the 36 judges of the High Court.

The new Court of Appeal has taken up the jurisdiction that was previously vested in the Supreme Court, the Court of Criminal Appeal and the Courts-Martial Appeal Court, with the latter two being abolished. The decisions of the new Court of Appeal will normally be considered to be final, unless the Supreme Court deems that there is a question of general public importance to be solved or that an appeal is required in the interest of justice.

An appeal before the new Court of Appeal can, in certain circumstances, be overturned. The law provides a specific provision for what is known as a "Leapfrog appeal". When justified by extraordinary circumstances, the Supreme Court may hear and determine appeals directly from the High Court without them having to pass through the Court of Appeal. In this case, the Supreme Court must be convinced that the decision of the High Court pertains to a question of general public importance or that an appeal is required in the interest of justice. Consequently, it is probable that this procedural feature will only be invoked

when constitutional and legal questions of great importance are in question.

Eventually, this new judicial structure should help in improving the overall effectiveness of the Irish judicial system by considerably reducing the waiting period of more than four years for an appeal before the Supreme Court.

Court of Appeal Act 2014,
www.oireachtas.ie/documents/bills28/acts/2014/a1814.pdf

IA/33429-A

[CARRKEI]

Italy

Law introducing a compensatory remedy for a violation of Article 3 of the ECHR

The legislative decree no. 92/2014 falls under the "action plan" that the Italian government presented before the European Court of Human Rights (hereinafter the "ECtHR") in 2013.

The "action plan" was adopted after the pilot ruling of Torreggiani et al. / Italy pronounced by the ECtHR on 8 January 2013 (petitions nos. 43517/09 e.a.). In this ruling, the Court sentenced Italy for violating Article 3 of the ECHR due to the conditions of detention of the petitioners. The Court especially highlighted the "severe lack of space that the [...] petitioners were subjected to [...]" during their detention (points 76-77 of the ruling). In this same ruling, it also emphasised the structural and systemic character of prison overcrowding in Italy (points 54 and 87 of the ruling). It ordered Italy to implement an effective remedy to offer adequate and sufficient compensation to the persons who were wronged due to prison overcrowding.

In this respect, the aforementioned legislative decree introduced a compensatory remedy for persons who were detained in conditions that do not comply with Article 3 of the ECHR, as interpreted by the ECtHR. This decree provides that persons who believe that they suffered treatment contrary to Article 3 can file a claim for compensation with the judge responsible for enforcing sentences. If the detention period that occurred in conditions contrary to Article 3 ECHR is fifteen days or more, the judge grants, as compensation, a reduction in the sentence to be served by one day for every ten days in custody. If the detention period is less than 15 days, or if the remaining sentence does not allow deducting the full sentence reduction, the judge also grants the sum of 8 euros for each day the person was subject to the violation.

Persons who have already served their sentence can file a claim for compensation before the competent civil court. The recourse must be filed within a period of six months from the end of the custody.

Persons who completed their imprisonment term on the date this legislative decree entered into force, including those who filed a petition before the ECtHR, can seek redress within six months from the date of entry into force of the said legislative decree.

Moreover, it must be noted that on 16 September 2014, the ECtHR deemed two petitions against the State of Italy, concerning the violation of Article 3 and related to prison overcrowding, to be inadmissible. After having examined the new measures adopted by Italy, including the compensatory remedy instituted by the legislative decree no. 92/2014, the ECtHR concluded that it is the responsibility of the

persons subject to trial to make use of this remedy, failing which would lead to not satisfying the condition of the exhaustion of domestic remedies (decisions on Stella / Italy and 10 other petitions, petition no. 49169/09 and Rexhepi / Italy and seven other petitions, petition no. 47180/10).

Legislative decree no. 92 dated 26.06.14, converted by the law no. 117 dated 11.08.14, pertaining to urgent provisions related to the compensation of detained or interned persons who were subject to treatment contrary to Article 3 of the ECHR, to modifications of the criminal procedure code and to provisions related to its implementation, to the body of the prison staff and correctional administration system, including the correctional administration of minors, Official Gazette no. 147 dated 27 June 2014, general series
www.gazzettaufficiale.it/eli/id/2014/08/20/14A06523/sg

[BITTOGI]

Luxembourg

Law providing for the automatic exchange of information on the taxation of savings

Directive 2003/48/EC, pertaining to the taxation of savings income, which entered into force on 1 July 2005, organises the automatic exchange of information between the tax administrations of the Member States.

The directive offers two possibilities to the Member States: either exchange information limited to certain categories of income, which signifies that the States mutually inform each other if a citizen of another State earns interest in them, or the deduction at source. In the latter case, the State in which the taxable person earns interest directly debits an amount of up to 35% from 1 July 2011. Three quarters of this tax are reserved for the State of residence of the taxable person and one quarter remains in the State in which the interest was earned. This regulation allows the taxable person to retain his anonymity with respect to the tax administration of his/her State of residence.

Only Austria, Belgium (which renounced it from 2011) and Luxembourg decided, as an exception and for a temporary period, to opt for the derogatory scheme that provides for a deduction at source in exchange for maintaining banking secrecy (individuals can still opt for an information exchange if they wish). Until now, Luxembourg had refused to adopt this principle in order to preserve its banking secrecy.

Henceforth, this is no longer the case. Wishing to participate more actively in the fight against tax evasion and fraud, Luxembourg will apply the automatic information exchange from 1 January 2015. Having met in a plenary session on 4 November 2014, the members of the Luxembourg parliament adopted the draft law transposing the directive regarding the taxation of savings income into domestic law. In this respect, the payment of interests that the Luxembourg-based banks will credit in favour of non-resident natural persons shall be transmitted to their respective tax administration. This signifies that it shall be informed by Luxembourg of the interests of certain earned income that falls under the directive. The taxable persons concerned will consequently lose their anonymity. The first information exchange will occur in March 2016 for the payment of interests of the fiscal year 2015. Corporate entities in general, residents of Luxembourg for tax purposes as well as residents of non-member States for tax purposes are excluded. The residents of Luxembourg for tax purposes

will continue to pay a 10% tax deducted at source.

Investment or savings income will not all be subject to the information exchange. Only interests on savings accounts, demand accounts, term accounts, bank certificates and bonds are concerned, as well as profits that generate indirect interest income such as certain investment funds, distributing funds and capitalisation funds. As regards the first, the pertinent information will be sent if the fund invests at least 15% in bonds. As regards the second, the interests on the capital gains shall be communicated if the fund invests at least 25% in bonds.

This constitutes major progress in the dismantling of banking secrecy, which is to be phased out progressively in Luxembourg.

Law dated 25.11.14 modifying the amended law dated 21.06.05 transposing the directive 2003/48/EC dated 03.06.03 of the Council of the European Union in matters of taxation of savings income in the form of payment of interests, Mémorial, 27.11.14, no. 214, pg.4168,
www.legilux.public.lu

[IDU]

Romania

Law on the procedures for preventing insolvency and on insolvency

Following the failure of the first reform project of the legislation on insolvency, adopted via a ruling of the government and declared unconstitutional by the decision dated 29 October 2013 of the Constitutional Court, a new law entered into force in this respect on 28 June 2014.

While, officially, the title of the new regulation is not the "insolvency code", it might as well be given this status looking at the complexity of its provisions. Thus, this law includes the insolvency prevention procedures, the simplified bankruptcy and insolvency procedure, the insolvency of autonomous state-owned companies (companies whose share capital is owned by bodies of the central or local public administration, developing an economic activity of national or local interest) and groups of companies, the bankruptcy of credit institutions and insurance companies, and cross-border insolvency.

The wording of Article 2 implies that the objective of this law consists of helping in the recovery of a debtor's liabilities, while encouraging their recovery. For this purpose, it emphasises on insolvency prevention procedures (the amicable negotiation of debts and the conclusion of a contract on the preventive arrangement with creditors). Its provisions also aim at making the reorganisation procedure more effective and dynamic and at increasing, in case of liquidation, the degree of value-creation of the assets from the general capital of the debtor.

For the first time, the law institutes 13 transversal principles that serve as an instrument for interpreting all its standards, and particular emphasis in given on negotiations for preventing insolvency, the valuation of the assets of the debtor, efficient restructuration, transparency and predictability, as well as procedural coordination with respect to groups of companies.

One of its more notable advances, at the national as well as European level, concerns the insolvency of company groups. Cross-border insolvency draws its inspiration from

international instruments, such as the legislative guide of the United Nations Commission for insolvency law, as well as the proposals for modifying the regulation (EC) no. 1346/2000, pertaining to insolvency procedures.

The coordination of procedures in case of cross-border insolvency mainly comprises the obligation of cooperation between the insolvency practitioners designated for the members of the company groups, the existence of a coordinating practitioner, a protocol for cooperation as well as compatible and coordinated recovery plans.

Other provisions, such as, for example, the definition of the private creditor test, are inspired from the case law of the Court of Justice in this matter (refer to the Frucona Košice / Commission case, C-73/11 P, EU:C:2012:535).

The law thus falls under a European context illustrating the new approach recommended by the Commission in matters of insolvency, which is to encourage viable companies to restructure, at an early stage, in order to avoid insolvency or liquidation.

Legea nr. 85/2014 privind procedurile de prevenire a insolvenţei şi de insolvenţă, publicată în Monitorul Oficial nr. 466 din 25.06.14,
www.legalis.ro

[CLU]

United Kingdom

Law providing for the reform of the Scottish judicial system

Following the creation of two new courts for civil matters (refer to *Reflets no 2/2014*, pg. 54), the judicial reform in Scotland continued with the adoption of a new law aiming at modifying the functioning of the "Sheriff Courts", common law courts judging civil and criminal matters, as well as the "judicial review" procedure.

Voted in by the Scottish Parliament on 7 October 2014, the law follows from the recommendations given in a 2009 report by Lord Gill, as part of his position as the "Lord Justice Clerk". This law proposed, for remedying the inadequacies observed in particular concerning the slowness and costs of the judicial system in civil proceedings, a series of reforms pertaining to the jurisdiction of Sheriff Courts, the specialisation of judges and the terms of filing petitions for "judicial review". In this respect, the primary objective was to clear the backlog in the Court of Session, which is the court having jurisdiction to hear and determine civil cases in the first instance and in appeal proceedings, by making it such that it only treats the most important cases.

Most of the recommendations have been included in the new law. Thus, the jurisdiction of the Sheriff Courts has been expanded with respect to the value of the disputes that these courts can hear and determine. Henceforth, all appeals in civil proceedings, of an amount less than GBP 100,000 (128,000 euros) must be filed before a Sheriff Court. Moreover, for cases with values of less than GBP 5,000 (6,401 euros), a new simplified procedure has been provided, which will replace the current procedures.

The new law also provides for the creation of the position of "Summary Sheriff", a judge having jurisdiction to rule on disputes of low values and to judge minor infractions, as well as the implementation of a judge specialisation system in domains that are yet to be defined by the "Lord President of the

Court of Session", the highest Scottish magistrate.

In addition, a new court, the "Sheriff Appeal Court", has been created to hear and determine appeals of decisions given by the Sheriff Courts, a role that was previously entrusted to "sheriff principals". The decisions of this body are subject to appeal before the Court of Session, but only if authorised. Similarly, the possibility of appealing against the decisions of the Court of Session in the Supreme Court has been made more restrictive.

Finally, a last modification concerns the institution of a peremptory time limit of three months for filing an appeal in "judicial review". While traditionally, there is no fixed time limit for this purpose, Scottish case law has nevertheless acknowledged that the late nature of an appeal ("mora") could, according to the assessment of the judge, constitute grounds for ineligibility.

Courts Reform (Scotland) Act 2014, *www.legislation.gov.uk*

[PE]

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Law aiming at reducing illegal immigration and facilitating the deportation of illegal migrants

On 14 May 2014, a new law concerning immigration received royal approval. With the purpose of making the immigration system more equitable, the lay brings a series of changes that aim at simplifying the removal of illegal migrants and reducing the number of factors likely to encourage future migrants to come to the United Kingdom.

Among the modifications made by the law, six merit an explanation. First, the number of decisions concerning immigration that can be subject to judicial remedy have been reduced from 17 to 4. Therefore, it is now not possible to file an appeal unless the issue in question is granting or withdrawal of the refugee status or humanitarian protection, or, to be more general, the protection of human rights. Next, when a petitioner contests a decision of deportation by mentioning the law governing the respect of family life and privacy, as guaranteed by Article 8 of the ECHR, the judge must take public interest into account, as defined by the law. In this respect, it has been provided that public interest requires every person to have a certain level of mastery over the English language and to be financially independent. Moreover, for foreign nationals guilty of a crime or offence, a rebuttable presumption is instituted, according to which the deportation is in public interest.

In addition, an obligation has been imposed on all private owners to check the immigration status of their tenants originating from non-member countries. Not complying with this obligation is penalised via a fine of up to GBP 3,000 (3,836 euros). Similarly, non-residents or persons not having a residence permit can no longer open a bank account, nor can they obtain a driver's licence. Moreover, persons benefitting from a temporary residence permit must pay a financial contribution in exchange for their registration with the national healthcare service. In addition, the system applicable to marriages and civil partnerships with respect to citizens of non-member countries has been made stricter.

Finally, the law provides the possibility for the Interior minister to strip British citizens who were born overseas or naturalised of their citizenship, if he believes that their

behaviour causes serious harm to the essential interests of the United Kingdom and that there are reasonable grounds to believe that they have the possibility of acquiring the citizenship of another country.

Immigration Act 2014,
www.legislation.gov.uk

[PE]

Slovakia

Amendment of the Constitution

On 4 June 2014, the Slovakian Parliament adopted an amendment to the Constitution, which came into force on 1 September 2014. Among the amendments made, it is necessary to mention, in particular, those related to the definition of marriage, the restriction of the immunity from criminal jurisdiction of judges and the reinforcement of the jurisdictions of the Judicial Council.

Firstly, the Constitution was amended with respect to the definition of marriage, described as a union only between a man and a woman.

Moreover, the protection and support of marriage are now considered to be relevant to public interest. The Slovak Republic therefore excludes the possibility of a marriage between persons of the same sex, which gave rise to a public debate in order to find out whether such a provision constitutes discrimination based on sexual orientation.

Secondly, the immunity of judges was limited such that, even though the consent of the Constitutional Court remains necessary for placing a judge in custody, this is no longer the case for proceedings filed against judges. However, it must be added in this context that, despite the said restriction, the judges can never be taken to court for acts related to their court activities.

Thirdly, as part of reinforcing the jurisdictions of the Judicial Council, the constitutional body ensuring the independence of the judiciary, it has now been entrusted with the tasks of controlling the judicial system and assessing the adequacy of the candidates to the positions of judges. With respect to these functions, the Judicial Council must adopt an opinion on the adequacy of the candidates, in light of the information provided by the National Security Authority and the declarations of the candidates themselves. It must be specified that, according to the provisions of law on the Judicial Council and on the protection of classified information related to the application of the Constitution, the National Security Authority collects, for this purpose, information on the candidates from the police services, the intelligence service, the military intelligence, as well as from other State bodies and individuals and corporate entities. Following this evaluation, the President of the Slovak Republic nominates the candidate to or relives the candidate from the post of a judge, depending on the case, on the advice of the Judicial Council.

It must be noted that this evaluation procedure applies not only to future candidates for judges, but also to all judges that have taken up their duties before 1 September 2014. When the opinion of the Judicial Council related to the evaluation of a judge is negative, it can be subject to an

appeal before the Constitutional Court. If the appeal is rejected, the President of the Slovak Republic relieves the judge from his duties.

It must be mentioned that these modifications concerning the evaluation procedure are subject to controversy, especially as concerns the effective protection of the independence of the judiciary and the violation of the principle of non-retroactivity. In that respect, the President of this body asked the Constitutional Court to assess the compliance of the legal provisions related to the application of the Constitution, which provide for the evaluation of judges that took up their duties before 1 September 2014, with the constitutional principles of the rule of law and the independence and impartiality of the judiciary. As part of these proceedings, currently still in progress, the Constitutional Court suspended the effects of the said provisions via a ruling. Being temporary in nature, the suspension decision will be valid at the most till the pronouncement of the decision on the merits of this case. This situation is interesting from a legal point of view because, even though the legal provisions providing the evaluation procedure for the judges will be called into question for their non-compliance with constitutional principles, this procedure is already, in itself, provided by the Constitution itself.

Finally, the Parliament approved the constitutional basis required for reopening a proceeding in the Constitutional Court and thereby, for revising final decisions after decisions taken by international courts.

Ústava Slovenskej republiky č. 460/1992 Zb.,

www://jaspi.justice.gov.sk/jaspiw1/htm_zak/jaspiw_mini_zak_zobraz_clanok1.asp?kotva=k1&skupina=l

[VMAG]

2. Other countries

People's Republic of China

On 17 June 2014, the Chinese authorities (the General Office of the State Council) published circular no. 29 [2014], the purpose of which was to implement measures meant to reinforce the compliance with the commitments of the government of the People's Republic of China subscribed as part of the World Trade Organisation (WTO).

Firstly, when adopting new policies likely to affect international trade, this circular requires the ministerial departments to carry out a preliminary examination of the compatibility of the draft legislative provision with the WTO agreements and the rules of accession of China to the WTO. This obligation is also imposed, in the same terms, on the provincial administrations.

Secondly, from now on, the circular also allows investors that are part of the Member States of the WTO to contest, in a written statement sent to the Ministry of Trade, any measures affecting trade that are adopted by the public authorities. In this respect, this ministry is required to re-examine the compliance of the said measures with the rules of the WTO. In this respect, the measures that can to be re-examined are only the general rules that affect imports and exports, especially those given on the non-exhaustive list appended to the circular.

Ever since the accession of China to the WTO in 2001, this new provision constitutes the first text adopted by China to align its governmental, ministerial and provincial policies with the rules of the WTO.

G.B.F. circular [2014] no. 29 of the People's Republic of China dated 09.06.14, www.gov.cn/zhengce/content/2014-06/17/ content_8887.htm

[WUACHEN]

D. Doctrinal echoes

Ability to rely on Article 27 of the Charter of Fundamental Rights - Ability to rely on it as concerns a dispute between individuals, by itself or in combination with directive 2002/14/EC - Directive establishing a general framework related to informing and consulting employees in the European community - Comments on the ruling of the Association de médiation sociale [Social mediation association] (C-176/12)

In its Grand Chamber ruling dated 15 January 2014 in the *Association de médiation sociale* case (C-176/12, EU:C:2014:2 - AMS), the Court pronounced on the interpretation of Article 27 of the Charter of Fundamental Rights of the European Union (Charter), concerning the right to informing and consulting employees of the company. The comments of the case law on this ruling, which was subjected to special attention by the doctrine, revealed its importance as concerns the question of the horizontal effect of the provisions of the Charter, the distinction between rights and principles, the conditions of being able to rely on the principles and its interaction with the question of the direct horizontal effect of directives.

The horizontal effect of the Charter

The majority of the doctrine highlighted the fact that the Court's ruling results in recognising the horizontal effect of the Charter. Therefore, Dittert stated that "the veritable benefit of the ruling [...] resides in the methodological specifications that the Court has brought regarding the theory of the direct horizontal effect of the fundamental rights guaranteed by the legal order of the Union. [...]. [T]his ruling is the first to openly recognise that the European fundamental rights are likely to produce direct horizontal effects and, therefore, be applied as is, even in disputes among individuals [1] ". In this respect, Cariat highlights that "[t]he possibility of invoking standards of Union law that protect fundamental rights in a horizontal dispute concerns the provisions of the Charter (art. 6, § 1, TEU) as well as the general principles of law (art. 6, § 3, TEU)"[2]. In this same sense, Surrel states that "[i]n line with the theory of positive obligations developed by the Court of Strasbourg […] it seems likely that a right granted by the Charter would be invoked in a horizontal dispute in order to bypass a national standard that does not guarantee its effective enforcement"[3].

In addition, the doctrine highlighted the fact that the ruling of the Court also includes criteria that clarify the conditions pursuant to which this horizontal effect may occur: "The Court offers legal practitioners of the Union a concrete criterion by which it suggests henceforth verifying whether or not a fundamental right granted by the Charter is likely to produce direct horizontal effects. This is a 'self-sufficiency' criterion of the

[1] DITTERT, D., "European fundamental rights: towards a generalised direct horizontal effect? CJUE, 15 January 2014, Association de médiation sociale, case C-176/12", *Revue des affaires européennes* [European case reviews], 2014, no. 1, pg. 177-182, pg. 180. In this same sense, also refer to MONTABES GARCÍA, C., "La eficacia entre particulares de la Carta de los Derechos Fundamentales de la Unión Europea", *Quaderns de recerca (Bellaterra)*, 2013-2014, no. 27, 23, October, 2014, pg. 33.

[2] CARIAT, N., "The invoking of the Charter of Fundamental Rights of the European Union in horizontal disputes — Situational analysis following the *Association de médiation sociale* ruling", *Cahiers de droit européen* 2014, no. 1, pg. 305-336, pg. 320-323.

[3] SURREL, H., "The absence of a direct horizontal effect of a principle given in the Charter of Fundamental Rights", *La Semaine Juridique. General Edition*, 2014, nos. 10-11, 491-494.

provision in question"[4]. "In other words, only provisions of the Charter that are 'legally perfect and [therefore] can be applied by the courts as such' may be invoked in the context of horizontal disputes. This test is welcome for (at least) two main reasons. Firstly, it is consistent with the need to preserve institutional balance within the EU. Secondly, it limits the harm to legal certainty that ensues unavoidably from the horizontal application of EU law when there are national measures inconsistent with it"[5]. However, certain authors have expressed criticisms concerning the clarity of the criteria given by the Court. Thus, Young states that "[i]t is not clear how far any of these criteria are necessary or sufficient to determine the horizontal application of a Charter provision. They are probably best understood as indications or guidelines"[6].

Concerning the question of the scope of application of the horizontal effect of the fundamental rights given in the Charter, several authors have expressed their doubts. Here, Dittert emphasises that "[t]he ratione personae scope of application of the direct horizontal effect would also merit a clarification. In a context of labour law, it seems to us that this is definitely not a coincidence"[7]. Other authors consider that the direct horizontal effect of social rights could be an exception: "[h]orizontal effect is possible, but it will certainly be an exception in the domain of social rights, where it could play a pivotal role […]"[8]. In line with these ideas, Dittert estimates that it seems "not very convincing to believe that the fundamental rights can be directly applicable in all of the 'classic' horizontal relationships, where the imbalance between the parties is much less marked, or even completely absent"[9]. Moreover, Frantziou estimates that the division between the provisions that grant the rights and those that do not, "[…] appears to create a hierarchy of provisions within the Charter based on their 'rights-conferring' nature and is additional […] to the distinction between rights and principles made in the Charter itself. […] In particular, the Court can be seen as suggesting that the crucial characteristic of provisions which are rights-conferring is that they do not require further legislative action - in other words, that they are purely 'negative' in character - while provisions that make reference to national laws and practices, such as Article 27, are to be considered as non-rights-conferring"[10].

Finally the doctrine highlights that there are still several questions that still need to be answered. Thus, according to Lazzerini, "[…] it remains open to question whether the test developed in AMS coincides with the more familiar test according to which, in order to have direct effect, a provision of EU law needs to be clear, precise and unconditional […] that, in order to establish whether the test is satisfied, one must have

[4] DITTERT, cit. supra note 1, pg. 181.
[5] LAZZERINI, N., "(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS", *Common Market Law Review*, 2014, vol. 51, pg. 907-934, pg. 926.
[6] YOUNG, A., "Horizontality and the EU Charter", UK Constitutional Law Blog, available at: http://ukconstitutionallaw.org/2014/01/29/alison-young-horizontality-and-the-eu-charter/, 23 October 2014, pg. 4.
[7] DITTERT, cit. supra note 1, pg. 182.
[8] JACQUÉ, J. P., "The Charter of Fundamental Rights and the Court of the European Union: a first assessment of the interpretation of the Charter's horizontal provisions", in ROSSI, L.S., and CASOLARI, F., (Eds.) *The EU after Lisbon*, Springer, 2014, pg. 137-160, pg. 152-153.
[9] DITTERT, cit. supra note 1, pg. 182.
[10] FRANTZIOU, E., "Case C-176/12 Association de Médiation Sociale: Some reflections on the horizontal effect of the charter and the reach of fundamental employment rights in the European Union", *European Constitutional Law Review*, 2014, vol. 10, no. 2, pg. 332-348, pg. 344-346.

regard to the wording of the relevant provision and to its explanation"[11].

The distinction between rights and principles

The absence of a difference between rights and principles in the AMS ruling has given rise to a certain number of doctrinal reactions. In this vein, Peers observes that "[t]here's a dog that didn't bark in this judgment" [12] and Lazzerini highlights an "[e]vident reluctance to open the Pandora's Box of the rights-principles distinction"[13]. And yet, Carpano believes that "[t]he entire reasoning of the Court is based on this right/principle distinction, while never actually clarifying it"[14].

Several authors regret the absence of a more pronounced decision, such as Lourenço, who observes that "AMS represents a missed opportunity for the Court to spell out which criteria are to be taken into consideration in the classification of the fundamental rights enshrined in the Charter as rights or principles"[15], or De la Rosa, who believes that "[t]he ruling is a step backwards with respect to the possibilities that this case offered, with the Court sticking to its classic conception of the absence of any horizontal effect of directives between individuals on any other consideration"[16].

With respect to the scope given to the social rights of the Charter, Tinière states that "[i]t results (...) from this ruling that the social rights guaranteed by the Charter in the form of principles cannot be invoked by individuals in the case of horizontal disputes. And yet, since most working relations are formed between individuals, this solution implicitly results in depriving them of any legal effect except when the working relationship involves the State authority"[17]. To be more general, Murphy highlights that "[i]t is not clear that a distinction between rights and principles within the Charter is at all useful-especially if there is a further distinction to be drawn between rights and principles that are capable of having direct effect and rights and principles that are not capable of having such effect" [18]. With the prior necessity prescribed by the Court to determine the content of a fundamental right independently, Lazzerini believes that it is "difficult to dispute the theoretical correctness of this approach. Its application may nonetheless entail some rather paradoxical consequences"[19].

However, certain authors such as Milchior and Pujol conclude on a prospective note, stating that "[t]hus, there are, in the Charter, independent provisions that can be invoked

[11] LAZZERINI, cit. supra note 5, pg. 926.
[12] PEERS, S., "When does the EU Charter of Right apply to private parties", *EU Law analysis*, eulawanalysis.blogspot.com, 23 October 2014.
[13] LAZZERINI, cit. supra note 5, pg. 931.
[14] CARPANO, E., "The representation of workers as proof against Article 27 of the Charter of Fundamental Rights of the Union: specifications on the horizontal inviolability of the law of the Union", *Revue de droit du travail*, 2014, no. 5, pg. 312-320, pg. 318.
[15] LOURENÇO, L., "General principles of European Union Law and the Charter of Fundamental Rights", *European Law Reporter*, 2013, no. 11-12, pg. 302-308, pg. 306.
[16] DE LA ROSA, S., "Are the social principles of the Charter of Fundamental Rights of the European Union simply decorative?", *Recueil Dalloz*, 2014, pg. 705-708, pg. 706.
[17] TINIÈRE, R., "The ability to rely on the principles of the Charter of Fundamental Rights in horizontal disputes", *Revue des droits et libertés fondamentaux*, 2014, no. 14, pg. 1-7, pg. 6.
[18] MURPHY, C., "Using the EU Charter of Fundamental Rights Against Private Parties after Association de Médiation Sociale", *European Human Rights Law Review*, 2014, no 2, pg. 170-178, pg. 177.
[19] LAZZERINI, cit. supra note 5, pg. 922-923.

directly and other that must be subject to specifications [...] hopefully, future rulings will emphasise on the 'right'/'principle' distinction, which practitioners of labour law and of the law of the European Union will follow attentively"[20].

The ability to rely on the principles

Certain authors have questioned the possibility of independently invoking the fundamental rights. According to Cariat, such a possibility "would profoundly alter the systemic relationships between the law of the Union and the national legal systems. If a situation falls under the scope of application of the law of the Union, the Court of Justice would find itself facing the possibility of not applying a national standard" [21]. Forst estimates that the challenge here would be to determine the fundamental rights most likely to exclude the application of national law, and questions the pertinence of an approach based on the wording of the standard: "[d]ie künftige Herausforderung besteht darin, die Grundrechte zu identifizieren, die zu einer Unanwendbarkeit mitgliedstaatlichen Rechts führen. Art. 27 EuGRC zählt nicht dazu. Der Verweis auf den Wortlaut ist zwar formalistisch, methodisch aber nicht zu beanstanden. Verallgemeinerungsfähig ist dieser Ansatz aber nicht"[22].

Several authors fear a too restrictive interpretation of the ability to rely on principles. According to Dubout, the Court introduces "a form of variable geometry in the category of principles, certain of which could be considered as more justiciable than others. In this manner, the principles will find themselves void of a large part of their usefulness"[23]. More explicitly, De la Rosa regrets that the reasoning of the Court "seems to be guided by an imperative of prudence and a willingness to not offend States that are not very inclined to recognise social rights on the basis of the law of the Union, primary or derived [, and that it] would entail significantly limiting the possibilities of invoking the social provisions of the Charter, which participate in the added value of the Charter with respect to conventional guarantees and cover an obvious symbolic dimension."[24].

According to Ines "the reasoning [...] results in confusing [...] the ability to rely on 'substitution' and the ability to rely on 'exclusion' [...] the first allows applying the standards of the Union law, while the second only results in not being able to apply the contrary national law. While requiring that the general principle or right, made concrete by the directive, creates a subjective right to exclude the contrary provision of national law, the Court of Justice makes the exclusion conditional on the existence of a standard of Union law that is not only likely to give rise to a rule similar to that of the directive, but is also capable of producing a direct horizontal effect, which the directive lacks. The ability to rely on exclusion is therefore equivalent to the ability to rely on substitution. [...] [W]hile these two abilities are distinct, it would be perfectly admissible

[20] MILCHIOR, R., and PUJOL, E., "Exclusion of the calculation of the effects of certain aided contracts and the ability to rely on the principles given in the Charter of Fundamental Rights for private persons", *La Semaine Juridique Sociale*, 2014, no. 14, pg. 33-35.

[21] CARIAT, cit. supra note 2, pg. 331.

[22] FORST, G., "Keine Wirkung des Art. 27 EuGRC zwischen Privaten ('Association de médiation sociale')", *Entscheidungen zum Wirtschaftsrecht*, 2014, pg. 93-94, pg. 94.

[23] DUBOUT, E., "Principles, rights and duties in the Charter of Fundamental Rights of the European Union: concerning the CJEU ruling, 14 January 2014, C-176/12, Association de médiation sociale", *Revue trimestrielle de droit européen*, 2014, no. 2, pg. 409-431, pg. 412- 413.

[24] DE LA ROSA, cit. supra note 16, pg. 707-708.

to exclude the contrary national law using the principle given in Article 27 of the Charter [in pursuance of the ability to rely on exclusion]"[25].

The interpretation of Article 27 of the Charter

The specific questions of the legal nature of Article 27 of the Charter, its qualification as a right or principle, as well as the conditions in which it can be invoked, have been reflected on by several authors. In this respect Cariat states that "[t]he response of the Court does not allow determining whether Article 27 constitutes a principle, nor whether belonging to this category of provisions prevents, *ipso facto*, all direct horizontal effects, and not even whether the absence of a direct horizontal effect is, on the contrary, an determining indicator of the nature of a principle of a specific guarantee'[26]. According to Papa, "[…] while making statements on the merely programmatic wording of Article 27, the Court prefers not to engage itself in the subject […] of the legal nature of Article 27"[27]. With respect to the reference to the national laws and practices, contained in the wording of Article 27 of the Charter, Jacqué believes that "[…] where the Charter states that a right is applicable under the conditions provided for by Union law and national laws and practices, the direct effect of that right is excluded. This makes for a significant limitation of the effect of social rights enshrined in the Charter, insofar as the vast majority of them are subject to that caveat"[28].

Concerning the legal nature of Article 27 of the Charter, several authors consider that "[w]e are definitely in the presence of a principle - while the explanations related to Article 52, § 5 do not mention the principles among the examples that they give - since it results from its 'wording' that, 'for this Article to fully produce its effects, it must be specified by provisions of the Union law or national law'" [29]. Moreover, Tinière considers that the position of the Court with regard to the ability to rely on this principle is deceiving: "[...] the Court can logically refuse to invoke the combination of this Article with the provisions of the directive that benefit from only a direct vertical effect. In doing this, it aligns the disputed system of principles granted by the Charter with that of directives that have been poorly transposed, or have not been transposed, thus voiding them of almost all normative substance. [...] It is therefore regrettable that the Court rejects the principle of the ability to rely on the exclusion of principles in horizontal disputes whereas it seems to be a logical conclusion from Article 52 § 5, without this leading to the creation of subjective rights enforceable against the States in social matters" [30]. In this same sense, Frantziou considers that the textual and technical analysis of Article 27 given in this ruling has a problem: "[…] it is unclear what the meaning of 'full effect' is and how it ought to be assessed. If the meaning of this term is intended to be synonymous with direct effect, as both the subject matter of the case and subsequent paragraphs of the judgment would suggest, then there is a clear problem of consistency with prior case-law. […] the Court finds that, in order

[25] INES, B., "Workforce of the company: cases of exclusion remain applicable", *Dalloz actualité,* 21 February 2014, pg. 3.
[26] CARIAT, cit. supra note 2, pg. 320-323.
[27] PAPA, V., "The Dark Side of Fundamental Rights Adjudication? The Court, the Charter, and the asymmetric interpretation of fundamental rights in the AMS case and beyond", *Social Justice Conference*, paper no. 46, *www.socialjustice2014.org*, pg. 11.
[28] JACQUÉ, cit. supra note 8, pg. 152.
[29] Refer to, in particular, SURREL, cit. supra note 3.
[30] TINIÈRE, cit. supra note 17, pg. 5-6.

for a Charter right to become 'fully effective' through further legislation, it is not sufficient that such legislation should simply express more specific conditions than the Charter right. […] Thus, the Court sets a very high threshold for what 'specific expression' in a directive is, if indeed not altogether abandoning the concept in practice. After all, it is difficult to think of a fundamental right worded in as specific a manner as the Court suggests that Article 27 should be, in order to become fully effective"[31].

Finally, according to Billeux, "[t]he Court seems to confirm the less generous reading advocated by the British and Polish authorities, declaring about Article 27 [...] that 'it is not sufficient to grant individuals a subjective right in itself' and cannot be invoked in a dispute between individuals for the purpose of excluding a national measure contrary to the said Article"[32].

The absence of direct horizontal effect of directives

Certain authors have expressed criticisms against the case law of the Court in that it supports the absence of the direct horizontal effect of directives: for Murphy, "[…] there is something wrong-headed about general principles being capable of having horizontal effect when directives do not. […] The Court's insistence that it is the general principle that may have horizontal effect, and not the Directive, is therefore unconvincing"[33]. Thus, certain authors have criticized that the Court did not take into account the importance of the questions raised in the AMS case and did not wish to accept a possibility of a direct horizontal effect of the directives: "Luxemburgo no ha estado a la altura de las cuestiones […] y no ha querido abrir la caja de Pandora de la Carta en AMS.[…]"[34]. The doctrine also noted contradictions in the case law of the Court. For Millán Moro, the rejection of the direct horizontal effect of directives in contrary to the principle of primacy: "[l]o más llamativo […] es el silencio del Tribunal en relación con el principio de la primacía. […] el Tribunal de Justicia […] no considera la aplicación de este principio, lo que lleva a una cierta contradicción en sus planteamientos y origina cuestiones de difícil resolución. […] [Lo] más lógico sería proceder a la aplicación por el juez nacional de la directiva en las relaciones horizontales"[35].

Moreover, certain authors have highlighted the conclusions of Advocate General Cruz Villalón in this case, in which he proposes that the articles of the Charter containing principles, made concrete in an essential and immediate manner by normative acts covering even the form of a directive, can be invoked in disputes between individuals, with the possible consequence of the non-application of the national regulation concerned[36]. For Gavilán Uría, the novelty of this reasoning resides in the distinction

[31] FRANTZIOU, E., cit. supra note 10, pg. 340-342.
[32] BAILLEUX, A., "Fundament rights face a crisis", *Revue de l'OFCE. Sciences Po*, 2014, no. 134, pg. 91-100, pg. 92.
[33] MURPHY, cit. supra note 18, pg. 176.
[34] GAVILÁN URÍA, E., "Los principios de la Carta de Derechos Fundamentales de la Unión Europea pueden ser invocados en litigios entre particulares?: Comentario a la sentencia del Tribunal de Justicia (Gran Sala) de 15 de enero de 2014 en el asunto C-176/12 Association de Médiation Sociale", *Revista General de Derecho Europeo*, Iustel, 2014, no. 34, pg. 24-25.
[35] MILLÁN MORO, L., "Eficacia directa versus primacía, TJUE, Sentencia del tribunal de justicia de 15.01.14 (Gran Sala), Association de Médiation Sociale, asunto C-176/12", *Revista de Derecho Comunitario Europeo*, 2014, no. 49, (will be available shortly) pg. 15.
[36] Conclusions of Advocate General Cruz Villalón, given on 18 July 2013, points 73 - 80.

between the "acts making the content of a 'principle' essentially and immediately concrete" and the other acts, normative ones as well as those for their individual application"[37]. According to Millán Moro, this proposal allows reconciling the direct horizontal effect of the directive and its primacy, while complying with the obligations imposed by Union law on the national judges, and while applying the principle of State responsibility[38].

The connection with the Mangold and Kücükdeveci cases

Certain authors believe that the AMS case clarifies the Mangold (C−144/04, EU:C:2005:709) and Kücükdeveci (C−555/07, EU:C:2010:21) rulings. Forst considers that this grants it a special importance that cannot be overestimated: "[e]s ist deshalb in seiner Bedeutung kaum zu überschätzen"[39]. Dittert attributes it "the significant merit of clarifying, in a slightly 'retroactive' manner, the teachings to be drawn from the highly controversial rulings in the Mangold et Kücükdeveci rulings […] the Court has now set the record straight in the sense that the direct horizontal effect is a property that can be attributed to fundamental rights, provided that they fulfil the criterion of 'self-sufficiency'". Ines highlights that the AMS ruling comprises a specification on the criteria for being able to rely on exclusion: "[...] even though it does not adopt a general formulation, the CJEU seems to extend the ability to rely on exclusion beyond the sole principle of non-discrimination" [40]. Papa deduces that the "'posthumous' labelling of Kücükdeveci as a case study on the horizontal application of the Charter […] it is possible to infer at least one hypothetic positive corollary: the declaration of the horizontal effectiveness, "no ifs, ands, or buts", of Art. 21 of the Charter" and that the AMS ruling constitutes "an important milestone in the 'difficult march' towards the Drittwirkung of the Charter of Fundamental Rights"[41].

However, a certain number of authors criticize the Court for not having seized the opportunity to further develop its case law in matters of fundamental rights: "[w]hat seems to move the Luxembourg judges is, on the one hand, the need not to insist on its Kücükdeveci jurisprudence, and, on the other, a concern with preserving its case law on directives"[42]. According to Simon, "the Grand Chamber preferred to make a decision that, instead of bolstering the case law approach that began in 2010, can be analysed as a cautious step back in the debate on the ability to rely on the exclusion of directives in horizontal disputes" [43]. Lazzerini considers that "the new judgment does not seem to reverse the Court's inclination towards judicial minimalism, if not even avoidance, when principled questions concerning the scope and effects of the Charter are at stake"[44].

According to Carpano, in the AMS ruling, "the Court of Justice specified the scope of the Mangold/Kücükdeveci case law by ending with a potentially paradoxical result.

[37] Conclusions of Advocate General Cruz Villalón, given on 18 July 2013, point 64. GAVILÁN URÍA, cit. supra note 36, pg. 21- 23.
[38] MILLÁN MORO, cit. supra note 35, pg. 15-16.
[39] FORST, cit. supra note 22, pg. 93; also refer to MITTWOCH, A.-C., "Bestellung eines Personalvertretungsorgans - keine unmittelbare Anwendung von Art. 27 Grundrechtecharta in einem Rechtsstreit zwischen Privaten", *Betriebs-Berater*, 2014, no. 41, pg. 2493-2496, pg. 2496.
[40] INES, cit. supra note 25, pg. 2-3.
[41] PAPA, cit. supra note 27, pg. 12-14.
[42] JACQUÉ, cit. supra note 8, pg. 152.
[43] SIMON, D., "Direct horizontal effect of the Charter of Fundamental Rights", *Europe Actualité du Droit de l'Union Européenne*, 2014, no. 3, pg. 13-14, pg. 14.
[44] LAZZERINI, cit. supra note 5, pg. 907.

On the one hand, the AMS ruling contributes in putting into perspective the scope of the Mangold/Kücükdeveci case law in that it appears that the ability to rely on the principle of non-discrimination based on age [...] does not so much result from the combination of a general principle with the directive than the self-sufficiency of the general principle itself. [...] On the other hand, putting into perspective the Mangold/Kücükdeveci case law has resulted in recognising the potential independent horizontal effect of certain provisions of the charter"[45].

On the other hand, Cariat highlights the contribution of the AMS ruling by estimating that "the Court cannot, by and large, be accused of minimalism, since it explicitly recognised the possibility of a direct, i.e. independent effect, of the Charter in a horizontal dispute and decided that Article 27 cannot claim this [and that] the AMS ruling henceforth and unequivocally grants that the possible invoking of the protective standards of fundamental rights in a horizontal dispute constitutes an additional stopgap measure for the absence of a horizontal effect of directives [and] allows confirming the Kücükdeveci case law"[46].

The effects on the main proceedings

Most of the authors observe an unsatisfactory result in this case. In this vein, Milchior and Pujol perceive the ruling to be an "admission of weakness" by observing that "one can legitimately question these to-and-fros between confirming a rule of law and admitting its inapplicability in this case. What is their purpose if it is not a cautious denunciation of a denial of justice?"[47] Renan adds that "[c]ompletely ironic, an individual can validly invoke the provisions resulting from these standards against his employer, so long as the latter is the State of France or an organisation charged with a task of public service" and notes that "the CJEU hopes that the accumulation of such remedies will incite the State of France to comply with the law of the Union"[48]. In this respect, Murphy however considers that "[t]he Court's reminder in its judgment that France may be liable for failure to transpose the Directive is a sorry consolation prize that places an onerous burden on individuals to hold the state to account […] The opacity and ineffectiveness of EU law in this field is problematic from the point of view of the Court and the Union's legitimacy"[49]. In the same context, De la Rosa questions on "the credibility of the Union [...], whose displayed willingness to rebalance the economic and social dimension in the integration process is not at all supported by such a decision"[50].

Conclusion

The conclusions expressed by the doctrine follow two broad lines. On the one hand, several authors highlight doubts and questions that still remain unanswered. On the other hand, a part of the doctrine believes that the ruling allows glimpses of a certain restrictive approach with respect to social rights.

[45] CARPANO, E., "Invoking the Charter of Fundamental Rights in disputes between private persons: concerning the right to information and consultation of workers", *Revue Lamy droit des affaires* 2014, no. 93, pg. 71-74, pg. 73-74

[46] CARIAT, cit. supra note 2, 316 and 336.

[47] MILCHIOR and PUJOL, cit. supra note 20, pg. 33-35.

[48] RENAN, F., "Exclusion of aided contracts and teachings of the calculation of the workforce of the company: analysis of a parapraxis", *La Loi / Le Quotidien juridique*, 2014, no. 67, pg.11-15, pg. 12.

[49] MURPHY, cit. supra note 18, pg. 177-178.

[50] DE LA ROSA, cit. supra note 16, pg. 708.

Thus, while Lazzerini considers that the ruling "[…] confirms the complexity of the questions relating to the scope and effects of the Charter, and it reflects a certain "prudence" of the Court in addressing them"[51], Carpano expresses a more critical opinion, stating that "[t]he response of the Court of Justice once again disappoints and is further proof of its suspicion of fundamental rights" [52] . Similarly, Papa considers that "[…] [g]iven the 'unbearable lightness' of the motivation of the AMS case, it seems pretty clear that the Court, especially when confronted with social rights, has an inclination to hit the brakes; this is in stark contrast to the attitude shown in cases involving other 'generations' of fundamental rights"[53].

Moreover, in light of the AMS ruling, Ruiz Zapatero questions the scope of effective judicial protection of the fundamental rights provided in Articles 19 TFEU and 47 of the Charter[54]. In this respect "it is no longer justiciable [...], except via implementing the State's liability for violating the law of the Union, pursuant to the Francovich case law"[55].

In any case, the doctrine concludes that "the dialogue between the national courts and the Court of Justice of the European Union on the scope of the Charter [...] will, without a doubt, continue with no end in sight just yet"[56].

[IGLESSA][KAUFMSV][GARCIAL]

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[51] LAZZERINI, cit. supra note 5, pg. 933.
[52] CARPANO, E., cit. supra note 45, pg. 73.
[53] PAPA, cit. supra note 27, pg. 11.
[54] RUIZ ZAPATERO, G., "Principios" y "derechos" en la Carta de la Unión Europea", *Revista Aranzadi de la Unión Europea*, 2014, no. 3, pg. 27-48, pg. 29.
[55] SIMON, cit. supra note 43, pg. 13-14.
[56] SURREL, cit. supra note 3.

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