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R E F L E T S

Legal developments of interest to the European Union

Preface

This edition of the bulletin *Reflets no. 2/2016* firstly refers to a ruling of the Grand Chamber of the ECtHR reaffirming the existence of a presumption of equivalence and defining in a precise manner the terms of a possible reconsideration of the mutual recognition mechanism (pages 8-9). Secondly, it refers to the ruling of the High Court of Justice (England and Wales) of 3 November last year, denying the government the power to invoke Article 50 of the Treaty on European Union alone and obliging it to refer the matter to the Parliament (pages 46-47). Also noteworthy is a new British legislation aimed at strengthening the system for combating illegal immigration (pages 57-58). Furthermore, two decisions given by US courts have caught our attention (pages 51-52): one by the Supreme Court on regulation aimed at prosecuting the criminal behaviour of economic operators, and the other by the United States Court of Appeal for the Second Circuit, strengthening the right to protection of personal data of consumers. Lastly, the doctrinal echoes relate to the comments on the Schrems ruling (C-362/14, EU:C:2015:650) declaring the invalidity of Decision 2000/520/EC and the Safe Harbour agreement.

Note that the Reflets bulletin is available for a brief period in the "À la Une" section of the Court of Justice intranet, as well as, permanently, on the Curia website (www.curia.europa.eu/jcms/jcms/Jo2_7063).

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

A. Case law

I. European and international courts

European Court of Human Rights

ECHR - Right to life - Prohibition of inhuman or degrading treatment - Orders for deportation of asylum seekers to their country of origin - Principle of ex nunc assessment of the risk incurred in the event of return - Violation of Articles 2 and/or 3 of the ECHR

In two rulings of 23 March and 23 August 2016, the Grand Chamber of the ECtHR clarified the scope of the obligations under Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment) of the ECHR in cases of deportation of asylum seekers to their country of origin.

The first case (F.G./Sweden) concerned an Iranian national who had converted to Christianity after his arrival in Sweden. He had, however, refused to invoke this conversion in support of his asylum request, even though the conversion put him at risk of being subjected to death penalty for apostasy in Iran. After his asylum request was rejected, the applicant had sought a stay of execution of the deportation order on account of his religious conversion. However, the national authorities held that the conversion did not constitute a new fact justifying a re-examination of the case.

The ECtHR recalled that, when an asylum request is based on an individual risk, it is not for the State examining this request to look for a risk factor that the asylum seeker did not present. However, in view of the absolute nature of the rights guaranteed by Articles 2 and 3 of the ECHR and the vulnerable situation that asylum seekers frequently find themselves in, if the State is informed that an individual may be subjected to treatment contrary to said articles upon returning to his country of origin, the national authorities are obliged to assess that risk ex officio. This applies in particular where they know that the asylum seeker is likely to belong to a group of persons systematically exposed to such treatment.

The ECtHR pointed out, in particular, that the Swedish authorities had not carried out a thorough examination of the actual situation and implications of the applicant's religious conversion. It asserted that, irrespective of the latter's conduct, the national authorities had to make an ex nunc assessment of the risk he would face upon returning to Iran as a result of his conversion. Therefore, in the absence of such an assessment, the ECtHR ruled that the deportation order, if implemented, would constitute a violation of Articles 2 and 3 of the ECHR.

The second case (J.F. and others v/s Sweden) concerned Iraqi nationals who were also the subject of a deportation order after their request for asylum in Sweden was rejected. This request was based on their fear of being persecuted by Al-Qaeda if they returned to Iraq, as a result of previous commercial relations of one of the applicants with the American forces.

The ECtHR again emphasised the importance of an ex nunc assessment of the risk incurred by the applicants if they returned to Iraq. In that regard, since their deportation had not been implemented when the ECtHR had examined the case, the date to be taken into account was that of the proceedings before it.

The ECtHR acknowledged that the general security situation in Iraq was not such that it would create a general need for international protection of asylum seekers and did not in itself prevent the applicants' expulsion. On the other hand, it held that the cumulative effect of their personal situation and the diminished capacity of the Iraqi authorities to protect them should be considered as constituting a genuine

risk of ill-treatment if they were to return to Iraq.

As regards the individual situation of the applicants, the ECtHR noted, inter alia, that since their account was coherent, credible and compatible with the information taken from reliable and objective sources on the situation of the country in question and that in the past they had been subjected to serious persecution in said country, there was a strong indication that they would continue to be at risk in Iraq. It should be noted that the judges, O'Leary (concurring opinion) and Ranzoni (dissenting opinion), regret the use of the "strong indication" criterion, since it appears to be inspired by Directive 2004/83/EC (the "qualification directive"), and in particular Article 4 (4) thereof, which specifies the concept of "strong indication". This difference in wording is likely to cause difficulties for the national authorities, who are required to enforce the Qualification Directive while respecting the requirements of Article 3 of the ECHR.

Regarding the protection capacity of the Iraqi authorities, the ECtHR emphasised that although the current level of protection provided was perhaps sufficient for the general population of Iraq, it was not the same for persons belonging to a target group such as those, like the applicants, who had collaborated with the American forces.

Thus, the ECtHR ruled that the deportation order, if implemented, would lead to a violation of Article 3 of the ECHR.

European Court of Human Rights, rulings of 23.03.16, F.G./Sweden (application no. 43611/11) and 23.08.16, J.F. and Others v/s Sweden (application no. 59166/12),
www.echr.coe.int

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IA/34180-A

[DUBOCPA]

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ECHR - Right of access to a court - Freedom of expression - Premature termination of the term of office of the President of the Hungarian Supreme Court on account of his criticism of legislative reforms in the country - Violation of Article 6, paragraph 1, and Article 10 of the ECHR

By a ruling of the Grand Chamber given on 23 June 2016, the ECtHR ruled on the premature termination of the term of office of the President of the Hungarian Supreme Court on account of his criticism of legislative reforms and his inability to challenge the decision before a judicial authority. The ECtHR concluded that this violated Article 6, paragraph 1 (right of access to a court) and Article 10 (freedom of expression) of the ECHR.

Former judge of the ECtHR from 1991 to 2008, the applicant was elected President of the Hungarian Supreme Court for a period of six years, until 2015. In his capacity as President of this court and the National Council of Justice, he spoke on various legislative reforms affecting the judiciary, in particular on the transitional provisions of the Hungarian basic law of 2011. These provided for the creation of a new Supreme Court (the Kúria) replacing the existing Supreme Court. Consequently, the functions of the President of the Supreme Court were to end with the entry into force of the new Constitution. Thus, the functions performed by the applicant ended on 1 January 2012, i.e. three and a half years before the scheduled end of his term. According to the criteria laid down for the election of the President of the Kúria, the candidates had to have at least five years' experience as magistrates in Hungary, since the term of office as judge of an international court was not taken into account. Consequently, the applicant could not take the position of President of the Kúria.

In this context, the ECtHR ruled that the applicant did not enjoy the right of access to a

court since the termination of his term of office was a consequence of the transitional provisions of the new Basic Law, a constitutional text beyond judicial review. For the ECtHR, this absence of judicial review results from a legal text whose compatibility with the requirements of the rule of law is questionable. In addition, it noted the importance of the intervention of an authority independent of the executive and legislative powers for any decision concerning the termination of a judge's term of office.

The ECtHR also held that the premature termination of the applicant's term of office constituted an interference with his right to freedom of expression as a result of his publicly expressed opinions on and criticism of issues of public interest on a professional basis. This termination served the purpose of protecting the independence of the judiciary and undoubtedly dissuaded the applicant as well as the other judges and presidents of courts to participate in future public debates on legislative reforms pertaining to the courts and on issues relating to the independence of the judiciary. The ECtHR held that, from a procedural point of view, restrictions on the exercise of the right to freedom of expression were not accompanied by effective and adequate safeguards against abuse.

European Court of Human Rights, ruling of 23 June 1986, Baka v/s Hungary, (application no. 20261/12),
www.echr.coe.int

IA/34185-A

[NICOLLO]

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ECHR - Right to a fair trial - Enforcement by Latvian judicial authorities of a judgment delivered by default in Cyprus - Regulation no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation") - Presumption of equivalent protection - Scope - Limits

By a Grand Chamber ruling of 23 May 2016, the ECtHR held that there had been no violation of Article 6 (1) (right to a fair trial) of the ECHR.

The case concerned the conviction of a Latvian national by a Cypriot court for the settlement of a debt he had incurred with a Cypriot company and the subsequent order issued by the Latvian courts to enforce the Cypriot judgment in Latvia, in accordance with Regulation (EC) no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter the "Brussels I Regulation"). The applicant complained that the Latvian courts had recognised and enforced a Cypriot judgment rendered by default, without being informed about the progress of the proceedings.

First, the ECtHR recalled that when contracting States implement EU law, they remain subject to the obligations they have entered into by acceding to the ECHR. These obligations must be assessed in light of the presumption of equivalent protection that the ECtHR established in the Bosphorus v/s Ireland ruling (decision of 30 June 2005, application no. 45036/98), and laid down in the Michaud v/s France ruling (decision of 6 December 2012, application no. 12323/11).

In this respect, the ECtHR noted that the application of the presumption of equivalent protection in the legal order of the EU is subject to two conditions: the lack of flexibility for the national authorities and the deployment of the full potential of the control mechanism provided for by EU law. As regards the first condition, the ECtHR has found that the provision implemented in the present case is contained in a regulation that is directly applicable and not in a directive that would have bound the State as to the result to be

achieved but would have left the choice of means and form to it. It stated that this provision allows refusal of the recognition and enforcement of a foreign judgment only within very precise limits and under certain conditions. It is clear from the interpretation given by the Court of Justice in a relatively extensive case-law that this provision does not grant discretionary power to the court hearing the application for enforcement. The ECtHR concluded that the Latvian Supreme Court did not have any leeway, since Article 34 (2) of the Brussels I Regulation did not give the States any discretionary power of judgment. With regard to the second condition, the ECtHR recalled that it had recognised in the aforementioned Bosphorus ruling that the control mechanisms in place within the European Union offered a level of protection equivalent to that provided by the ECHR mechanism. It stated that the Supreme Court had not referred the matter to the Court of Justice for a preliminary ruling on the interpretation of Article 34 (2) of the Regulation. It found, however, that the applicant had not put forward any specific complaint relating to the interpretation of Article 34 (2) of the Brussels I Regulation and its compatibility with the fundamental rights that would have made it possible to consider that a referral before the Court of Justice for a preliminary ruling was necessary.

The ECtHR also held that the person concerned should have been aware of the legal consequences of the debt acknowledgement document that he had signed. This document, governed by the Cypriot law, concerned a sum of money borrowed by him from a Cypriot company and contained a clause in favour of the Cypriot courts. Accordingly, the applicant should have been aware of details of any proceedings before the Cypriot courts. By his inaction and lack of diligence, it is the applicant who largely contributed to creating a situation that he complained about to the Court and that he could have avoided.

Consequently, the ECtHR did not find any manifest lack of protection of fundamental rights such as to reverse the presumption of equivalent protection.

European Court of Human Rights, ruling of 23.05.16, Avotiņš v/s Latvia (application no. 17502/0746),
www.echr.coe.int/echr

IA/34183-A

[NICOLLO]

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**** Brief (ECHR)***

ECHR - Access to a court - Defamation action resulting from cross-border broadcasting of a television program - International jurisdiction - Regulation no. 44/2001 - Violation of Article 6 (1) of the ECHR

By a ruling of 1 March 2016, the ECtHR unanimously found that Sweden had violated Article 6, paragraph 1 (access to a court) of the ECHR in the context of a defamation action following the cross-border broadcasting of a television program.

The Swedish courts had declared that they had no jurisdiction to hear such a defamation action brought by the applicant. They had applied the "country of origin principle" laid down by Directive 2010/13/EC (the "Audiovisual Media Services Directive"), since the program in question was broadcast by a company based in the United Kingdom. The Supreme Court had also rejected the applicant's request to refer a question to the Court of Justice for a preliminary ruling.

Firstly, the ECtHR, referring in particular to the Konsumentombudsmannen v/s De Agostini and TV-Shop ruling (C-34/95, C-35/95 and C-36/95, EU:C:1997:344), held that only Regulation (EC) no. 44/2001 on jurisdiction and the

recognition and enforcement of judgments in civil and commercial matters makes it possible to determine the court authorised to hear such a defamation action. According to the ECtHR, this referred to British and Swedish courts. Secondly, the ECtHR held that, because of the importance of factors connecting the impugned program to Sweden, there is a presumption that Sweden has an obligation to guarantee the applicant the right of access to a court. In that regard, the fact that the applicant could bring proceedings in the United Kingdom did not exempt Sweden from its obligations.

European Court of Human Rights, ruling dated 01.03.16, Arlewin v/s Sweden (application no. 22302/10),
www.echr.coe.int

IA/34177-A

[DUBOCPA]

EFTA Court

European Economic Area - Competition rules - Material scope - Collective agreement - Boycott of a port user to oblige it to accept the agreement - Inclusion - Restriction on freedom of establishment

The EFTA Court received a request for an advisory opinion relating to competition law and the freedom of establishment. In essence, the request raised two main issues:

- firstly, the issue of whether the exemption from competition rules of the EEA agreement that applies to collective agreements covers the use of a boycott of a port user in order to oblige it to accept a convention, where such acceptance implies that the user must choose to purchase loading and unloading services from a separate administrative agency rather than using its own employees to do the same work.

- the issue of whether there is a restriction on freedom of establishment where a trade union resorts to a boycott in order to have a collective agreement accepted by a company whose parent company is established in another State of the EEA, where the collective agreement implies that the company must choose to purchase loading and unloading services from a separate administrative agency rather than using its own employees to do the same work.

Regarding the first question, the EFTA Court held that:

"The exemption from the EEA competition rules that applies to collective agreements does not cover the assessment of a priority of engagement rule (…) or the use of a boycott against a port user in order to procure acceptance of a collective agreement, when such acceptance entails that the port user must give preference to buying unloading and loading services from a separate company (…) in place of using its own employees for the same work.

Articles 53 and 54 EEA may apply separately or jointly to a system such as the one at issue.

Should a port (…) not be regarded as a substantial part of the EEA territory, identical or corresponding administrative office systems, which may exist in other ports, must be taken into account in order to determine whether a dominant position covers the territory of the EEA Agreement or a substantial part of it."

Then, regarding the second question, the EFTA Court held that:

"A boycott (…) aimed at procuring acceptance of a collective agreement providing for a system which includes a priority clause, is likely to discourage or even prevent the establishment of companies from other EEA

States and thereby constitutes a restriction on the freedom of establishment under Article 31 EEA.

It is of no significance for the assessment whether a restriction exists if the company's need for unloading and loading services proved to be very limited and/or sporadic.

(…) it is of no significance for the assessment of the lawfulness of the restriction that the company, upon which the boycott is imposed, applies another collective agreement in relation to its own dockworkers."

EFTA COURT, Judgment of 19.04.16, in Case E-14/15, Holship Norge AS / Norsk Transportarbeiderforbund,
www.eftacourt.int

IA/34176-A

[LSA]

II. National courts

1. Member States

Germany

Freedom to provide services - Differential treatment between foreign nationals and citizens of local municipalities, concerning the use of a community swimming pool - Justification - Absence

In a ruling of 19 July 2016, the Bundesverfassungsgericht (Federal Constitutional Court) held that reduced rates for the use of a local swimming pool by the citizens of local municipalities were illegal, following the request of an Austrian citizen (hereinafter, "the applicant") who had not been able to benefit from the reduced rates for using the swimming pool in question, which was operated by the defendant.

The applicant had lodged an appeal with the Amtsgericht (District Court) in Laufen, followed by an appeal to the Oberlandesgericht (High Court), in Munich, seeking compensation for the higher price that he had paid and the finding that the defendant was obliged to grant him the benefit of the reduced rates. His application was rejected by both courts with the argument that Articles 18 and 56 TFEU were not applicable in the present case because of a lack of horizontal effect insofar as it was a private law relationship. The activity in question was not related to public utilities and the pool operator was a legal person governed by private law.

As part of an application to reopen proceedings in an action against these decisions, the Bundesverfassungsgericht (Federal Court of Appeal) decided that the direct applicability of the fundamental rights does not depend on the form of action or on the form of organisation chosen by the State for the execution of its task, since the State always acts with the aim of serving public interest. In cases where the State decides to use a private law organisation to perform its duties, the fundamental rights are directly applicable to the legal person governed by private law and to the body governed by public law, regardless of whether it is a for-profit activity or whether the activity is used solely to meet collective requirements.

The Bundesverfassungsgericht ruled that the municipalities are authorised to give priority to their citizens, if this is justified for objective reasons such as promoting cultural and social well-being of said citizens, strengthening the local community, limiting the circle of users or ensuring adequate use of infrastructure. Since managing the pool in question entails attracting visitors from outside the

municipality, the Bundesverfassungsgericht decided that the benefits conferred on citizens could not be justified and infringed the principle of equal treatment within the meaning of the German constitution.

Moreover, the Bundesverfassungsgericht held that the Oberlandesgericht infringed the prohibition of arbitrary measures by holding that a violation of Article 56 TFEU did not result in the invalidity of the contract concluded between the parties, a consequence that the German civil law provides for in case of non-compliance with "legal prohibitions".

Lastly, the Bundesverfassungsgericht held that the Oberlandesgericht had infringed Article 101 (1), sentence 2, of the Grundgesetz, as the applicant was prevented from approaching his lawful court because the Oberlandesgericht had not fulfilled its obligation to refer the case to the Court of Justice to interpret EU law, even though it was a final decision. The Bundesverfassungsgericht decided that the Oberlandesgericht was not sufficiently informed about the substantive law of the Union concerning the applicability of fundamental rights to bodies governed by the State and about the justification of privileges conferred on citizens for economic or tax reasons, both of which have been the subject of rulings of the Court.

Bundesverfassungsgericht, order of 19.07.16, 2 BvR 470/08,
www.bundesverfassungsgericht.de

IA/34174-A

[LERCHAL]

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EU Law - Primacy - Limits under national law - Ultra vires acts - Jurisdiction of the European Central Bank - Program for the purchase of sovereign bonds on secondary markets

Following the ruling of the Court of Justice in the Gauweiler and others case (C-62/14, EU:C:2015:400), the Bundesverfassungsgericht (Federal Constitutional Court) rejected several appeals against the European Central Bank (ECB) decision relating to an outright monetary transactions program allowing the European System of Central Banks (ESCB) to acquire negotiable bonds, more particularly sovereign bonds, of Member States (OMT program).

The Bundesverfassungsgericht followed the interpretation given by the Court in finding that the OMT program, as set out by the latter, did not exceed the ECB's monetary policy powers and did not violate the prohibition on monetary financing of the Member States. However, it has established a number of conditions that the German central bank must comply with in the event of its participation in the implementation of the OMT program, namely the absence of prior announcement of the acquisitions, an upstream limitation of the volume of acquisitions, compliance with a minimum period between the issuance of a security on the primary market and its repurchase by the ESCB in order to avoid altering the terms of issue, a limitation on repurchase operations to securities of Member States with access to the bond market enabling them to finance these securities, the exceptional nature of holding the securities until maturity, and finally, the limitation or cessation of repurchase operations and the reinstatement of securities acquired in the market where the intervention is no longer necessary.

The decision of the Bundesverfassungsgericht is of institutional importance insofar as it concerns, in addition to the Union's economic and monetary policy, the relationship between EU law and German law. The scope of the ECB's powers as an institution of the Union is assessed in the context of a review of ultra vires acts, a mechanism developed by the

Bundesverfassungsgericht, in the same manner as the review of constitutional identity, as a limit to the primacy of EU law in the German legal system.

In this regard, the Bundesverfassungsgericht pointed out that sovereign rights can be transferred to the Union only within the limits laid down by the German constitution, the scope of this transfer being subject to its judicial review under the voting rights. As regards the consequences of an ultra vires act, the Bundesverfassungsgericht stressed in particular that German constitutional bodies are required to actively oppose such acts by virtue of their "responsibility for integration", in order to ensure that the implementation of the process of European integration does not unduly undermine the "right to democracy" of German citizens.

Bundesverfassungsgericht, ruling of 21.06.16, 2 BvE 13/13 and Others,
www.bundesverfassungsgericht.de

QP/08289-P1

[KAUFMSV]

**** Briefs (Germany)***

EU law - Limits under national law - Respect for the constitutional identity - Human dignity and the prohibition of self-incrimination - Grounds for refusal to execute a European arrest warrant

The Bundesverfassungsgericht (Federal Constitutional Court) has clarified its case-law concerning the control of constitutional identity, according to which the application of Union acts or national measures determined by EU law must be rejected, notwithstanding the principle of the primacy of EU law, since those acts or measures undermine the intangible core of German constitutional identity.

Having previously held that the execution of a European arrest warrant must be refused by the German judicial authorities, in particular, where such execution would undermine human dignity (see the order of 15 December 2015, 2 BvR 2735/14, *Reflets No. 1/2016, p. 11-12*), the Bundesverfassungsgericht rejected the appeal of a person subject to a European arrest warrant issued by the British authorities against the decision declaring his surrender to the United Kingdom for criminal prosecution as lawful.

The applicant alleged an infringement of his human dignity, and more specifically, the right not to contribute to his own incrimination by being silent, because under British law, the criminal court is able to draw adverse inferences from the silence of an accused. German constitutional law precludes such a restriction on the right to silence of the accused.

However, the Bundesverfassungsgericht held that while the right not to contribute to his own incrimination is effectively rooted in human dignity, as enshrined in the Constitution, the execution of a European arrest warrant can be refused only in the case of a direct attack on the essential content of that right. In that regard, he pointed out that it is not necessary that the rights of an accused recognised by the law of the issuing Member State be wholly consistent with the level of protection guaranteed by the Constitution. However, British law does not render inoperative the right of an accused not to contribute to his own incrimination, insofar as the accused is not compelled to break his silence and a possible conviction cannot be founded on the sole fact that he had remained silent.

Bundesverfassungsgericht, order of 06.09.16, 2 BvR 890/16,
www.bundesverfassungsgericht.de

IA/34172-A

[KAUFMSV]

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Validity of an arbitration agreement - Exclusive jurisdiction of the Court of Arbitration for Sport (CAS) - Obligation of submission of athletes - Lack of jurisdiction of the German courts

By a ruling of 7 June 2016, the Bundesgerichtshof (Federal Court of Justice) confirmed the validity of an arbitration agreement providing for the exclusive jurisdiction of the CAS for compensation claims made by the applicant, a globally successful speed skater.
In order to participate in an international competition, the applicant had undertaken to comply with the anti-doping rules of the International Skating Union (ISU) and had signed the arbitration agreement in question. Due to an anomaly in her blood levels, she had been suspended by the ISU from all competitions for a period of two years. The appeals against this decision to the CAS and the Swiss Federal Court were unsuccessful, since the latter had accepted its jurisdiction to review the CAS decision only on a given number of procedural issues, such as the composition of the CAS, the unequal treatment of parties or the violation of the right to be heard, the examination of substantive law being limited to a breach of public policy.

Subsequently, the applicant brought an action before a German court in order to obtain a finding of the illegality of the suspension and the award of compensation. The Oberlandesgericht (Munich Regional Court) held that the Arbitration Convention did not preclude its jurisdiction to hear the merits of the case insofar as the applicant's obligation to comply with the arbitration agreement in order to be admitted to the sports competition constituted an abuse of a dominant position.

The Bundesgerichtshof upheld the ISU appeal and dismissed the applicant's appeal as inadmissible on account of its lack of jurisdiction under the arbitration agreement. It considered that the fact of having to sign the arbitration agreement in order to participate in the international competitions organised by the ISU does not constitute an abuse of a dominant position, since the respect of the rights of athletes is sufficiently guaranteed by the rules of procedure of the CAS. This applies despite the selection of referees from a list prepared mainly by the international sports federations, as the latter and the athletes are not, in principle, guided by opposing interests in the fight against doping. In addition, the Bundesgerichtshof pointed out that arbitral awards are subject to review by the Swiss Federal Court.

Bundesgerichtshof, ruling of 07.06.16, KZR 6/15,
www.bundesgerichtshof.de

IA/34173-A

[LERCHAL] [KAUFMSV]

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Free movement of services in the field of transport - Prohibition of the application "UberPOP" - Unfair competition

The Oberlandesgericht (Higher Regional Court) of Frankfurt am Main, upheld a decision of first instance prohibiting the use of private drivers by customers using the "UberPOP" smart phone application. The Oberlandesgericht held that the electronic brokerage service thus proposed cannot be authorized under the law on transport of persons (Personenbeförderungsgesetz), insofar as it is neither a taxi service nor a car rental service, and thus constitutes an act of unfair competition for which the operator of the application is held liable.

By examining inter alia the compatibility of this prohibition with EU law, the Oberlandesgericht characterised the brokerage service in question as a transport service, within the meaning of Article 58 (1) TFEU, thus excluding it from the scope of free movement of services pursuant to Article 56 TFEU and Directive 2006/123/EC on services in the internal market. Furthermore, it held that the activity in question did not, in the absence of actual Uber operations in Germany, fall within the scope of freedom of establishment within the meaning of Article 49 (1) TFEU.

An appeal in cassation against this decision is currently pending before the Bundesgerichtshof (Federal Court of Justice). The decision is in the context of the pending Uber Belgium (C-526/15) and Asociación Profesional Elite Taxi (C-434/15) cases, which raise similar issues relating to electronic brokerage services in the field of transport.

Oberlandesgericht Frankfurt am Main, ruling of 09.06.16, 6 U 73/15,
https://olg-frankfurt-justiz.hessen.de

IA/34175-A

[LERCHAL] [KAUFMSV]

Austria

Freedom to provide services - Restrictions - National legislation establishing a public monopoly on gambling - Justification

Under federal law on gambling (Glücksspielgesetz, hereinafter the "GSpG"), the right to organise gambling activities is reserved for the Austrian federal government that has a monopoly on the area. However, the federal government does not organise gambling activities and grants limited concessions. Regarding the question of compliance of this regulation with EU law, the Verwaltungsgerichtshof (Administrative Court, hereinafter "VwGH") and the Oberster Gerichtshof (Supreme Court, hereinafter the "OGH") arrived, in two decisions issued during the same month, at two conflicting outcomes.

In this regard, it should be recalled that, in the Pfleger ruling (C-390/12, EU:C:2014:281), the Court of Justice held that the Austrian GSpG constitutes a restriction on the freedom to provide services stipulated under Article 56 TFEU, as these regulations do not really pursue the objective of protecting players or combating crime and do not really address the concern to reduce gambling or combating crime related to these activities in a coherent and systematic manner, which is a matter for the national court to verify.

In light of that ruling, in a judgment of 16 March 2016, the VwGH upheld the Federal Finance Minister's appeal against a judgment of an inferior administrative court, which had annulled an administrative penalty imposed by finding that the monopoly on operation of gambling was contrary to EU law. By describing the historical development of monopoly of gambling in the Austrian legal order, dating back to the eighteenth century, the VwGH conducted a comprehensive assessment of the circumstances. Considering the case-law of the Court, the VwGH stated that the aim of the GSpG, namely the protection of players, the fight against gambling addiction, the reduction of crime related to gambling activities and the prevention of criminal acts, is achieved in a coherent and systematic manner. Consequently, the VwGH concluded that the GspG complied with EU law.

However, by order of 30 March 2016, the OGH, hearing several cases on the basis of the law against unfair competition, held that the public monopoly in the gambling market was contrary to EU law. Referring to the case-law of the Court of Justice, in particular the

aforementioned Pfleger ruling and the Ladbrokes ruling (C-258/08, EU:C:2010:308), Stoß ruling (C-316/07 and Others, EU:C:2010:504), Zeturf ruling (C-212/08, EU:C:2011:437), Dickinger/Ömer ruling (C-347/09, EU:C:2011:582) and Stanleybet ruling (C-186/11, EU:C:2013:33), and relying particularly on the Court's reasoning on the extent of advertising by the monopoly holder, the OGH reviewed the advertising of two dealers "Österreichische Lotterien" and "Casinos Austria AG". It concluded, also taking Austrian doctrine into account, that the advertising of those dealers was not limited to controlled expansion accompanied by measured advertising and was inconsistent with the aim of channelling players into controllable circuits. The OGH held that, by attributing a positive image to the activities, the aim of the advertising is to encourage people, who up to this day were not entirely inclined to play, to participate actively in the activities and that the monopoly on the gambling market cannot, therefore, be justified. By pointing out that, given the factual context of the case, the parties to the dispute in the main proceedings do not benefit from the scope of protection of EU law, the OGH found that there has been discrimination against nationals, contrary to the principle of equality enshrined in the Austrian constitution. He therefore requested the constitutional court to annul several provisions of the GspG as well as a regulation of the federated State of Lower Austria.

Verwaltungsgerichtshof, ruling of 16.03.16, 2015/17/0022 and order of the Oberster Gerichtshof of 30.03.16, 4 Ob 31/16m,
https://www.vwgh.gv.at/rechtsprechung/aktuelle_entscheidungen/2016/ra_2016170066.html?12
http://www.ogh.gv.at/de/entscheidungen/antrag-vfgh/anfechtung-des-gluecksspielmonopols-beim

IA/34165-A
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[LEEBCOR]

**** Briefs (Austria)***

Citizenship of the Union - Right of free movement and residence within the territory of the Member States - Directive 2004/38 - Obligation for an economically inactive citizen of the Union to have sufficient resources

The applicant, a retired person of Romanian nationality, moved to Austria at the age of 69 years. At no time did he have sufficient resources to live in Austria. Thus, he applied for a compensatory supplement ("Ausgleichszulage"), a social security benefit intended to supplement the superannuation and qualified by the Court of Justice as a "special non-contributory benefit" within the meaning of Article 70 (2) (c) of Regulation (EC) no. 883/2004, on the coordination of social security systems.

By a ruling of 10 May 2016, the Oberster Gerichtshof (Supreme Court, hereinafter the "OGH") by considering the case-law of the Court, particularly the Brey ruling (C-140/12, EU:C:2013:565), Dano ruling (C-333/13, EU:C:2014:2358), Alimanovic ruling (C-67/14, EU:C:2015:597) and García-Nieto ruling (C-299/14, EU:C:2016:114) recalled that it is clear from this case-law that a host Member State may refuse an application for social benefits if one of the conditions laid down in Article 7 (1) (b) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States is not fulfilled. In light of that case-law, it held that an economically inactive citizen of the Union is not entitled to social benefits when he exercises his freedom of movement for the sole purpose of obtaining the benefit from another Member State, even though he does not have sufficient resources. By upholding the decisions of the lower

courts, the OGH thus concluded that the applicant was not entitled to the compensatory supplement.

Oberster Gerichtshof, ruling of 10.05.16, 10 ObS 15/16b,
http://www.ogh.gv.at/de/entscheidungen/weitere/keine-ausgleichszulage-fuer-einen-pensionisten-aus

IA/34167-A

[LEEBCOR]

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Social security - Migrant workers - Unemployment - Unemployed atypical frontier worker who has maintained links with the Member State of last employment - Right to social benefits in that Member State

In several similar cases, the Austrian Employment Service had refused to grant unemployment benefits to persons of Hungarian, Romanian and Croatian nationality who had their last employment in Austria, because of their residence in the territory of another Member State. The workers visited their families in their respective Member States of origin, some once or twice per month and other three to four times a year.

In four rulings of 2 June 2016, referring to the case-law of the Court of Justice, in particular the Jeltes ruling (C-443/11, EU:C:2013:224), the VwGH ruled that an unemployed person, other than a frontier worker, who, in the course of his last job, was residing in a Member State other than the Member State of that employment, and who did not return to the Member State of his place of residence, shall make himself available to the employment services of the Member State of the last employment, under Article 65 (2), third paragraph of Regulation (EC) No 883/2004 and is entitled to receive benefits under the rules laid down in Articles 61 and 62 of that Regulation. Consequently, the VwGH concluded that, pursuant to Article 11 (3) (a) of that regulation, the Republic of Austria was obliged, as a Member State of last employment, to grant the persons concerned benefits of the Austrian unemployment insurance.

Verwaltungsgerichtshof, rulings of 02.06.16, 2016/08/0047, 2016/08/0046, 2016/08/0053, 2016/08/0065,
https://www.vwgh.gv.at/rechtsprechung/aktuelle_entscheidungen/2016/ra_2016080047.html?4

IA/34168-A
IA/34169-A
IA/34170-A
IA/34171-A

[LEEBCOR]

Belgium

Immigration policy - Return of illegally staying third-country nationals - Detention of an adult member of a family for deportation - Disproportionate interference with the exercise of the right to family life

The Royal Decree of 17 September 2014 determining the content of the convention and penalties that may be imposed pursuant to Article 74/9 (3) of the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners, offers illegally residing families with minor children the option of residing, under certain conditions, in a personal dwelling. In order to benefit from this option, however, the families concerned must conclude an agreement with the Aliens Office, which aims to control the effective removal of the family from Belgian territory. If this agreement is not complied with, the penalties mentioned in Article 3 of said Royal Decree may be applied, including the detention of an adult member of the family in a closed centre or a penitentiary until the removal of the family. In the event of evident unwillingness of the family to cooperate, this provision even

provides for the possibility of keeping the family with the minor children in a closed centre in view of their removal.

As regards the sanction consisting of the detention of an adult member of the family, the Conseil d'État found, in a judgment of 28 April 2016, that this measure constitutes a disproportionate interference with the exercise of the right to family life enshrined in Article 8 of the ECHR. In this respect, the Council of State also observed that, although Directive 2008/115/EC requires Member States to take all necessary measures to ensure effective removal of illegally residing foreigners, this directive also requires them to ensure that such measures take account of family life and do not exempt them from compliance with Article 8 of the ECHR.

As regards the sanction consisting of detention of the family with minor children in a closed centre, the Conseil d'État found that this measure was contrary to Article 74/9 (3) of the Law of 15 December 1980 insofar as the Royal Decree had failed to specify that families with minor children can be kept together only in a place appropriate to their requirements.

In accordance with these observations, the Conseil d'État partially annulled the Royal Decree of 17 September 2014.

Conseil d'État, ruling of 28.04.16, no. 234.577,
http://www.raadvst-consetat.be

IA/34179-A

[EBN]

**** Brief (Belgium)***

Economic and monetary union - Treaty on stability, coordination and governance - National law approving the treaty - Action for annulment - Dismissal

In a ruling of 28 April 2016, the Constitutional Court dismissed actions for annulment with regard to the law on stability, coordination and governance within the economic and monetary union.

No applicant had an interest in the annulment of the approval law. The applicants' interest as citizens, interest groups, nationals or voting rights holders was not sufficient.

When it approves a treaty, the legislator cannot undermine the guarantees offered by the Constitution. The treaty of stability leaves it entirely up to the national parliaments to establish and approve the budget and possible austerity measures. The Constitutional Court has recognised that certain powers are entrusted to the Union's institutions, in particular the European Commission and the Court of Justice, but the national identity inherent to the fundamental, political and constitutional structures or the fundamental values of protection that the Constitution confers on individuals cannot be undermined. However, this was not the case here.

Constitutional Court, ruling of 28.04.16, no. 62/2016,
www.const-court.be

IA/34182-A

[NICOLLO]

Cyprus
**** Brief***

Judicial cooperation in civil and commercial matters - Service of judicial and extrajudicial documents - Regulation no. 1393/2007- Refusal to accept the act - One of the documents provided not translated - Lack of standard form in Annexe II of the regulation - Consequences

Following the judgment of the Court of Justice, Alpha Bank Cyprus (C-519/13, EU:C:2015:603), the procedure was resumed before the Supreme Court to complete the appeal proceedings in the main proceedings.

In essence, in its aforementioned Alpha Bank Cyprus ruling, the Court held that Regulation (EC) no. 1393/2007, relating to the service and notification in the Member States of judicial and extrajudicial documents in civil or commercial matters, must be interpreted as meaning that the entity of each Member State which is competent to accept judicial or extrajudicial documents from another Member State (hereinafter the "receiving entity") shall inform the recipient of a document about its right to refuse the acceptance thereof, systematically using, for this purpose, the standard form in Appendix II of the regulation. In addition, the Court found that the fact that the receiving entity, when conducting such a service, has not appended the standard form in Appendix II, does not constitute a ground for invalidity of the procedure, but an omission which must be corrected in accordance with the provisions of that regulation.

As regards the manner of correcting such an omission, the Supreme Court held in its ruling of 12 April 2016 that the onus is on the applicant to take the appropriate procedural steps, under both the Cypriot procedural rules and the provisions of Regulation no. 1393/2007 in order to correct the procedural omission in the present case.

Supreme Court, second instance, ruling of 12.04.16, civil appeals no. E23/2013 to E29/2013,
http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201604-E23-2013etcapofDEE.htm&qstring=si%20and%20senh%20and%20dau

QP/08133-P1

[LOIZOMI]

Croatia

Judicial cooperation in criminal matters - Arrest warrant issued for the execution of a custodial sentence or detention order - Enforcement - Consent to surrender - Validity - Conditions

By decision of 6 June 2016, the Supreme Court ruled on the application of the law on judicial cooperation in criminal matters between the Member States of the Union (hereinafter the "law"), relating in particular to the European arrest warrant.

The Supreme Court allowed the appeal brought by a Croatian national subject to a European arrest warrant issued by Germany, against the decision of 13 May 2016 of the Velika Gorica regional court, the Croatian executing judicial authority, which held that the arrest warrant could be executed and had thus authorised the surrender of the applicant, insofar as he had given his consent.

The applicant had consented to his surrender at the hearing held in order to determine whether, pending the effective execution of the European arrest warrant, he should be kept in provisional custody. However, he had objected to his surrender at a second hearing on his possible surrender and, subsequently, during the examination by the prosecutor.

However, under Article 27 (3) of the law, once consent is given, it is irrevocable.

The Supreme Court recalled, first, that under Article 27 (2) of the law, the person concerned must be in a position to know all the consequences of his consent to his surrender. In addition, Article 22 (4) of the law provides that, when the person sought is a Croatian national, he has the right to serve in Croatia the custodial sentence or detention order imposed in another Member State.

The Supreme Court inferred from the above that consent to surrender is only valid if the person concerned knows that he has the right, as a Croatian national, to serve in Croatia a sentence imposed in another Member State. The person must therefore be informed about that right by the prosecutor.

Consequently, the Supreme Court referred the case to the Velika Gorica regional court for reconsideration.

Vrhovni sud Republike Hrvatske, order of 06.06.16, Kž-eun 28/16.-4, *www.vsrh.hr*,

IA/33745-A

[KOMADPE]

Spain

Fundamental rights - Right of access to justice - Restriction - Imposition of legal costs to legal persons - Lack of proportionality of measure

The Constitutional Court annulled the payment of court fees imposed on legal persons to bring legal action. The possibility of requiring the payment of these costs was introduced by the very controversial law no. 10/2012 of 20 November 2012, relating to the regulation of certain expenses in the field of the administration of justice. In 2015, the Ministry of Justice had announced the removal of the measure for individuals.

The applicants argued that the excessive amount of these costs infringed certain fundamental rights, such as the right to effective protection of judges and courts in order to exercise their rights and legitimate interests (Article 24.1 EC), the right to equality before the law and non-discrimination (Article 14 EC) and, in tax matters, the right to a contribution based on the economic capacity and respect for the progressive nature of the tax contribution system (Article 31 EC). In their view, these excessive amounts had a dissuasive effect as regards referral to the courts.

The Constitutional Court recalled that, even if the legislature has the option of defining the conditions for access to justice as a fundamental right, this action is subject to considerable limits (STC 20/2012). In this context, it is not acceptable to impose measures entailing such high amounts that they impede access to justice, in accordance with the case-law of the Court of Justice set out in its ruling of 30 June 2016, Vasile Toma, C-205/15, (EU: C:2016:499) and that of the ECtHR, set out in its ruling of 19 June 2001, Kreuz v/s. Poland (application no. 28249/95).

As regards the proportionality of the limitation of the fundamental right of access to justice, the Constitutional Court held that the measure in question was not the appropriate means of preventing unjustified legal actions, owing to the presence of other measures having the same objective already in place in the Spanish legal order. According to the Constitutional Court, the measure at issue does not comply with the proportionality criterion in the strict sense. Having weighted the principle of proportionality and the deterrent effect, the Court found that this criterion had not been complied with insofar as even persons with sufficient financial means were actually deterred from bringing legal action because of the legal costs in relation to the economic value of the subject-matter of the dispute.

Tribunal Constitucional 140/2016, ruling of 21.07.16, Rec. 973/2013; (BOE 196, 15.08.16), *http://www.tribunalconstitucional.es*

IA/33754-A

[NUNEZMA]

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Protection of individuals with regard to the processing of personal data - Directive 95/46 - Judgment of the Court in the Google Spain and Google case, C-131/12 - Concept of "controller"

The civil and administrative chambers of the Supreme Court recently delivered judgments on the concept of "controller" within the meaning of Article 2 (d) of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data. This refers, in particular, to the judgments on whether Google Spain SL, the Spanish subsidiary of Google Inc., can be considered liable for the data processing performed by the Google search engine. The importance of these judgments lies in the fact that they have ended with contradictory solutions that are only a few days apart.

While the administrative chamber of the Supreme Court decided, by its judgments of 11, 14 and 15 March 2016, that Google Spain could not be considered liable for the processing, since only Google Inc. met the conditions set out by the Court of Justice in its Google Spain and Google judgment (C-131/12, EU: C: 2014: 317), the civil chamber of the Supreme Court has reached the opposite solution, by its judgment of 5 April 2016, that Google Spain is jointly liable for the processing, alongside Google Inc.

The latter judgment is part of a civil procedure seeking compensation for infringement of the right to protection of personal data. On the other hand, the judgments of the administrative chamber, subsequently upheld by numerous other judgments of the same chamber, are the result of administrative appeals lodged against decisions of the Spanish Data Protection Agency (including, in particular, in the case resulting in the Court's judgment, the Google Spain and Google case cited above). It is in particular with regard to the difference in the rules applicable in each of these chambers, namely civil law in one case and administrative law in the other, that the civil chamber of the Supreme Court justifies, in its judgment, departing from the interpretation of the administrative chamber as regards the concept of "controller". In addition, it pays particular attention to the obstacles that may arise for potential applicants from the need to bring a civil action in Spain against a foreign defendant (in this case, Google Inc.), which could call into question the objective of the effective protection of the fundamental rights at issue. Thus, in the light of the Google Spain and Google judgment, the civil court held that Google Spain can be considered as being liable for the "processing" in the broad sense.

It should also be noted that, following the judgment of the civil chamber of 5 April 2016, the administrative chamber stated, in a series of judgments delivered on 13, 20 and 27 June 2016, that the obligation to lodge complaints under administrative law solely against Google Inc. as the sole controller excluding Google Spain, is not to impede the protection of fundamental rights. These judgments indicate, in this regard, that said complaints, although directed against a foreign company, may be filed directly with the Spanish Data Protection Agency. In any event, these judgments uphold the case-law of the administrative chamber concerning the concept of "controller", within the meaning of Article 2 (d) of Directive 95/46/EC. It therefore seems necessary to conclude that there is a contradiction within the Spanish case-law as regards the interpretation of that concept.

Tribunal Supremo, Sala de los Contencioso-Administrativo, ruling of 15.03.16 (recurso no. 804/2015)
IA/33751-A

Tribunal Supremo, Sala de lo Civil, ruling of 05.04.16, no. 210/2016 (Recurso no. 3269/2014)
IA/33753-A

Tribunal Supremo, Sala de los Contencioso-Administrativo, ruling of 13 June 1986, nos. 1382/2016 (recurso no. 794/2015),
IA/33752-A
www.poderjudicial.es

[OROMACR]

**** Brief (Spain)***

Liability of the State for breach of EU law - Violation attributable to the tax authorities - VAT Directive - Sufficiently serious violation

The Supreme Court found a sufficiently serious breach of EU law by the tax authorities and ordered the Spanish State to pay compensation to Teknon for the damage suffered by the latter due to the violation of the sixth VAT directive by the State.

At the origin of this decision is the request for reimbursement of the excessive VAT amounts paid by Teknon as part of several tax declarations, pursuant to Article 79 (5) of Law 37/1992, which imposes fixed and predetermined quotas for the determination of the tax base. The applicant relied on the non-conformity of that Article with Directive 77/388/EC. The Supreme Court asserted that such violation was sufficiently serious, insofar as the Spanish State had asked the European Commission, pursuant to Article 27 of that directive, for authorisation to introduce special measures, derogating from the Directive, concerning the article of the national legislation in question.

Tribunal Supremo, ruling of 06.05.16, No. 1887/2016, Rec. 199/2014, ECLI:ES:TS:2016:1887,
http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo

IA/33755-A

[NUNEZMA]

Estonia
**** Brief***

Prevention of the use of the financial system for the purpose of money laundering and terrorist financing - Directive 2005/60/EC - Extension of the scope of that directive by national legislation - Service provider of alternative means of payment - Exchange transactions of the virtual currency* "bitcoin" *against traditional currencies - Inclusion

By decision of 11 April 2016, the Supreme Court ruled on the application of Estonian law on prevention of money laundering and terrorist financing to a service provider, offering exchange of the virtual currency "bitcoin" against traditional currencies. Said law provides inter alia that its rules apply to "financial institutions", including "service provider of alternative means of payment". It means any person performing transactions involving funds having a monetary value that can be exchanged for traditional currency units or that is acceptable to other operators.

The Supreme Court, with particular reference to the Hedqvist judgment (C-264/14, EU:C:2015:718), in which the Court of Justice had ruled that the virtual currency "bitcoin" has no purpose other than that of means of payment, held that a person offering exchange of the virtual currency "bitcoin" for traditional currencies must be considered as a "service provider of alternative means of payment". Therefore, this person falls under the law on prevention of money laundering and financing of terrorism and is, therefore, subject to supervision and inspection by the competent authorities. According to the Supreme Court, the intention of the national legislature, also emerging from the preparatory work in this respect, is unambiguous.

The Supreme Court also held that Estonian legislation is compatible with the provisions of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and the financing of terrorism. More specifically, although the directive does not define the concept of "service provider of alternative means of payment", Articles 4 and 5 of the directive clearly authorise Member States to extend the scope of the directive to professions and categories of companies that carry out activities particularly liable to be used for money laundering or terrorist financing purposes and to maintain more stringent provisions in force to prevent such risks. According to the Supreme Court, the validity of extension of the scope of Directive 2005/60/EC in Estonia is not affected by the failure of the State to comply with its commitment to inform the Commission.

Finally, in an *obiter dictum*, the Supreme Court noted that the application of general obligations of due diligence required by law on the prevention of money laundering and terrorist financing does not take into account the specific characteristics of the virtual currency "bitcoin". In addition, in order to avoid disputes in the future, it enjoined the legislator from specifying the conditions of due diligence obligations for service providers of alternative means of payment, recognising, nevertheless, that the cross-border dimension of transactions related to the "bitcoin" currency makes it difficult for every Member State to regulate this issue separately.

Supreme Court, Administrative Chamber, ruling of 11.04.16, Case No. 3-3-1-75-15, published on the Supreme Court website, www.riigikohus.ee

IA/34411-A

[HUSSAAV]

France

Electronic communications networks and services - Tax on services provided by electronic communications operators - Tax not covered by the provisions on State aid - No restriction on the freedom to provide services

In a judgment of 19 July 2016, the Conseil d'État dismissed the application of SFR, representing the rights of Neuf Cegetel, to be relieved of the tax on services provided by electronic communications operators, provided for by Article 302 bis KH of the General Tax Code, to which the company had been subject during the month of March 2009.

Firstly, the Conseil d'État rejected the argument based on the infringement of Articles 107 and 108 TFEU. On the basis of the ruling of 16 October 2013, TF1 v/s Commission (T-275/11, EU:T:2013:535), the Supreme Administrative Court held that, in the absence of a binding assignment link between the tax at issue and the compensation by the State budget for the loss of advertising revenue of the France Télévisions group, said tax cannot constitute a method of financing an aid measure. This tax constitutes revenue under the general budget of the State contributing to the general conditions for balanced budgets and does not fall within the scope of Articles 107 and 108 TFEU concerning State aid.

Secondly, the Conseil d'État held that the difference in treatment provided for in Article 302 bis KH of the General Tax Code between the operators with a public electronic communications network and virtual mobile network operators, i.e. operators who do not have electronic communications networks but provide electronic communications services, whether they are French or residents of another Member State, even if they have a network in that other Member State, does not undermine the provision of services as stipulated in Article 56 TFEU.

According to the Conseil d'État, such a difference in treatment is justified by the objective pursued by Article 302 bis KH of the General Tax Code of encouraging the installation and maintenance of heavy infrastructure allowing sustainable coverage of the national territory and the European Union, and does not go beyond what is necessary to achieve that objective, since it directly takes into account the actual contribution to the achievement of this objective made by operators having a network.

Finally, the Conseil d'État, referring to the Commission v/s France ruling (C-485/11, EU:C:2013:427), held that the tax under Article 302 bis KH of the General Tax Code does not fall within the scope of Article 12 of Directive 2002/20/EC on the authorisation of electronic communications networks and services. In this regard, the Conseil d'État stressed that this tax is only imposed on operators with a general authorisation already providing their services on the market for electronic communications services to end users and that its operative event is linked not to this general authorisation procedure or to the granting of that right of use but to the activity of the operator consisting of providing services to end users.

Conseil d'État, ruling of 19.07.16, no. 392574, unpublished,
https://www.legifrance.gouv.fr/

IA/33687-A

[BENSIJO]

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Approximation of laws - Procedure for the provision of information in the field of technical standards and regulations and of rules on information society services - Directive 98/34, Article 8 - Technical rule - Definition - Prohibition of informing the customer about the location and availability of transport cars with drivers - Inclusion - Consequences

Hearing an action brought by Uber France, Uber BV and by professional taxi organisations, the Conseil d'État, by a judgment of 9 March 2016, quashed the provisions of Decree no. 2014-1725 relating to special public transport of persons and implementing the prohibition on private hire vehicles ("VTC") to inform customers of their location and availability.

To uphold the appeal, the Supreme Administrative Court relied on Directive 98/34/EC, laying down a procedure for provision of information in the field of technical standards and regulations and rules on services of the information society, under which any member State wishing to adopt a new technical rule must first inform the European Commission thereof. In this regard, the Conseil d'État held that, since the prohibition of provision of information against VTCs is a general requirement for access to an information society service and, therefore, a technical regulation within the meaning of Article 8 of the Directive, the Commission should have been informed about it beforehand, which was not the case. The Conseil d'État therefore ruled that the provisions of the decree implementing this prohibition laid down by law no. 2014-1104 relating to taxis and VTCs, were vitiated by illegality.

However, the Conseil d'État stated that other provisions of the decree imposing new rules of prohibition and obligations in the field of special public transport does not constitute technical regulations within the meaning of Article 8 of the Directive 98/34/EC, insofar as they did not meet the criteria laid down in that provision. The Conseil d'État ruled that it was so, firstly, for the creation of a national

register for the availability and geo-tracking of taxis, as this creation was part of a right and not an obligation and, on the other hand, for provisions relating to the obligation for taxis to be equipped with an electronic payment terminal, said obligation not constituting a service carried out remotely. Finally, the highest administrative court considered that the provisions of Article R.3124-13 of the Transport Code, which allow customers to be linked to non-professional drivers, did not fall under the concept of technical regulation within the meaning of Article 8 of Directive 98/34/EC, given that these provisions are not directly related to an information society service.

It should be noted that a reference for a preliminary ruling, currently pending before the Court of Justice and also involving Uber France, concerns the interpretation of Article 8 of Directive 98/34/EC. This reference raises the question whether Article L.3124-13 of the Transport Code constitutes a new, non-implicit technical regulation relating to one or more information society services within the meaning of Article 8 that Directive, to which the Conseil d'État, in its ruling of 9 March 2016, responded in the negative (pending Uber France SAS case, C-320/16).

Conseil d'État, 6th/1st SSR, ruling of 09.03.16, no. 388 213,
www.legifrance.gouv.fr

IA/33688-A

[MANTZIS]

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Social policy - Protection of the safety and health of workers - Organization of working time - Directive 2003/88 - Article 7 - Entitlement to paid annual leave - Provision having direct effect - Enforceability for an employer with exorbitant powers in relation to the rules applicable in relations between individuals

In the context of the evolution of its case-law relating to paid annual leaves (see *Reflets no*. 3/2012, p. 12-13), in a judgment of 22 June 2016, the Chamber for Social and Labour Matters of the Court of Cassation ruled on the enforceability of Article 7 of Directive 2003/88/EC concerning certain aspects of the organisation of working time for an employer with exorbitant powers in relation to the rules applicable to relations between individuals.

In this case, an employee of the urban transport company of Reims, who was the victim of an accident at work and was on sick leave for more than four years, had been dismissed after the doctor had determined that he was permanently incapacitated. The employee had applied to the Labour Court making various applications relating to the execution and termination of the contract, including the payment of compensation in lieu of paid leave not taken during his period of absence. After the employee's demand was met in appeal, his employer had appealed in cassation. According to the latter, Article L. 3141-3 of the Labour Code makes the acquisition of the right to annual paid leave subject to the performance of actual work; the period during which performance of the employment contract is suspended because of an accident at work or occupational disease is limited to an uninterrupted period of one year.

Insofar as Directive 2003/88/EC does not allow such a derogation from the right to annual paid leave, the Court of Justice, in the Dominguez ruling (C-282/10, EU:C:2012:33), had requested the French court to interpret national law, to the extent possible, in accordance with the directive, in order to ensure its effectiveness. However, the principle of consistent interpretation is limited by the interpretation contra legem. In a dispute between individuals, the national court cannot go against the letter of the provisions of national law which are in complete contradiction with a directive, the obligation to

transpose the EU directives into national law incumbent on the Member States and not on private employers.

The present case raises the question of the nature of the employer in question and, in particular, whether it could be subject to the unconditional and sufficiently precise provisions of Article 7 of Directive 2003/88/EC, which guarantees each worker a right to four weeks of paid annual leave without making, under the case-law of the Court of Justice, a distinction between workers who have actually worked during that period and those absent from work during the reference period because of sick leave (see, Schultz-Hoff ruling, C-350/06, EU:C:2009:18).

In this respect, the Social Chamber initially recalled the Marshall judgment (C-152/84, EU:C:1986:84) which states that when litigants are able to rely on a directive against the State, they can do so regardless of the status of the State, employer or public authority, in order to prevent the State from taking advantage of its lack of knowledge of EU law. It also recalled the Foster judgment (C-188/89, EU:C:1990:313), under which the Court of Justice accepted that unconditional and sufficiently precise provisions of a directive may be invoked by litigants against bodies or entities subject to the authority or control of the State or which have exorbitant powers in relation to those resulting from the rules applicable to relations between individuals.

Secondly, the Social Chamber applied this case-law on the ground that a body, such as the one at issue in this case, namely a private company responsible for a public transport network, in charge under an act of the public authority of carrying out, under the supervision of the latter, a service of public interest, the scope, methods and tariffs of which are fixed by the organising public authority and having, as such, exorbitant powers in relation to the rules applicable in relations between individuals, may be subject to the unconditional and sufficiently precise provisions of a directive, in this case, those of Article 7 of Directive 2003/88/EC.

It follows that an employee of such a company is entitled, directly on the basis of Directive 2003/88/EC, to the payment of a compensatory allowance for paid leave not taken, which was not granted to him under the Labour Code. Conversely, he may not be granted rights exceeding the four weeks guaranteed by that directive.

Court of Cassation, Social Chamber, judgment of 22.06.16, no. 15-20.111,
www.legifrance.gouv.fr

IA/33662-A

[CZUBIAN]

**** Briefs (France)***

Electronic communications networks and services - Authorisation - Directive 2002/20 - Decision approving a modification to the financing arrangements for an authorized television service without resorting to an open procedure

According to the second paragraph of Article 5 (2) of Directive 2002/20/EC on the authorisation of electronic communications networks and services, while the authorisations for the use of radio resources are in principle to be issued after an open procedure, the Member States may exceptionally not use such a procedure where this is necessary for the attainment of an objective of public interest defined in compliance with EU law.

Following the request of La Chaîne Info, the Audiovisual Board (hereinafter "CSA") approved the modification of the financing arrangements for an authorised digital

terrestrial television service (hereinafter referred to as "DTT"), changed from paid to free, without resorting to an open procedure. The Conseil d'État upheld this decision.

Firstly, the Conseil d'État pointed out that, by allowing the CSA to approve the modification, as regards resorting to remuneration on the part of users, of the authorization for an audiovisual communication service, the legislature took account of the failure of the paid distribution business model defined by the regulatory authority at the launch of the DTT, and the benefit that may be associated thereto, in view of the fundamental need for pluralism and public interest, in pursuing the dissemination of a service that opted for this model. Secondly, the Conseil d'État held that it is up to the CSA to assess whether, owing to the lack of an available frequency, the need for pluralism and public interest justifies not resorting to an open procedure. If this is the case, the CSA must issue the requested authorization without infringing the provisions of the directive.

Conseil d'État, judgment of 13.07.16, no. 395824, https://www.legifrance.gouv.fr

IA/33686-A

[WUACHEN]

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Immigration policy - Status of third-country nationals who are long-term residents - Directive 2003/109 - Requirement of sufficient own resources - Indirect discrimination against persons with disabilities - Absence

Following the refusal of his application for a long-term resident card on the grounds of insufficient own resources, a Moroccan national with a disability who held a one-year residence permit challenged the decision of the prefecture. He argued before the trial courts that the requirement of sufficient own resources without recourse to the social aid scheme, provided in Article 5 (1) of Directive 2003/109/EC on the status of third-country nationals who are long-term residents, constituted indirect discrimination to the detriment of persons with disabilities.

According to the Conseil d'État, such a requirement is likely to constitute indirect discrimination against persons with disabilities. However, this requirement is linked to the specific characteristics of the long-term resident status, under which the holder is entitled, inter alia, to reside for more than three months in another Member State. Refusal to issue a long-term resident permit does not preclude the issue of another residence permit and does not in itself affect the right of residence of the person concerned. This refusal therefore does not infringe the right to respect for private and family life guaranteed by Article 8 of the ECHR. Moreover, the requirement of sufficient own resources justified by the legitimate aim of granting long-term resident status only to foreigners enjoying financial autonomy is necessary and proportionate to the purpose of the provision.

Conseil d'État, judgment of 20 June 1986, no. 383333,
https://www.legifrance.gouv.fr

IA/33685-A

[WUACHEN]

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Taxation of non-resident companies - Withholding tax - Dividends distributed by a company established in France - Compatibility

By a decision of 15 June 2016, the Conseil d'État ruled on the legality of the withholding tax regime implemented on the basis of the provisions of Article 119 bis (2) of the

General Tax Code, applicable to dividends distributed by a company established in France to a company established in another Member State of the European Union.

After recalling the relevant case-law of the Court of Justice of the European Union concerning Articles 63 and 65 TFEU on the free movement of capital, the Conseil d'État decided that the Court of Appeal had not erred in law in holding that the deductions at source did not infringe those provisions. As found by the Court of Appeal, first, an investment company established in France would be subject, under the collection of such dividends, to corporate tax. Secondly, a non-resident company which is in a deficit situation and which does not fall under the tax system of parent companies and a company established in France placed in the same situation cannot be regarded as being in an objectively comparable situation, particularly since the determination of the taxable income of these two companies is governed by the tax rules specific to the legislation of each Member State and no provision in French domestic law provides for an exemption from dividends received by a resident company that does not does not fall under the tax system of parent companies when its results are negative. Moreover, as the Court of Appeal had held, since the applicant did not dispute that its capital was not variable and that it was not obliged, at the request of the investors, to repurchase its shares, the Conseil d'État considered that it was not justified in claiming that as an investment company governed by Belgian law, it would find itself in a position objectively comparable to that of certain categories of companies that are exempt from withholding tax and corporate tax on dividends received by French companies.

Conseil d'État, 8th chamber, ruling of 15.06.16, no. 381196,
www.legifrance.gouv.fr/

IA/33683-A

[CSN]

Greece

Equal treatment of men and women - Access to posts in the national police force - Obligation to have completed military service - Condition applicable only to male candidates

By judgment of 11 February 2016, the *Symvoulio tis Epikrateias* (Council of State, hereinafter "SE") ruled on the compatibility of national legislation on the creation of jobs within the national police with the principle of equal treatment for men and women, as guaranteed, inter alia, by Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards the access to employment, vocational training and promotion, and working conditions.

More specifically, Article 9 of the Law 2734/1999 on the recruitment process for national police guards, provided, among the general conditions of recruitment, that all male applicants must have completed their military service. Thus, the applicant not having completed his military service had been denied his candidature on that ground. Following this refusal, the applicant had brought an action for annulment against this decision before the *Dioikitiko Efeteio Athinon* (Athens Administrative Court of Appeal), claiming that this condition of access to employment in the national police force constituted gender-based discrimination. Since the appeal had been dismissed, the applicant had lodged an appeal with the SE.

On appeal, the SE upheld the judgment of the *Dioikitiko Efeteio Athinon*. It found that this requirement under Law 2734/1999 did not constitute discrimination contrary to Directive 76/207/EEC, since the law on military service provided that in peacetime, compulsory

military service applies only to men. Referring to the case law of the Court of Justice (Dory ruling, C-186/01, EU:C:2003:146), the SE recalled that EU law does not preclude that the obligation of military service rests solely with men. The decision of a Member State concerning the limitation of compulsory military service to men is an expression of a choice of military organization to which EU law is accordingly not applicable.

Symvoulio tis Epikrateias, ruling of 11.02.16, no. 456/2016, NOMOS database

IA/34164-A

[PANTEEI]

Hungary

EU law - Rights conferred on individuals - Breach by a Member State of the obligation to transpose a directive - Obligation to compensate for damage caused to individuals

By judgment of 19 November 2014, the Budapest Regional Court (Fővárosi Ítélőtábla) ruled on the responsibility of the Hungarian State for damage caused to individuals due to incorrect transposition of a directive. This judgment is the first in Hungarian case-law to accept State responsibility as a result of the legislature.

At the root of this judgment is a dispute between consumers and a travel organiser who has become insolvent. Insofar as the consumers concerned were reimbursed for only part of the travel expenses already paid, they brought an action, inter alia, against the Hungarian State. In this regard, they argued that the national government decree that had allowed the travel organizer to set a ceiling for the guarantee it had to provide in order to reimburse the funds deposited by consumers in the event of insolvency, was contrary to Article 7 of Directive 90/314/EEC on package travel, package holidays and package tours.

Referring to the Francovich and Others judgment (C-6/90 and C-9/90, EU:C:1991:428), the Budapest Regional Court ruled, firstly, that the responsibility of the State due to a violation of EU law can be established only when the violate directive has conferred rights on individuals, that this violation is sufficiently serious and that there is a direct causal link between the violation and the damage caused.

Referring to the Baradics and Others order (C-430/13, EU:C:2014:32), by which the Court of Justice, hearing a preliminary ruling as part of the same dispute, had confirmed that national rules whose terms did not effectively guarantee that the consumer is compensated for all the funds he has deposited in the event of the insolvency of the travel organiser were contrary to Council Directive 90/314/EEC, the Regional Court concluded that the Hungarian legislature had infringed EU law. It also found that the direct causal link was established insofar as the provisions of the government decree had resulted in the amount of the cover not being sufficient to reimburse all the funds deposited by the consumers.

It should be noted that the Regional Court based its decision on Article 339 (1) of the (former) Hungarian Civil Code which lays down the general rule for tort liability. Consequently, it rejected the application of the special rules on State responsibility which, under Hungarian law, exclude State responsibility for acts of the legislature. Moreover, the Regional Court has also relied on the case-law of the Court of Justice in this matter which, according to the reasoning of this Hungarian court, forms part of the national rules concerning State responsibility.

Since that judgment, another Hungarian court (Fővárosi Törvényszék) after making a

preliminary reference to the Court of Justice (Berlington judgment C-98/14, EU:C:2015:386), by decision of 3 May 2016, also found that the State is responsible as a result of the legislature, in view of the incompatibility with Article 56 TFEU of the national rules prohibiting the operation of slot machines outside casinos, without providing for either a transitional period or compensation for the operators of the gaming rooms.

Fővárosi Ítélőtábla, ruling of 19.11.14, 3.Pf.20.182/2014/2,
Fővárosi Törvényszék, ruling of 03.05.16, 2.P.22.701/2015/35

QP/08074-P1
QP/08316-P1

[VARGAZS] [HEVESRE]

Ireland

Border control, asylum and immigration - Asylum procedure - Right of asylum seekers to work on national territory

By a judgment of 14 March 2016, the Court of Appeal held that an asylum seeker has no right under the Constitution to work in Ireland.

The asylum seeker concerned, a Burmese national, had arrived in Ireland on 16 July 2008 and had applied for refugee status the following day. No decision on granting refugee status had been rendered till May 2013. The basic requirements of the applicant, such as food and housing, had been met by the State.

Pending a decision on his asylum application, the applicant had received a potential job offer and, through his lawyer, had applied to the Minister for Justice and Equality for temporary permission for employment and residence in the territory, under the Immigration Act 2004 or the Refugee Act 1996. His application had been rejected.

The applicant then lodged an appeal against this rejection before the High Court. He argued, inter alia, that the refusal constituted a violation of his rights under Article 40.3 of the Constitution, a violation of Articles 7 and 15 of the Charter of Fundamental Rights of the European Union and a violation of Articles 8 and 14 of the ECHR. His application was also dismissed by the High Court.

The Court of Appeal, having stated that Article 15 of the Charter can only pertain to third-country nationals who have already obtained a work permit in a Member State, examined the constitutional question of whether the asylum seeker had a right to work or earn a living as a "personal right" under Article 40.3 of the Constitution. In this regard, the Court of Appeal, while recognising that the fact of being employed contributes to the dignity and well-being of a person, held that Article 40.3 cannot be interpreted as granting to an asylum seeker, the right to work or earn a living in the national territory, this right being intimately linked to the right of citizens to reside in the territory.

This decision was appealed before the Supreme Court.

Court of Appeal, ruling of 14.03.16, NHV v/s Minister for Justice and Equality & Ors, [2016] IECA 86,
www.courts.ie

IA/34329-A

[CARRKEI]

Italy

Right to freedom of religion - Regional regulations establishing the conditions for the construction of places of worship in Lombardy - Obligation for religious groups other than those having concluded agreements with the State to comply with certain conditions in order to obtain authorisation to build a place

of worship - Violation of Articles 3, 8, 19 and 117 (2) (h) of the Constitution

In a judgment of 23 February 2016, the Constitutional Court ruled on the constitutionality of certain provisions of the law of the Lombardy region (no. 12/2005) concerning the rules for the construction of places of worship in that region.

As a preliminary matter, the Court stated that the principle of secularism has constitutional value and that it does not imply that the State be indifferent to religions but that it safeguards the freedom of religion in the context of pluralism of faith and culture.

The Court added that the freedom to freely profess religious faith, to propagate it and to practice it in private or in public, as enshrined in Article 19 of the Constitution, is a fundamental aspect of the freedom of religion, recognised for all religious faiths. In this regard, the Court has clarified that the existence of a concordat, such as that between the State and the Catholic Church, cannot constitute grounds for discrimination between religious faiths, under penalty of violating the principle of equality of all religious faiths before the law (provided for in Article 8 of the Constitution) and the freedom to freely profess a religious faith individually or collectively. The Court further stated that the minority status of a certain religious faith cannot justify inferior protection of its religious freedom in relation to that guaranteed to other more widespread faiths.

In light of these principles, the Court declared the regional law as unconstitutional insofar as it had introduced: (i) discrimination between the Catholic religion and religious faiths having signed an agreement with the State on the one hand, and all other religious faiths on the other, by stipulating, only for the latter, conditions to be fulfilled in order to obtain a building permit; (ii) the obligations for the applicant faith in the present case to obtain two opinions favourable to the construction and to install a video surveillance system outside the place of worship in direct contact with the local police.

However, the Court considered that the obligation, stipulated for all religious faiths other than the Catholic religion, to sign an agreement for urban development with the municipal administration and to include in said agreement an immediate resolution clause in the event of unauthorised activities within the place of worship, was compatible with the Constitution. This obligation is proportionate and meets the objective of ensuring the harmonious development of urban centres.

The provision requires each new place of worship to be integrated into the architecture of the Lombard landscape and was also found to be in conformity with the Constitution insofar as it refers to objective criteria in order to identify the characteristics to be respected.

Finally, the Court asserted the inadmissibility of the pleas raised concerning the non-conformity of the regional legislation to Article 117 (1) and (2) of the Constitution, read in conjunction with Articles 10, 17 and 19 TFEU and the Articles 10, 21 and 22 of the Charter of Fundamental Rights of the European Union, because of the absence in the order for reference of any arguments concerning the applicability of the EU provisions in the present case.

Corte costituzionale, ruling of 23.02.16, no. 63,
www.cortecostituzionale.it

IA/34418-A

[LTER]

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Ne bis in idem principle - Scope - Application of the basic principles of criminal law to administrative offences - Possibility of applying the rule prohibiting a second

criminal trial in administrative proceedings - Exclusion

In two judgments of 2 March and 21 April 2016, the Court of Cassation ruled on the ne bis in idem principle and, more specifically, on the application of certain essential principles of criminal law to administrative offences, as well as on the implementation of an administrative procedure and a criminal proceedings to judge the same offence.

In the first ruling, the Court of Cassation affirmed that the principles stated by the ECtHR in the Grande Stevens and Others v/s Italy ruling (judgment of 4 March 2014, application nos. 18640/10, 186447/10, 18663/10, 18668/10 and 18698/10), according to which the conduct of criminal proceedings for offences that had already led to an administrative penalty, of a substantially criminal nature, violates the ne bis in idem principle, only involve the application of rules to the fair trial without the principle of lex mitior being applied in relation to administrative sanctions in the domestic legal order.

The case was referred to the Court of Cassation by a banking institution and a director who had been subject to an administrative penalty imposed by Consob (National commission for companies and the stock exchange) for failure to apply, inter alia, the principles stemming from the Grande Stevens ruling.

The Court of Cassation stated in its judgment that the principles in criminal matters cannot be extended to administrative offences and that the ECtHR ruling only implies that the rules relating to a fair trial apply to proceedings involving significant property-related consequences. Moreover, according to the Italian High Court, the principles laid down in the Grande Stevens judgment must be considered in the light of a fair trial but cannot lead to the characterisation of an administrative provision as criminal in the domestic legal order.

Accordingly, the Court of Cassation dismissed the appeal and found that the principle of "tempus regit actum" was applied to the administrative punitive measures and not the principle of “favor rei”.

In the second ruling, the Court of Cassation stated that Article 649 of the Criminal Procedure Code (hereinafter “CPP”) providing for the prohibition of a new criminal trial where the accused has already been tried for the same offence cannot be interpreted autonomously by the trial judge, in the light of Article 4 of Protocol no. 7 of the ECHR, as interpreted in the Grande Stevens ruling.

The matter was referred to the Court of Cassation by the Attorney General of the Republic at the Court of Appeal of Turin in order to obtain the quashing of the judgment for which the Court of Asti had acquitted the accused and had decided that he was not to be prosecuted because he had already been the subject of administrative penalties for the same offence.

According to the High Court, on the one hand, the trial court cannot interpret the national criminal provision in a manner consistent with the ECHR, since the national provision refers to several criminal proceedings for the same act. On the other hand, it must raise a priority question of constitutionality in relation to said Article 4 of Protocol 7 of the ECHR in the part where Article 649 CPP does not provide for the applicability of the prohibition of a second trial if the accused was tried, by an irrevocable decision, for the same act in an administrative proceeding.

It should be noted that the Constitutional Court ruled on the ne bis in idem principle by declaring inadmissible the priority question of constitutionality raised by the Court of

Cassation concerning the compatibility of Article 649 CPP with Article 117 of the Constitution in relation with Article 4 of Protocol 7 to the ECHR and, in particular, the application of an administrative procedure and a criminal prosecution for the same act in the light of the Grande Stevens judgment.

The Constitutional Court stated that its intervention would have had the sole effect of preventing the conduct or conclusion of a second proceeding for the same act without establishing any order of priority between the criminal penalty and the administrative penalty. Consequently, in the Court's view, the possible confirmation of the merits of the question merely prevented the imposition of the double sanction, but it did not provide a definitive solution to the problem of application of two procedures to the same act.

The Constitutional Court concluded that this final solution could only be ensured by the intervention of the national legislature.

Corte Suprema di cassazione, ruling of 02.03.16, no. 4114,
http://www.penalecontemporaneo.it/upload/1457173447Sentenza%20Consob.pdf
Corte Suprema di cassazione, ruling of 21.04.16, no. 25815,
http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snpen&id=./20160623/snpen@s30@a2016@n25815@tS.clean.pdf
Corte costituzionale, order of 08.03.16, no. 102,
http://www.giurcost.org/decisioni/2016/0102s-16.html

IA/34414-A
IA/34415-A
IA/34417-A

[GLA]

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Personal data - Protection of individuals with regard to the processing of such data - Search engines on the Internet - Search carried out from using the name of a person - Right to erase - Serious crimes - Exclusion

By a decision of 31 March 2016, the personal data protection officer (garante per la protezione dei dati personali, hereinafter "the controller") ruled on the right to digital oblivion in matters of terrorism. A matter was referred to the controller by an ex-terrorist of the 1970s and 1980s, having finished serving his sentence. He had asked Google to delete certain URLs and certain search suggestions displayed by the auto-fill function when his name and the word "terrorist" was entered in the search bar.

According to the applicant, the indexed information was extremely misleading and detrimental, causing him serious personal and professional harm. Moreover, the time elapsed, lack of novelty of the information and his new life were not such as to justify public access to this information.

In its decision, the controller stated, first of all, that the constituent element of the right to be forgotten is the lapse of time in relation to the occurrence of the events constituting the subject matter of the information obtained from the search engines. However, where such information relates to serious crimes, the time criterion is limited and requests for deletion must be assessed less favourably and on a case-by-case basis.

The controller then observed that the facts referred to in the information cited made a mark on the collective memory insofar as they concerned one of the darkest periods in Italian history, in which the applicant was a principal figure. Moreover, despite the time elapsed, the public's attention to the events of the period in question is still very high. This statement was corroborated, according to the controller, by the actuality of references related to the URLs in question.

Finally, the Comptroller considered that the right of the public to obtain information on terrorism should prevail over the right to erase. Accordingly, in view of the fact that the Google Spain and Google ruling (C-121/12) was not applicable in this case, it dismissed the action.

Garante per la protezione dei dati personali, decision of 31.03.16, no. 152, filed on 21.06.16, *http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/4988654*

IA/34416-A

[GLA]

**** Briefs (Italy)***

Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP - Directive 1999/70 - Measures to prevent the misuse of successive fixed-term employment contracts - National legislation authorizing, pending the completion of the competition for the recruitment of staff of State-run schools, the renewal of fixed-term employment contracts to fill vacancies

By a judgment of 15 June 2016, the Constitutional Court ruled on the Italian legislation that allows the administration to recruit, without any limit, technical or administrative teaching staff, in order to fill the staff vacancies of a school.

The Constitutional Court was initially seised of an appeal in respect of said legislation because of its non-conformity with the first paragraph of Article 117 of the Constitution read in conjunction with Article 5 of the ETUC, UNICE and CEEP framework agreement on fixed-term work. In this context, the Constitutional Court referred to the Court of Justice for a preliminary ruling on the compatibility of the national legislation with EU law.

Referring to the answers given by the Court of Justice in its Mascolo and Others ruling (C−22/13, C−61/13 to C−63/13 and C−418/13, EU:C:2014:2401), the Constitutional Court invalidated said law since it allows the potentially unlimited renewal of said employment contracts without establishing objective and transparent criteria for verifying whether such a renewal actually meets a genuine temporary requirement. The Court also assessed the existence, in the relevant legislation, of measures to penalise the abuse of such employment contracts. In this regard, by introducing under law no. 107/2015 new penalties in the event of abuse of such fixed-term contracts, such as a right to compensation for the damage suffered, it recognised the existence of sanctions of a proportionate, effective and dissuasive nature.

Cour costituzionale, ruling no. 187 of 15.06.16, *www.cortecostituzionale.it*

QP/08064-P1

[LTER]

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Recourse to surrogacy abroad - Declaration of birth made abroad - Request for transcription of the certificate in Italy - Qualification as an offence committed abroad - Exclusion

In a judgment of 5 April 2016, the Court of Cassation ruled that it was not an offense for an Italian couple to have resorted to surrogacy in a country where that practice did not constitute an offence.

The public prosecutor appealed to the Court of Cassation following a judgment of the Naples Court acquitting the couple in question. According to the court, the couple did not want to commit a criminal offence by resorting to the impugned conduct, to the point that it went to a foreign country where surrogacy is not an offence.

In its judgment, the Court of Cassation held, firstly, that the national case-law on the punishment of offences committed abroad is not unambiguous and that the essential condition for prosecuting a person for an offense committed abroad is that the latter is punishable, not only under Italian law, but also by the legal order of the country in which it was committed.

Furthermore, according to the Italian High Court, the couple having resorted to surrogacy acted on the basis of the Italian rules providing that the details of the birth of Italian nationals abroad must be provided to the consular authority, which is responsible for sending the copy to the Italian authorities, and must be carried out in accordance with local rules by the competent authorities.

Accordingly, the Court of Cassation, by upholding the judgment of the trial court, ruled out that the mere application for transcription of the birth certificate made abroad in accordance with the local rules may constitute an offence.

Corte Suprema di cassazione, ruling of 05.04.16, no. 13525,
http://www.foroitaliano.it/wp-content/uploads/2016/04/cass-pen-13525-16.pdf

IA/34413-A

[GLA]

Latvia
**** Brief***

Social security for migrant workers - Health insurance - Benefits in kind provided in another Member State - Obligation to obtain prior authorisation by the competent institution of the Member State of origin

By a judgment of 31 March 2016, the Supreme Court interpreted Article 22 of Regulation (EEC) No. 1408/71 on the application of social security schemes for salaried employees, non-salaried employees and their family members who move within the European Union.

In that judgment, the Supreme Court ruled on whether the care received should be classified as urgent or planned, and therefore, whether Article 22 (1) (a) or (c) applies in this case.

In the present case, the applicants had submitted to the competent authority in Latvia an application for reimbursement of medical expenses for the care received by their child in Germany. Latvian legislation provides for prior authorisation from the competent authority before travelling to another Member State for non-urgent medical treatment. This authorisation had not been sought in the present case, since the parents had considered that the medical intervention was urgent.
The Supreme Court concluded that the lack of prior authorisation as such cannot automatically lead to the denial of reimbursement of costs. Nevertheless, it is necessary to ascertain whether the obligation prescribed under national law is compatible with EU law and whether the particular circumstances of each individual situation must also be assessed.

According to the Supreme Court, the criteria for obtaining the authorisation are objective, clear and non-discriminatory, and the procedure for obtaining such authorisation and the possibility of appeal against the decision of the competent authority is known. In some cases, the authorisation may be obtained on the day of submission of the request. However, the applicants have neither submitted such a request nor explained why the authorisation was not requested.

Consequently, the Supreme Court held that the dismissal by the lower court of the remedy for reimbursement of costs was well founded.

Latvijas Republikas Augstākā tiesa, ruling of 31.03.16, case no. SKC-25/2016

IA/34419-A

[BORKOMA]

Malta

Fundamental Rights - Right to a fair trial by an independent and impartial court - Violation

In a judgment of 12 February 2016, the Constitutional Court upheld a decision of a court of first instance that certain rules governing the formation, composition and functioning of the Industrial Relations Tribunal were contrary to the right to a fair trial under Article 39 (2) of the Maltese Constitution and Article 6 (1) of the ECHR.
In the present case, the court of first instance, which was hearing a matter submitted by a trade union organisation, had examined the procedure followed for the appointment of judges of the Industrial Relations Tribunal and the factors which ensured the independence of the judges vis-à-vis the administration. In that regard, it had pointed out that any judicial authority established by law for the purpose of determining the existence or extent of a civil obligation must be independent and impartial within the meaning of Article 39 (2) of the Constitution. Thus, where an action to that effect is brought by a person before such a judicial authority, his case must be heard fairly within a reasonable time.

Referring to the relevant case law, in particular the Clarke v/s UK judgment of the ECtHR of 25 August 2005 (application no. 20166/92), the court of first instance had found that the security of tenure of judges appointed by the government is an essential means to guarantee the independence of the judiciary. In this regard, the court of first instance had held that the "ad hoc" procedure for the appointment of judges of the industrial relations tribunal by the government, as well as their legal obligation to take into account, in the exercise of their judicial functions, the social policy of the same government, infringed Article 6 (1) of the ECHR. It had also found a violation of the right to a fair trial because an appeal of a decision of the industrial relations tribunal could only take place on points of law.

In the light of these observations, the court of first instance found that there had been a violation of Article 39 (2) of the Maltese Constitution and Article 6 (1) of the ECHR. This decision was upheld on appeal by the Constitutional Court on 12 February 2016.

Constitutional Court, judgment of 12.02.16, General Workers Union / L-Avukat Generali (application no. 19/08 AF),
www.justiceservices.gov.mt/

IA/33684-A

[BORGELI]

Netherlands

Border control, asylum and immigration - Asylum policy - Procedure for granting and withdrawing refugee status - Directive 2013/32 - Procedure for examining an application for asylum - Lack of evidence supporting the credibility of the application for asylum - Margin of appreciation of the competent authorities - Judicial review - Scope

By a decision of 13 April 2016 delivered in a case concerning an asylum application filed by an Afghan national, the Conseil d'État

interpreted Article 46 (3) of Directive 2013/32/EU relating to the common procedures for the granting and withdrawal of international protection. According to that provision, Member States shall ensure that an effective remedy, before a court against a decision concerning an application for international protection, provides for a full and exhaustive examination of both the facts and the legal points, including, where appropriate, an examination of the requirements for international protection under Directive 2011/95/EU, at least in the context of appeal procedures before a court of first instance.

At the first instance, it was felt that the competent Dutch authorities had been justified in concluding that the asylum application of the Afghan national in question was not credible.
Hearing the case, the Conseil d'État upheld the trial judgment, holding that the court had rightly respected the margin of appreciation of the competent authorities.

According to the Conseil d'État, when the asylum seeker does not provide any evidence supporting his asylum claim, the Dutch authorities have a margin of appreciation as to the credibility of the asylum seeker's application. In such a case, the administrative court cannot substitute its appreciation of the credibility of such an application with that of said authorities, since the latter are in a better position, in that respect, given their experience in the field.

Admittedly, as a result of the entry into force of Directive 2013/32/EU, the judicial review of the credibility of asylum applications has been strengthened in the Netherlands, as the Dutch administrative courts did not perform a marginal scrutiny of said applications in the past. However, according to the Conseil d'État, this does not imply an independent assessment of the credibility of the asylum claim by the administrative court, or that the decision of the competent authorities is no longer the basis of appreciation of the administrative court.

Lastly, the Conseil d'État pointed out that it is not necessary to refer the matter to the Court of Justice for a preliminary ruling insofar as the aforementioned interpretation of Article 46 (3) of Directive 2013/32/EU corresponds to the general scheme and purpose of that directive and to the case-law of the Court of Justice and the ECtHR. The fact that two Dutch courts have given a different interpretation of this provision is, according to the Conseil d'État, irrelevant in this respect.
Raad van State, judgment of 13.04.16, www.rechtspraak.nl, ECLI:NL:RVS:2016:890,

IA/34162-A

[SJN]

Poland

Judicial cooperation in civil matters - Jurisdiction and the enforcement of judgments in civil and commercial matters - Regulation No. 44/2001 - Jurisdiction clause - Scope - Litigation relating to tort liability related to a contractual relationship subject to a clause conferring jurisdiction - Inclusion

By order of 7 April 2016, the Sąd Najwyższy (Supreme Court, hereinafter "SN") ruled on the scope of a jurisdiction clause contained in a contract between an applicant residing in Poland and the defendant having its registered office in Austria.

In the present case, the parties were bound by a furniture supply agreement dated 2010 which contained the jurisdiction

clause according to which "the only court with jurisdiction to hear the parties [is that of the city] of W. [in Austria]". In 2012, the parties signed an agreement for an "additional compensation" for the Austrian partner amounting to 2% and then 3% of the value of the sale. The Austrian partner itself deducted that remuneration from the price of the furniture. In 2014, the furniture supplier filed a claim for damages with a court in Poland. It argued that the deduction of the additional remuneration made by the Austrian partner constituted an act of unfair competition consisting in the collection, in addition to the profit margin, of costs for the admission of the goods for sale. The lower courts had dismissed the appeal on the ground that, under the jurisdiction clause, only the Austrian courts had jurisdiction to hear the case.

On appeal by the applicant, the SN upheld the assessment of the lower courts. Referring to the case law of the Court of Justice, particularly the Powell Duffryn ruling (C-214/89, EU:C:1992:115), the SN ruled that the jurisdiction clause contained in the 2010 agreement also applied to the 2012 agreement, the latter being closely linked to said agreement by supplementing its provisions, both of which constitute a single legal relationship between the parties. As regards the tortious source of the obligation invoked by the applicant in support of his action on the merits of the case and his conclusions justifying the jurisdiction of the Polish courts, the SN took the view that, in the present case, the act giving rise to the legal action was liable to cover both contractual and tortious liability. However, according to the SN, in cases where these two sources of liability are involved, the jurisdiction clause applicable to disputes resulting from a legal relationship extends not only to disputes relating to contractual liability but also to disputes based on tortious liability, provided that the claims that resulted in these disputes are closely related to any claims based on contractual liability. Otherwise, the application of the jurisdiction clause in a dispute between individuals would be dependent on the applicant's decision alone, namely the choice of the legal basis for his request.

Sąd Najwyższy, order of 07.04.16, II CSK 465/15,
http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20csk%20465-15-1.pdf

IA/33744-A

[PBK]

Portugal

EU law and national law on competition - Fines - Determination of amount - Criteria under national law - Assessment of the constitutionality

In a judgment of 21 June 2016, the Constitutional Court had to rule on the constitutionality of a provision of the national legislation on competition which corresponds, in substance, to Article 23 (2) of the Regulation (EC) No. 1/2003 on the implementation of competition rules laid down in Articles 81 and 82 of the EC treaty (now Articles 101 and 102 TFEU). According to that provision, the national competition authority may impose fines not exceeding 10% of the total turnover in the previous business year on companies and associations of companies when, deliberately or by negligence, they have violated the provisions relating to anti-competitive practices.

The judgment of the Constitutional Court originates from an appeal brought by a company (hereinafter

the "applicant") which was held responsible for a violation of the provisions of the national legislation on competition concerning abuse of dominant position and Article 102 TFEU and, in respect of these violations, has been fined €3.73 million by the Portuguese competition authority.

In support of its action, the applicant alleged violation of the principles of legality, legal certainty, separation of powers and proportionality. It considered that the provision on the determination of the fine establishes an extremely broad and indeterminate punitive framework, leaving the Competition Authority the power to determine the amount of the fine, and that the use of turnover as a criterion for determining the applicable fine is an imperceptive and inappropriate criterion.

According to the ruling of the Constitutional Court, it follows from the latter's case-law that the different nature of the wrongful conduct, censorship and penalties between administrative law and criminal law justify that the principles applicable in criminal matters are not automatically applicable in the field of administrative law. Moreover, since the levels of illegality and seriousness of the impugned conduct and the economic situation of the companies can be very different, the minimum and maximum limits of the fine serve to cover the disparity of possible situations. Finally, according to the Constitutional Court, this disparity is necessary to provide a deterrent to the existing punitive framework.

This judgment is of particular interest in the context of the discussion concerning the administrative or (quasi) criminal nature of competition law, following the Menarini judgment of the ECtHR (judgment of 27 September 2011, application no. 43509/08), which recognised the fine imposed by the Italian competition authority as criminal in nature the within the meaning of Article 6 (1) of the ECHR.

Tribunal Constitucional, ruling of 21.06.16, no. 400,
http://www.tribunalconstitucional.pt/tc/acordaos/20160400.html

IA/34181-A

[MHC]

Czech Republic

Approximation of laws - Unfair business-to-consumer commercial practices - Directive 2005/29 - National regulations establishing a prohibition in principle on commercial practices making the participation of consumers in a game or a contest subject to the purchase of products or services - Inadmissibility

In its ruling of 24 August 2016, the Supreme Administrative Court (Nejvyšší správní soud) examined the lawfulness of an administrative decision imposing a fine on a company operating a network of supermarkets in the Czech Republic for organising in 2012 eight promotional contests for consumers. The administrative penalty had been imposed on the basis of the national legislation governing lotteries and other similar games, according to which any contests making the participation of consumers subject to the acquisition of a product or service, with the exception of contests with low-value prizes.

In the course of its examination, despite the parties' lack of argument, the Nejvyšší správní soud raised, without consultation, a plea alleging violation of EU law. In that regard, referring to the principle of the legality of sentences, which also applies in

the field of administrative penalties, it noted that a penalty could not be imposed on the basis of a national provision contrary to a rule of EU law with priority of application. On the basis of the case-law of the Court of Justice (Plus Warenhandelsgesellschaft ruling, C-304/08, EU:C:2010:12), the administrative high court held that such a prohibition in principle was contrary to Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market directly applicable to the facts of the case.

In the present case, the disputed contest constituted, according to the administrative high court, a commercial practice within the meaning of that directive. The Nejvyšší správní soud recalled that the latter provides complete harmonisation in this domain, preventing Member States from adopting stricter measures. In particular, it exhaustively lists practices that must automatically be regarded as unfair, without there being any need to examine the specific circumstances of the case. However, the organisation of games or contests making the participation of consumers subject to the acquisition of a product or service is not one of these practices. In these circumstances, the almost total prohibition of contest for consumers provided for by the Czech legislation goes beyond what the directive stipulates. Such contests should be prohibited only after an individual and specific examination of the case.

Moreover, according to the Nejvyšší správní soud, such a prohibition and the resulting penalties could not have been considered more acceptable, if they had strictly fallen under rules governing gambling activities. As this latter area is not harmonised by EU law, Member States enjoy a wider margin of appreciation. However, in the view of the administrative high court, even if the contests, such as those at issue in the present case, were to be regarded as gambling, their organisation would be unlawful and punishable only in the absence of an authorisation required by law. However, to the extent that the legislature has not provided for the possibility of seeking authorisation for such contests, a penalty for that reason would also not be possible.

In view of these considerations, the Nejvyšší správní soud held that the administration had inflicted on the applicant a penalty in violation of the requirements of EU law and, accordingly, annulled the contested judgment of the court of first instance and the previous administrative decisions.

Nejvyšší správní soud, ruling of 24.08.16, 8 As 136/2015-51,
www.nssoud.cz

IA/33746-A

[KUSTEDI]

**** Briefs (Czech Republic)***

The Nejvyšší soud (Supreme Court) was hearing an appeal in cassation brought by a university in a dispute with a teacher with whom it had concluded several successive fixed-term contracts. In the presence of the judges, the teacher challenged the fixed term of his last contract by invoking the provisions of the Labour Code (law no. 262/2006 Sb.), according to which a contract is considered to be open-ended when the full term of successive fixed-term contracts exceeds two years and when the employee informs his employer of his willingness to continue to perform his functions. Conversely, the university maintained that the contract had been concluded for a fixed term on the basis of the provisions of law no. 111/1998 Sb. on

higher education, which allow for the linking of fixed-term contracts between universities and their teachers.

In its judgment of 26 January 2016, the Nejvyšší soud annulled the decisions of the lower courts according to which the provisions invoked by the university were not applicable in the present case because they were contrary to Directive 1999/70/EC concerning the framework agreement ETUC, UNICE and CEEP on fixed-term work. Unlike the lower courts, the High Court accepted the university's arguments by holding that the last fixed-term contract concluded between the parties was valid, provided that it complied with the provisions of the law on higher education, constituting an exemption, provided for by the Labour Code, from the rule limiting the linking of fixed-term contracts. In that regard, it pointed out that that conclusion cannot be called into question by the fact that those provisions were contrary to Directive 1999/70/EC. First, Article 5 of the Appendix to that directive does not have a direct effect insofar as its wording is not sufficiently precise and unconditional. Second, the indirect effect of the directive cannot lead to a *contra legem* interpretation of the contested national provisions. Consequently, their application should not be disregarded on the pretext of their contradiction with Article 5 of the Appendix to Directive 1999/70/EC.

Nejvyšší soud, ruling of 26.01.16, 21 Cdo 2513/2014,
ECLI:CZ:NS:2016:21.CDO.2513.2014.1
www.nsoud.cz

IA/33747-A

[KUSTEDI]

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In its judgment of 15 December 2015, the Supreme Court (Nejvyšší Supreme Court) had to rule on the question of whether the insurer of a person jointly and severally liable for a road accident is entitled to appeal directly against the insurer of another person jointly responsible for this accident to ask it for reimbursement of what the first insurer paid in addition to the share of responsibility of its insured party.

The Nejvyšší soud invalidated a restrictive interpretation of the national provisions relating to insurance for civil liability in respect of motor vehicle traffic, adopted by the lower courts. Unlike the latter, the Nejvyšší soud found that the insurer of a co-perpetrator of an accident was entitled to a direct right of action against the insurer of the other co-perpetrator of the accident. The interpretation that grants the right to take such an action only to persons who have suffered damage in the accident or that, conversely, would restrict the circle of persons against whom the insurer may turn, in the event of subrogation in the rights of its insured party, to only the co-perpetrators of the harmful act, would be contrary to the scheme and purpose of the contested national provisions.

In reaching that conclusion, the Nejvyšší soud relied inter alia on the multiple-language versions of Directive 2000/26/EC on the approximation of the laws of the Member States relating to insurance for civil liability resulting from motor vehicle traffic. It recalled that Article 3 of this directive guarantees injured parties a right of direct action against the insurance company covering the civil liability of the person liable and that, injured party refers to any person entitled to compensation for damage caused by vehicles. A comparison of the multiple-language versions would indicate, according to the Nejvyšší soud, that this concept includes not only persons

who have suffered direct harm but also those who have suffered indirectly.

Nejvyšší soud, ruling of 15.12.15, 23 Cdo 4210/2013,
ECLI:CZ:NS:2015:23.CDO.4210.2013.1
www.nsoud.cz

IA/33748-A

[KUSTEDI]

Romania

Unfair clauses in consumer contracts - Directive 93/13 - Action for the annulment of unfair terms introduced by an association for consumer protection - Finding of unfair nature by the national court - Extent of jurisdiction of said court

By a decision of 19 April 2016, the Constitutional Court rejected the objection of unconstitutionality concerning the provisions of Articles 12 and 13 of law no. 193/2000 on unfair terms in consumer contracts, raised by several banking institutions in connection with the various legal actions for cancellation of unfair terms in credit agreements concluded with consumers.

From the outset, it should be emphasised that the wording of Articles 12 and 13 of law no. 193/2000 was amended by law no. 76/2012, which entered into force on 1 October 2013. Under the new provisions, when a national court has found that a contractual term is unfair, it obliges the professional to remove it, from both the content of the ongoing contracts and the general terms and conditions inserted by a professional in the various contracts in question. However, in order for a decision to be able to produce such effects, it is necessary that legal action for the annulment of such an unfair term be brought by an association for consumer protection.

In that regard, it should be noted that Articles 12 and 13 of law no. 193/2000 transpose into national law Articles 6, 7 and 8 of Directive 93/13/EEC on unfair terms in contracts concluded with consumers.

In this legislative context, the applicants alleged that the provisions of Articles 12 and 13 of law no. 193/2000, as amended by law no. 76/2012, were contrary to several constitutional provisions, including the principle of non-retroactivity of the law.

By examining this objection of unconstitutionality, the Constitutional Court held that an action brought by an association for consumer protection and allowing the courts to remove an unfair term is an action in rem, suspending the effects of such a term and will produce effects only in the future. On the basis of the case-law of the Court of Justice on the consumer protection system laid down by Directive 93/13/EEC, which takes particular account of the situation of inferiority in which the consumer finds himself vis-à-vis the professional, the Constitutional Court held that provisions such as those laid down in Articles 12 and 13 of law no. 193/2000 are in conformity with such a system.

The Court has also pointed out that the case-law of the Court of Justice relating to the interpretation of Articles 6 and 7 of Directive 93/13/EEC does not preclude a finding of nullity of an unfair term in the general conditions of contracts concluded with consumers, in the context of an injunction brought in the public interest of consumers by an organisation for consumer protection, affects all consumers who have entered into a contract subject to those general conditions, including those

which were not parties to the injunction. It should be emphasised that, in order for an ongoing contract to continue following the finding of nullity of some of its unfair terms, the professional concerned is obliged to request the consumer to renegotiate the contractual conditions.

In accordance with its case-law as well as the case-law of the Court of Justice on non-retroactivity and the immediate application of procedural rules, the Constitutional Court rejected the arguments concerning the retroactivity of the provisions of Articles 12 and 13, holding that these provisions lay down procedural rules that must be immediately applied, enabling the courts to remove in the future terms that they consider to be unfair. In this sense, the Constitutional Court emphasises that a law on immediate application applies not only to legal situations arising from its entry into force but also to the future effects of legal situations arising prior to that entry into force. As such, a law does not apply retroactively when it removes, for the future, the effects of a legal situation arising under the former law.

Thus, on the basis of its own case-law and the provisions of law no. 193/2000, the Court rejected the objection of unconstitutionality as a whole.

Curtea Constitutionala, ruling of 19.04.16, no. 245,
https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx

IA/34412-A

[PRISASU]

United Kingdom

Judicial cooperation in civil matters - Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility - Regulation No 2201/2003 - Determination of the court better placed to hear the case - Applicability of Article 15 to child-protection appeals based on public law

In a judgment of 13 April 2016, the Supreme Court ruled on the applicability of Article 15 of Regulation (EC) No 2201/2003 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ("Brussels Iia" regulation), to child-protection appeals based on public law. In principle, the courts of the State in which the child usually resides have jurisdiction to rule on the case. However, said Article 15 allows, by way of exception, the referral of the case to a court better placed. Although a preliminary ruling by the Court on the applicability of such an exception to these appeals is awaited shortly in the CAFA case, C-428/15 (PPU), the Supreme Court considered that the wording of that article was clear and ruled on the case.

Thus, the Supreme Court ruled that the British courts had jurisdiction to rule on the custody of two Hungarian nationals who had been born in the United Kingdom and had always lived there. Victims of abuse and neglect, they had been separated from their parents and placed in a foster family, also in the United Kingdom. Subsequently, the local authority had initiated an adoption procedure for the children, without the consent of their parents. However, in the meantime the mother, who had returned to Hungary, had requested, under Article 15 of the Brussels IIa Regulation, the referral of questions concerning the custody of her children before the Hungarian courts.

The Supreme Court held that the best interests of the children required a decision without further delay. It accordingly made a decision on the assumption that Article 15 applies to child-protection appeals based on public law, without waiting for the Court to rule on that point.

According to the Supreme Court, it was necessary to determine whether a transfer of jurisdiction was in the best interests of the child. The transfer to the Hungarian courts would have excluded the possibility of the children staying with the host family where they had been placed for a long time, which would have been contrary to their best interests.

Supreme Court, ruling of 13.04.16, N (Children), [2016] UKSC 15,
Supreme Court, ruling of 22.06.16, D (A Child), [2016] UKSC 34,
www.bailii.org

IA/ 34325-A
IA/ 34326-A

[HANLEVI]

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The Government of the United Kingdom cannot trigger Article 50 TEU on its own

On 3 November 2016, the High Court of Justice (England & Wales) ruled on the possibility for the executive to trigger on its own the mechanism in Article 50 TEU following the "Brexit" referendum of 23 June 2016.

As there were several individuals wishing to bring a case before the courts of England and Wales, the High Court appointed Gina Miller and Deir Dos Santos, two British citizens, as principal applicants. Other interested parties participated in the proceeding as interested parties and interveners. In addition, representatives of the Scottish and Welsh governments attended the hearing as observers.

For three days on 13, 17 and 18 October 2016, the said parties and the Minister responsible for organising the exit from the European Union, as defendant, pleaded before a three-member panel comprising the Lord Chief Justice, the Master of the Rolls and a Lord Justice of Appeal, reflecting the importance attached to the case.

The importance of the case is also reflected in the procedure followed. Exceptionally, the appeal which has already been lodged by the United Kingdom government will be examined directly by the Supreme Court. Thus, the case overrides the Court of Appeal, under a procedure known as a "leapfrog appeal". The hearing before the Supreme Court is scheduled for early December 2016.

Note that under Article 50 (1) TEU, "[a]ny Member State may decide, in accordance with its constitutional rules, to withdraw from the Union". Paragraph 2 states that "[t]he Member State that decides to withdraw shall notify its intention to the European Council".
The essential element of the decision is the finding that a notification in accordance with Article 50 TEU would inevitably lead to changes in national law. The High Court assumes that such a notification would imply a definitive withdrawal of the United Kingdom from the Union. In this regard, it will be reiterated that under Article 50 (3) TEU, "[the treaties shall cease to be applicable to the State concerned from the date of entry into force of the withdrawal agreement or, failing that, two years after notification".

The High Court inferred from this that the prerogatives available to the Minister

responsible for organising the exit of the United Kingdom from the European Union (Crown prerogative) did not enable the latter to carry out the notification provided for in Article 50 TEU (paragraph 111: "does not have power [...] to give notice"), without, however, deciding on the concrete procedures to be implemented for that purpose. It must be pointed out that the High Court did not rule as a last resort.

Finally, it should be noted that this decision differs from a decision of the High Court of Justice in Northern Ireland dated 28 October 2016, in which it held that the Government of the United Kingdom alone may give a notification in accordance with Article 50 TEU. In its view, such a notification would only probably entail amendments to the national law. The scope of this decision, however, seems limited to the legal context of Northern Ireland. The applicant confirmed his intention to appeal to the Supreme Court.

High Court, ruling of 03.11.16, R (Miller) v. Secretary of State for Exiting the European Union, [2016] EWHC 2768 (Admin),
High Court of Northern Ireland, ruling of 28.10.16, McCord's (Raymond) Application, [2016] NIQB 85,
www.bailii.org

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IA/ 34330-A

[HANLEVI]

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

Common customs tariff - Tariff headings - Bra suitable for mastectomized women - Classification in heading 9021 of the Combined Nomenclature

On July 13, 2016, the Supreme Court unanimously ruled that a bra suitable for women who have undergone a mastectomy is an orthopaedic appliance and must therefore be classified in Heading 9021 of the Combined Nomenclature. In its judgment, the Supreme Court examined the case-law of the Court of Justice, and in particular the Uroplasty ruling (C-514/04, EU:C:2006:464) and Unomedical ruling (C-152/10, EU:C:2011:402).
Supreme Court, ruling of 13.07.16, Amoena (UK) Ltd / Revenue and Customs Commissioners [2016] UKSC 41,
www.bailii.org

IA/34327-A

[PE]

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Union law - Application - Union law and national law - Referendum on the maintenance of the United Kingdom within the Union - Exclusion of the right to vote of British citizens expatriated for more than 15 years - Violation of the right of free movement of persons - Absence

On 24 May 2016, the Supreme Court dismissed the appeal of two expatriate British citizens against a judgment of the Court of Appeal by which the latter had dismissed their appeal. The applicants had invoked the incompatibility with EU law of the deprivation of the right to vote, in the context of the referendum on the maintenance of the United Kingdom within the Union, of British citizens living abroad for more than 15 years.

Like its case-law concerning the right of prisoners to vote in European elections *(Reflets No. 3/2013*,p. 48-49), the Supreme Court held that, even assuming that the EU law could be applied, which was not the case, it cannot validly be

argued that the exclusion violated the free movement of persons in the Union on the grounds specified by the High Court and the Court of Appeal. The latter had held that the exclusion of the right to vote was too uncertain, indirect and negligible to constitute a restriction on freedom of movement and that, in any event, it was unrealistic to assume that the absence of a right to vote would discourage nationals from settling abroad or convince expatriate citizens to return permanently to the United Kingdom.

Supreme Court, decision of 24.05.16, R (on the application of Shindler and another) / Chancellor of the Duchy of Lancaster and another [2016] UKSC 0105,
www.supremecourt.uk/news/permission-to-appeal-decision-24-may-2016.html

IA/34328-A

[PE]

Sweden

Copyright - Works of art permanently placed in public places - Limitations of copyright - Images reproducing the said works of art - Transmission of the images in question on the Internet

Following a reference from the Stockholms Tingsrätt (Court of first instance of Stockholm), the Högsta domstolen (Supreme Court), by decision of 4 April 2016, interpreted Article 24, paragraph 1 of the Swedish copyright law, particularly the concept of "reproduction" ("avbildning") therein, in the context of transmission of such reproduction on the Internet.

Article 24 provides that the right of exclusivity enjoyed by the author of a work may be limited, in the case of reproductions of works of art placed permanently in public places, provided that the purpose of these reproductions is to advertise for an exhibition or marketing of the said works, in order to promote them, or when the works concerned are part of a collection, or a catalogue, except in digital format.

In this case, an association representing the interests of 80,000 visual artists had brought an action before the Stockholms tingsrätt against Wikimedia Sverige, a Swedish non-profit association. It accused the latter of having infringed the copyright of its members by publishing photos of works of art permanently placed in public places, on the Wikimedia Sverige site, which was freely accessible to the public and supplied by the association. The site provides a database of public art in Sweden available to the public, educational system and tourism sector.

Wikimedia Sverige had argued that the publication of images of the works of art was legal, as Article 24 of the copyright law included not only the right of reproduction of the works concerned, but also a right of transmission of the reproductions to the public. According to Wikimedia Sverige, that provision could not be interpreted more strictly than the relevant EU law, namely Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.

The Supreme Court interpreted Article 24 in the light of Directive 2001/29/EC, in particular Article 5 (5) thereof, and found that the limitation of copyright provided for in Article 24 is based on the public interest of freely reproducing images of cities or landscapes without prejudice to any copyright that may be involved. This limitation applies even when the work of art in question is the main reason for the

image, and when that image is used in order to be marketed.

The Supreme Court found that making the works accessible through a database open to the public gives them a significant commercial value, which must be reserved for the creator of the work. Since Article 24 of the Swedish law must be interpreted narrowly, the publication of the images at issue on the Wikimedia Sverige website could, of course, be a matter of "public interest" under Article 24, but the limitation of the creators' right of exclusivity had to be regarded, considering the extensive use of the images on the site and the absence of compensation granted to the creators, as going far beyond the objective of this article.

The Supreme Court found that, in view of the current state of the Swedish copyright law, the right to use works of art using new technologies belongs entirely to the creators of those works. Consequently, Wikimedia Sverige is not entitled to transmit the images stored on its database to the public, regardless of whether the transmission was for profit or not.

Högsta domstolen, decision of 04.04.16, case no. 0849-15,
http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2016/2016-04-04%20%C3%96%20849-15%20Beslut.pdf

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[JON]

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Trademark law - Sign in the shape of a letter - Risk of confusion

In a judgment of 2 June 2016, Svea hovrätt (Court of Appeal in Stockholm) specified the extent of the protection of a trademark consisting of a single letter by finding that there is a risk of confusion between the distinctive sign of m&m's (property of Mars) and the sign of m (property of Kraft).

At the end of an agreement between Mars and Marabou/Freia (now Kraft Foods Sverige Intellectual Property AB, hereinafter "Kraft") concluded in 1998, whereby Mars refrained from selling M&M's in Sweden, the American company Mars Incorporated decided to market M&M's in Sweden from January 2009 through its subsidiary Mars Sverige AB.

Kraft filed an injunction before the Stockholms Tingsrätt (Court of First Instance of Stockholm) against Mars Inc. and Mars Sverige AB for the import, marketing and sale of confectionery and chocolate products, in particular under the trademarks m&m's, M&M's and m, citing, firstly, that its national brand m had been registered from December 2009 for confectionery and chocolate products and, secondly, that the sign had in any event acquired a distinctive character even before that date.

According to Kraft, there was a risk of confusion between its brand m and the individual signs m, m&m's and M&M's which were used by Mars for its chocolate-coated peanuts and dragées. The signs m and m&m's were used on the product packaging, while the sign M&M's was used as text for the marketing of these products.

After the request was granted by the court of first instance, Mars filed an appeal against the judgment of the court before the Svea hovrätt.

The Svea hovrätt, under pain of penalty, prohibited Mars Sverige AB and Mars Incorporated from using the signs m and

m&m's for confectionery and chocolate products in its business activity. According to said court, Kraft enjoyed exclusive rights to the sign m for chocolate-coated peanuts, because it was already placed on the market at the time when Mars Sverige AB began to use the signs m and m&m's in Sweden in January 2009. Admittedly, according to the Court of Appeal, the sign m had only a weak initial distinctive character. However, the extended use has reinforced this distinctiveness.
Given the risk of confusion between the signs m and m&m's and the sign m, in particular due to the fact that the signs were used for products of the same nature, that the 'm' signs are more or less identical and that the sign m of Kraft and the sign m&m's of Mars were rather similar from the visual point of view, visual appearance being more important than pronunciation of the signs for products in this case, the Svea hovrätt found that Mars Sverige AB was guilty of counterfeiting. Conversely, this was not considered to be the case with respect to the M&M's sign.

In addition to Mars Sverige AB, the Svea Hovrätt also banned Mars Incorporated from using the signs m and m&m's; the company was found guilty of making business activity possible for Mars Sverige in Sweden and thus contributed to said counterfeiting.

Svea hovrätt, ruling of 02.06.16, case no. T-5406-15, summary published on the Svea hovrätt website
http://www.svea.se/Om-Svea-hovratt/Nyheter-fran-Svea-hovratt/Svea-hovratt-/

IA/33750-A

[JON]

2. Other countries

United States

Racketeering Influenced and Corrupt Organization Act (RICO) - Regulations aimed at prosecuting criminal conduct of economic operators - Scope - European Union civil actions against US cigarette manufacturers because of their involvement in smuggling - Claim for compensation for damage suffered outside the United States - Exclusion

By judgment of 20 June 2016, delivered in the *RJR Nabisco v. European Community* case, the Supreme Court ruled that the federal law to combat organised crime by facilitating the prosecution of criminal conduct of economic operators, the *Racketeering Influenced and Corrupt Organization Act (RICO),* is, in certain circumstances, applicable to activities carried out outside the United States. Nevertheless, the private plaintiff must allege and demonstrate that it has suffered damage in the United States, and therefore, in this case, the European Union's claim for compensation has not been upheld.

The Supreme Court thus put an end to a 16-year dispute between the European Union and its Member States, represented by the Commission, and RJR Nabisco. The origin of this dispute dates back to the early 2000s, when, on the basis of the RICO, the Commission filed civil actions in the United States District Court for the Eastern District in New York against certain American cigarette manufacturers because of their involvement in the smuggling of cigarettes into the European Union. In particular, the Commission sought compensation for damage resulting from the smuggling activity and consisting mainly of the loss of customs duties and value added tax that would have been paid in the event of legal import, as well as

injunctions to put an end to the impugned conduct.

These proceedings led the companies concerned to bring actions before the Court mainly for, inter alia, the annulment of the Commission's decisions giving rise to these actions. The Tribunal's decision dismissed the actions as part of the combined Philip Morris and Others v. Commission cases (T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, EU:T:2003:6) and was the subject of an appeal before the Court. By way of the Reynolds Tobacco and Others v. Commission ruling (C-131/03 P, EU:C:2006:541) delivered in this case, the Court confirmed that the Commission's decision to bring legal action did not constitute an act subject to appeal.

This case ended with the decision of the Supreme Court, which, while recognising the extraterritorial applicability of the RICO, held that the provisions providing for the possibility of bringing a civil action do not allow for compensation to be obtained for damage suffered outside the United States. As a result, the European Union's request for compensation was rejected.

United States Supreme Court, ruling of 20.06.16,
https://www.supremecourt.gov/opinions/15pdf/15-138_5866.pdf

IA/34186-A

[VMAG]

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Stored communications act - Territorial scope - Search warrant ordering Microsoft to provide e-mails of a consumer, stored on a server abroad - Exclusion

On 14 July 2016, the United States Court of Appeal for the Second Circuit ruled against the United States government by holding that the legislation in force does not authorise courts to issue and enforce, through service providers located in the United States, warrants aimed at seizing the content of consumer emails stored on servers abroad. This decision is a major victory for the safeguarding of the right to protection of personal data of consumers.

In this case, the government had obtained in December 2013, a search warrant issued by a court on the basis of Article 2703 of the Stored Communications Act (SCA), ordering Microsoft to provide emails of one of its users suspected of being involved in drug trafficking. These emails were stored on a server in Dublin (Ireland). Microsoft had refused to disclose the contents of the e-mails in question and, relying, inter alia, on Rule 41 of the Federal Rules of Criminal Procedure, had argued that such a warrant had territorial limitations.

In 2014, the United States District Court for the Southern District of New York rejected Microsoft's request to have said warrant partially cancelled. It concluded that the fact that Microsoft had its headquarters in the United States was more important than the geographical location of the data and, in addition, the place where the government examines the content of the e-mails (United States) was to be the relevant "place of seizure".

As a result of this ruling, Microsoft appealed to the United States Court of Appeal for the Second Circuit, which held that this practice constituted an illegal extraterritorial application of the SCA. According to this court, the fact that an online service provider is established in the United States is not sufficient to justify the

warrant for importing to the USA data that were stored on a server abroad and owned by a foreign citizen, without taking into account any legal obligations imposed by the country where the data are stored.

It should be mentioned that the Justice Department still has a remedy before the Supreme Court.

United States Court of Appeal for the Second Circuit, ruling of 14.07.16, *https://www.justsecurity.org/wp-content/uploads/2016/07/Microsoft-Ireland-2d-Cir-Opinion-20160714.pdf*

IA/34187-A

[VMAG]

B. National legislations

Member States

Belgium

Royal Decree establishing the list of safe countries of origin

Pursuant to article 57/6/1, paragraph 4, of the law of 15 December 1980 on access to the territory, stay, establishment and return of the foreigners, the list of safe countries of origin is determined at least once a year by a royal decree designating the countries where there is no particular fear of persecution within the meaning of the international convention relating to the status of refugees (the Geneva Convention) or there are no serious reasons to believe that the asylum seeker runs a real risk of serious harm in the event of a return. The inclusion of a country in this list of safe countries of origin paves the way for the application of a specific procedure for refusing to take into consideration applications for asylum of persons from that country, with shorter deadlines for processing these applications.

Since 2012, Albania has been consistently qualified as a "safe country of origin" in successive royal decrees. However, in two judgments of 23 October 2014, the Conseil d'État partially annulled the Royal Decrees laying down the list of safe countries of origin for the years 2012 and 2013, insofar as Albania had been retained therein. By two judgments of 7 May 2015 and 23 June 2016, the Conseil d'État, for the same reasons, partially annulled the royal decrees adopted in this regard in 2014 and 2015. The Conseil d'État based its annulment decisions on the fact that the rates of recognition of asylum seekers from Albania remained high.

Notwithstanding the now consistent case-law of the Conseil d'État, Albania was again designated as a safe country of origin by the Royal Decree of 3 August 2016 establishing the list of safe countries of origin. In this respect, the Belgian Government argued, inter alia, that the conclusions of the abovementioned judgments of the Conseil d'État concerning Albania had lost their relevance, especially since the protection rate had fallen considerably in relation to Albania.

Royal Decree of 03.08.16, implementing Article 57/6/1, paragraph 4, of the law of 15.12.80 on access to the territory, stay, establishment and removal of foreigners, establishing the list of safe countries of origin, M.B. 29.08.16, *http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2016080325&table_name=loi*

[EBN]

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Ethics of lawyers and wearing religious symbols

In an additional article added to the code of ethics of lawyers, the German- and French-speaking Bar Association of Belgium (OBFG) ruled on whether lawyers should wear distinctive signs in court.

A new article is thus inserted into the fundamental principles and general duties of the code, in order to prohibit lawyers from wearing a distinctive sign, whether of religious, philosophical or political origin, when carrying out their functions in court.

As a reminder, any breach by the lawyer of these principles and obligations constitutes an ethical violation likely to be the subject of disciplinary proceedings.

This addition comes into force on 1 November 2016, the first day of the fourth month following that of its publication in the Belgian Official Gazette.

Regulation of 13.06.16 of the German- and French-speaking Bar Association amending Article 1.4 and inserting Article 1.5 of the Code of Ethics of Lawyers, M.B., 27.07.16

[NICOLLO]

Ireland

Criminal law providing for the removal of certain criminal convictions

A new legislation, "The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016", came into force in April 2016. It provides that certain criminal convictions may be removed.

Said legislation provides that, when a person aged 18 or over has been convicted of an offence, and at least seven years have elapsed since the conviction, the conviction may be removed. However, the legislation is limited in its application to a single conviction. Consequently, if a person has been convicted more than once, his convictions cannot be removed. However, limited exceptions apply in this context, particularly where several convictions have been issued following a single incident or at the same time. Multiple convictions concerning certain offences affecting public order or traffic offences before the District Court may also be removed. Conversely, a conviction for a sexual offense, an offence judged by the Central Criminal Court, or an offence with a term of imprisonment of more than 12 months cannot be removed.

If the criteria for assessing the removal of the conviction are met, the person concerned must be considered as having never been convicted or even having never committed an offence.

http://www.irishstatutebook.ie/eli/2016/act/4/enacted/en/pdf

[CARRKEI]

Italy

Law governing civil unions between persons of the same sex and cohabitation

On 5 June 2016, the rules governing civil unions between persons of the same sex and cohabitation came into force (regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze). This is a very important reform for Italy, which has been debated for a long time and will have effects not

only in civil matters but also in other branches of law.

By the first part of this law, which regulates the constitution of a civil union, its personal and property effects and the dissolution of the union, the legislature gives legal recognition to same-sex couples who request for it.

The legislature has organised the new system by taking marriage as a model with respect to patrimonial relations and those with the public administration. In addition, special regulations on pension, retirement and social security are also applicable to same-sex partners.

Conversely, the standards that apply to relations between parents and children and those relating to adoption have not been extended to civil unions. Children born during the civil union will be considered only as children of the biological parent; the provision for the stepchild adoption which was initially proposed has been removed from the final text. However, the possibility of applying what is prescribed for adoption remains. In this regard, it is useful to note that the adoption law provides for the possibility for the court to authorise a spouse living with the parent of a child to adopt the child in order to promote the institution of family and ensure the harmonious development of the minor.

The constitution of the union allows the couple to choose a common name and entails reciprocal obligation of moral and material assistance as well as cohabitation. It should be noted, however, that the fidelity obligation was removed from the final legislation.

In the conclusion of this first part, the legislature has incorporated provisions relating to the dissolution of the union. In particular, the legislature extended the provisions for protection of the weakest party stipulated for divorce in civil unions. In addition, two dissolution causes have been identified. The first, which is objective in nature, arises from the death of the partner, a criminal conviction or a dissolution obtained abroad. The second, which is subjective in nature, applies when the partners express the will to dissolve the union before the head of the civil registry.

The second part of the law is devoted to the recognition of the rights of heterosexual or same-sex partners. It is a minimum protection regulation relating to the granting of certain rights and offers the possibility of extending this protection by the conclusion of a cohabitation contract.

According to the law, two adults who are together in a stable relationship based on an emotional bond and mutual moral and material assistance and who have no family ties or conjugal relations may be considered de facto cohabitants.

The rights recognised by the law concern the personal and property aspects. As regards the first, the rights of spouses and family members in cases of sickness or death are extended to cohabitants. As regards property rights, the legislature has laid down rules concerning their common residence and particularly the right to continue living at that residence for a certain number of years in the event of the death of a partner (who is also the owner) as well as the rights relating to the rent agreement. Other provisions are made for participation in the management of family businesses and the distribution of dividends.

In the event of a breach of the cohabitation arrangement, the court establishes the right

of the cohabitant to receive support allowance from the other when he or she needs it or cannot provide for his or her subsistence.

Law of 20.05.16, n. 76 published in J.O no. 118 of 21.05.16,
http://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg

[GLA]

Netherlands

Draft law for a referendum on membership of the European Union

On 22 June 2016, the Conseil d'État delivered its opinion on the draft law to organise a referendum in the Netherlands on its membership of the European Union.

The Conseil d'État has proposed reconsidering said draft law. According to it, the proposed question, i.e. "Are you for or against the membership of the Netherlands to the European Union?" is not adequately clear and concrete. Moreover, the explanatory statement of the draft law would not address the possible consequences of a negative result of the referendum or alternative solutions to participation in the European Union.

Furthermore, the Conseil d'État was of the opinion that consultative referendums call into question representative democracy, since in such a democracy, it is for the government and the Parliament to take a stand on issues such as membership to the European Union, in accordance with the applicable procedures. Moreover, to follow the outcome of the referendum without a re-examination as to the substance would be contrary to the Dutch constitution.

Lastly, and in the event that such a referendum was actually organised, the Conseil d'État pointed out that not only the residents of the Netherlands, as provided for by the draft law, but also those of Aruba, Curaçao, and Saint-Martin should be able to vote.

Raad van State, opinion W04.16.0057/I of 22.06.16,
www.raadvanstate.nl,
IA/34163-A

[SJN]

Poland

Law on the Constitutional Court

In its opinion of 11 March 2016, the Venice Commission of the Council of Europe considered that the solutions provided for by the law of 22 December 2015 on amending the law on the Constitutional Court, such as a higher quorum, the requirement of a two-thirds majority to adopt decisions and a strict regulation that prevents urgent cases from being addressed, are constraints that undermine the effectiveness of the Court and, as a result, jeopardise the rule of law and the functioning of the democratic system (the law and opinion were presented in *Reflets No. 1/2016, p. 48).*

Following this opinion, the Parliament adopted the new law of 22 July 2016 on the Constitutional Court. At first glance, the new text takes into account the remarks of the Venice Commission. The constraints mentioned therein have been considerably reduced, and in some cases even eliminated. For example, the number of judges in the Grand Chamber was reduced from 13 to 11 and the majority to adopt decisions for that body went from two-thirds to a simple majority.

Hearing several requests for review of the constitutionality of the new law, the Constitutional Court delivered its judgment on 11 August 2016, i.e. before the date of

entry into force of the text under review. This was only possible in application of the law on the Constitutional Court of 2015 (presented in *Reflets No. 3/2015, p. 55-56*) that had expanded the possibility for this court to hear requests in chambers and not in court. The latter option had been considered, inter alia, in cases where the legal problem of a case was sufficiently explained in the previous case-law of the Constitutional Court.

In this regard, the Constitutional Court first found, in its judgment, that the latter condition was present in the present case, while the legal problems at issue, namely the violation of the principle of separation of powers, independence of the judiciary as well as the impediment to the effective functioning of the Constitutional Court, had previously been dealt with in the K 34/15, K 35/15 i 47/15 rulings. Consequently, the case could be heard in chambers.

On the merits, the Constitutional Court ruled a number of provisions of the new law as unconstitutional. One of these provisions provides for the obligation to decide cases in the Grand Chamber only at the request of three judges, the obligation to settle the appeals, in principle, in chronological order of their receipt, the obligation to postpone the hearing in the case decided in the Grand Chamber in the absence of the Attorney-General, and the obligation to postpone the deliberations in such a case for a period of three months in case of objection by four judges against the proposed judgment, such a postponement being repeatable after these three months. The Constitutional Court held, in essence, that the provisions referred to violated the principle of effectiveness and reliability of public institutions, as reflected in the preamble to the Constitution.

At the time of publication of this issue of *Reflets*, the decision of the President of the Court on the promulgation of the judgment of 11 August 2016 in the Official Gazette has still not been implemented by the government.

Law of 22.07.16 on the Constitutional Court (JO position 1157),
http://isap.sejm.gov.pl/DetailsServlet?id=WDU20160001157

[PBK]

United Kingdom

Law to reduce illegal immigration

On 12 May 2016, a new law to strengthen the system against illegal immigration received royal approval. The text, which follows a 2014 law on the subject (see *Reflets No. 3/2014*, p. 60-61), is part of the government's objective of creating a "hostile environment for illegal immigrants". Some of its provisions are of particular importance since, for the first time in the area of immigration, private actors are obliged to perform duties that are normally the prerogative of the State, on pain of criminal or civil penalties. The law applies to all foreign nationals who require a residence permit in order to enter the territory of the United Kingdom.

Seven new additions are worth mentioning. First, irregular work becomes a criminal offence punishable by imprisonment for up to six months. In addition, the salary received is recoverable as proceeds from the offence. Previously, an offence was committed only when the residence permit contained a condition prohibiting the person concerned from working. In this regard, new powers are conferred on immigration officers to close companies for up to 48 hours in certain cases. Secondly, an employer is prohibited from

hiring a person when he or she has reasonable grounds to believe that the person is not entitled to work because of his status as an illegal immigrant. The law provides for a maximum penalty of five years' imprisonment in this regard. In the same vein, it is now necessary to justify legal residence in the United Kingdom both to sell alcoholic beverages and to obtain and retain a driving license.

Similarly, driving a car without proof of legal residence is an offence. In this regard, new powers are conferred on immigration officers to search places and persons for the purpose of seizing driving licenses issued to persons without legal residence in the United Kingdom. In addition, banks are prohibited from opening a bank account for persons who do not have a residence permit. As for the existing accounts, the banks must notify the Home Minister about all those that must no longer be used because of the holder's status as an illegal immigrant.
Moreover, the law prohibits landlords from renting residential property to persons who do not have a residence permit, under penalty of civil sanction. As for employers, an owner who leases property to an illegal immigrant is liable to imprisonment for up to five years, if he knows or has reasonable grounds to believe that the tenant does not have a residence permit. New powers are also given to landlords to expel a tenant who is an illegal immigrant.

Finally, the law broadens the scope of the system introduced by the 2014 law which allows the expulsion of an immigrant whose appeal against the decision refusing to grant a residence permit is pending, unless there is a risk of serious and irreversible damage for the person concerned in the event of a return to his country of origin. While this system was originally intended only for perpetrators of crimes as well as for persons whose presence on the national territory is likely to disturb public order, it now applies to all immigrants covered by the 2016 law.

Immigration Act 2016,
www.legislation.gov.uk

[PE]

Slovakia

Overhaul of the civil procedure and administrative justice

As part of an overhaul of the civil proceedings, the National Council of the Slovak Republic adopted on 21 May 2015, three new procedural codes, namely the civil litigation procedure code (zákon č. 160/2015 Z. z. Civilný sporový poriadok, hereinafter the "CSP"), the civil non-litigation procedure code (zákon č. 161/2015 Z. z. Civilný mimosporový poriadok) and the administrative justice code (zákon č. 162/2015 Z. z. Správny súdny poriadok), which entered into force on 1 July 2016. The overhaul aims to increase judicial efficiency and speed up decision-making processes.

Among the principles governing the interpretation of these codes are the principles of legal certainty and the protection of legitimate expectations laid down in Article 2 of the CSP, the essential corollary of which is that everyone can legitimately expect his dispute to be decided in accordance with the case-law of the highest courts, including that of the Court of Justice. Thus, any departure from that case-law must be duly reasoned. The key role of the Najvyšší súd (Supreme Court) in applying the principle of legal certainty is reflected in the creation of its Grand Chamber for cases where a chamber of the Najvyšší súd intends to depart from the case-law of that court.

It should be noted that Article 3 of the CSP provides for the principle of the interpretation of procedural provisions in accordance with EU law. Conversely, the new legislation does not explicitly establish that the courts are bound by the decisions of the Court. In this regard, it is clear from the explanatory statements to the CSP that, apart from decisions on the annulment of a measure, the Court's judgments are in principle binding only inter partes. Nevertheless, according to those reasons, this does not prejudice in any way the binding nature of a preliminary ruling for the referring court.

In order to rationalise the judicial process, the parties are required to assert the facts and provide evidence within the period prescribed by law or determined by the court hearing a specific dispute. In addition, a request for the disqualification of a judge on grounds of bias, when considered to be manifestly unfounded, may be penalised by a fine of up to 500 Euros.

One of the new additions is the strengthening of the procedural protection of persons claiming a violation of the principle of non-discrimination and the protection of consumers and employees, through procedural rules that are less stringent than those governing other contentious proceedings. For example, the right of the court to examine evidence ex officio should be mentioned.
As regards the remedies, the CSP implies, inter alia, a limitation on the possibility of lodging an appeal in cassation. It can only be brought against the judgments and, among the orders, against only those that put an end to the proceedings.

The civil non-litigation procedure code exhaustively lists the types of out-of-court proceedings, the new ones of which are, for example, the procedure for the return of minors abroad in the event of unlawful removal or retention (reflection of the obligation under the Hague Convention on the civil aspects of international child abduction) and the procedure for placing the child in a foster family for adoption. Among the new additions, it is also necessary to mention the strengthening of the powers of notaries in the context of certain out-of-court procedures, in particular the succession procedure.

Concerning the reform of administrative justice, the legislature has, for the time being, given up the creation of a Supreme Administrative Court and, consequently, the Najvyšší súd remains the Supreme Court ruling on appeals. Given that the rules governing administrative litigation have so far been part of the former civil procedure code, the new code is, in a way, the first codification of administrative justice.

Unlike the previous legislation, it is no longer possible, in principle, to bring an action against administrative decisions that have not become final. Beyond the procedure under common law (general administrative appeal), the Code introduces certain specific procedures, such as the procedure on administrative offenses and the procedure in social and asylum matters.

Furthermore, in the field of the environment, the new legislation gives the public concerned extensive procedural rights, including the right to take legal action. This approach takes into account the objectives of Article 9, paragraphs 2 and 3, of the Aarhus Convention, in view of the judgment of the court in the Lesoochranárske zoskupenie case (C-240/09, EU:C:2011:125).

As far as remedies are concerned, it should be pointed out that decisions in administrative proceedings can no longer be the subject of an ordinary appeal. On the other hand, the Code introduces two extraordinary remedies, namely an appeal in cassation and an application for review. The non-conformity of a decision of the administrative court with a decision of the Court, the Council or the Commission, which is binding on the parties to the main proceedings, constitutes a justification for the review. This ground for review, existing in similar terms in the context of civil proceedings, reflects the contribution of the Kühne & Heitz ruling (C-453/00, EU:C:2004:17).
Zákon č. 160/2015 Z. z. Civilný sporový poriadok. Zákon č. 161/2015 Z. z. Civilný mimosporový poriadok. Zákon č. 162/2015 Z. z. Správny súdny poriadok.
https://www.slov-lex.sk/vyhladavanie-pravnych-predpisov

[VMAG]

Sweden

Law on patent and market courts

The Swedish Parliament passed a law (2016: 188) on the patent and markets courts based on a bill of the Swedish government proposing the establishment of specialised courts in matters of intellectual property, commercial practices and competition (prop. 2015/16:57). This law became effective on 1 September 2016.

By this reform, which aims to put an end to a system of judicial review that had previously been divided among several courts, notably the Patent Court of Appeal (Patentbesvärsrätten) and the Market Court (Marknadsdomstolen), the latter have been replaced by two new courts, the Patent and Market Court (Patent- och marknadsdomstolen), and the Patent and Market Court of Appeal (Patent- och marknadsöverdomstolen).

The Stockholm Court of First Instance (Stockholms Tingsrätt) and the Stockholm Court of Appeal (Svea hovrätt) will, as from the entry into force of the law, respectively act as first and second instance courts for matters concerning intellectual property disputes. As a general rule, the latter's decisions cannot be appealed before the Supreme Court, with the exception of cases of criminal law and appeals that are significant for guiding the application of the law. The latter, therefore, require a declaration of admissibility by the Supreme Court.

The reform was deemed necessary in order to ensure quality and efficiency in judicial proceedings on intellectual property, commercial practices and competition, in particular in order to prevent a litigant, as in the previous system, from being obliged to conduct several parallel trials in order to defend his interests. Given the relatively small number of appeals in this area, a concentration of the appeals in only two courts was considered desirable, thereby enhancing the knowledge of the judges appointed to deal with the cases concerned, which are often very complex in nature.

In addition to the administrative organization of the new specialized courts, the new law provides for a procedural regulation to be applied by these new specialized courts. This includes the possibility of dealing with cases jointly, as well as the possibility for parties to invoke new evidence or proof.

Law (2016: 188) on Patent and Market Courts,
https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016188-om-

patent--och-marknadsdomstolar_sfs-2016-188

[JON]

C. Doctrinal echoes

On the Schrems judgment (C-362/14, EU:C:2015:650) finding that Decision 2000/520/EC and the Safe Harbour Agreement were invalid

By its judgment of 6 October 2015 in the Schrems case, the Court, meeting in the Grand Chamber, held, firstly, that Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data, read in the light of the Charter of Fundamental Rights of the European Union (hereinafter the "Charter"), must be interpreted as meaning that a decision by which the European Commission finds that a third country ensures an adequate level of protection does not preclude a supervisory authority of a Member State from examining a person's request for the protection of his rights and freedoms with regard to the processing of personal data concerning him and that have been transferred from one Member State to that third country, when the person claims that the law and practices in force in that country do not provide an adequate level of protection. Secondly, the Court also held that the contested decision was invalid, namely the Commission's Decision 2000/520/EC, in accordance with Directive 95/46/EC on the relevance of the protection provided by the Safe Harbour principles, and by the frequently asked questions relating thereto, published by the United States Department of Commerce (often referred to as the "Safe Harbour Agreement").

On the role of national supervisory authorities

Several authors report that the role of national supervisory authorities is reinforced by the ruling commented upon[1]. Regarding the functions of these authorities, **Skrinjar Vidovic** observes that "the judgment defines three aspects of [their competences] […]: they are obliged to examine complaints from individuals regarding the treatment of their personal information by other countries; they are entitled to bring cases in front of the national court to question the validity of adequacy decisions; and they are entitled to suspend the transfer of personal information to other countries when they believe it is appropriate"[2]. For its part, **Perraki** considers that the ruling somehow transforms the national authorities into quasi-judicial bodies, although their role in the protection of personal data is always limited by EU law[3].

Likewise, many authors point out that the judgment reinforces the independence of the national authorities: thus, **Wolff** and **Stemmer** note that "[d]"ie Entscheidung des EuGH stärkt die institutionelle Selbständigkeit der Aufsichtsbehörden, die zumindest partiell von der Bindungswirkung der

[1] SALVATORE S., "La Corte di giustizia restituisce (temporaneamente) agli Stati membri la competenza a valutare l'adeguatezza del livello di protezione dei dati personali soggetti a trasferimento verso gli Stati Uniti", Studi sull'integrazione europea, nº 3, 2015, p. 623-640, p. 635.

[2] SKRINJAR VIDOVIC, M., "Schrems v Data Protection Commissioner (Case C-362/14): Empowering National Data Protection Authorities", Croatian Yearbook of European Law & Policy, vol. 11, 2015, p. 259-275, p. 265.

[3] PERRAKI, P., "Dedomena prosopikou charaktira", Elliniki Epitheorisi Evropaïkou Dikaiou, 2015, p. 491-496, p. 493.

Kommissions-entscheidung freigestellt werden"[4]. However, some of these commentators observe that there is a certain contradiction between the independence granted by the Court to the national authorities and the exclusive jurisdiction it reserves with regard to the finding of invalidity of the acts of EU law: for example, **Uría Gavilán** states that "resulta paradójico que el Tribunal declare, por un lado, […] que es el único competente para declarar la invalidez de un acto de la Unión, apoyándose en la necesidad de salvaguardar la seguridad jurídica y, por otro, permita que las agencias nacionales de protección de datos puedan suspender las transferencias de datos de forma unilateral"[5].

On the incompatibility of the Safe Harbour Agreement with the provisions of the Charter

As regards, firstly, the role of the Schrems judgment in the context of the case-law on the protection of personal data, several authors emphasize the relationship between the judgment commented upon and the judgments in the Digital Rights Ireland and Seitlinger e.a. C-293/12 and C-594/12, EU:C:2014:238) and Google Spain and Google cases (C-131/12, EU:C:2014:317)[6]. In this regard, **Tracol** observes that the judgment "confirms the major role played by the Grand Chamber in the protection of personal data after its two famous judgments in the cases of Google Spain and Digital Rights Ireland. These three judgments show [the Grand Chamber's willingness] to behave as a Constitutional Court of the EU in charge of ensuring compliance with the Charter"[7].

According to **Sauron** "[t]he Schrems case-law must be repositioned in a legal strategy of the Court [developed] for several years [...] in two directions: the protection and expansion of the rights of users of digital services and the consolidation of the network of supervisors in this area"[8]. **Alexandropoulou-Aigyptiadou** also observes that the judgment is one of a series of the Court's decisions that seem to give priority to self-determination of the individual[9]. For **Pollicino** and

[4] WOLFF, H.A. and STEMMER, B., "Die Entscheidung der Kommission zur Angemessenheit des Datenschutzniveaus in den USA", Bayerische Verwaltungsblätter, 2016, p. 181-187, p. 187.

[5] URÍA GAVILÁN, E., "Derechos fundamentales versus vigilancia masiva - Comentario a la sentencia del Tribunal de Justicia (Gran Sala) de 6 de octubre de 2015 en el asunto C-362/14 Schrems", Revista de Derecho Comunitario Europeo, nº 53, 2016, p. 261-282, p. 273-274; see also PIRODDI, P., "I trasferimenti di dati personali verso Paesi terzi dopo la sentenza Schrems e nel nuovo regolamento generale sulla protezione dei dati", Il diritto dell'informazione e dell'informatica, 2015, p. 827-864, p. 844-845, et POLLICINO, O. et BASSINI, M., "La Carta dei diritti fondamentali dell'Unione europea nel reasoning dei giudici di Lussemburgo", Il diritto dell'informazione e dell'informatica, 2015 p. 741-777, p. 750.

[6] See, for example, RESTA, G., "La sorveglianza elettronica di massa e il conflitto regolatorio USA/UE", Il diritto dell'informazione e dell'informatica, 2015, p. 697-718, p. 697, URÍA GAVILÁN, E., cit. *supra* note 5, p. 275, PIRODDI, P., cit. *supra* note 5, p. 827-864, p. 827-829, or TINIÈRE, R., "Court of Justice, gde ch., 6 October 2015, Schrems, case C-362/14, ECLI:EU:C:2015:650", case-law of the CJEU 2015, Bruylant, 2015 p. 149-153.

[7] TRACOL, X., "Invalidator strikes back: The harbour has never been safe", Computer Law & Security Review, vol. 2, nº 2, 2016 p. 1-18, p. 12-13; see also WOLFF, H.A. and STEMMER, B., cit. *supra* note 4, p. 184.

[8] SAURON, J.-L., "L'affaire Schrems", Gazette du Palais, nº 301 to 302, 2015, p. 7-10, p. 7.

[9] ALEXANDROPOULOU-AIGYPTIADOU, E., "Diasynoriaki roi prosopikon dedomenon apo tin EE stis IPA: I prosfati apofasi tou DEE enopsei tis schetikis drastiriotitas tou Facebook (C-362/2014, M. Schrems kata Irlandou Epitropou Prostasias Prosopikon Dedomenon)", Dikaio Meson Enimerosis & Epikoinonias, 2016, p. 12-24, p. 23.

Bassini, finally, the judgment asserts the course of case-laws initiated with the Google Spain and Google ruling, cited above, under which "i diritti 'economici' soccombono rispetto alla privacy"[10].

On a more general note, **Carrera** and **Guils** observe that "[t]he Schrems judgment sends a strong reminder to EU policy makers about the need to firmly anchor any legislative acts on the transfer of data on a framework of protection commensurate to the [Charter] and the EU data protection architecture"[11]. **Kardachaki** adds in this regard that the Court "[has established] itself as the ultimate gatekeeper of EU fundamental rights"[12]. On this point, **Tracol** goes even further by stating that "[t]he Grand Chamber thus applied fundamental rights to international relations"[13]. Thus, according to **Debet,** "[t]he European citizens have found an ardent defender of fundamental rights in the specific field of data protection with the Court [...]. This, at a time when the official institutions of the Union seem timid or impotent to challenge US hegemony, is to ensure that respect for the founding principles of data protection makes great strides"[14]. According to **Vlachopoulos,** with its judgment, the Court finds that personal data is not a new, unnecessary, fundamental right that is registered in the name of a legal maximalism, but a very important instrument for the protection of fundamental rights in a democratic society[15].

Some authors nevertheless wonder whether the Court could have gone further in the review of the agreement with regard to the Charter: **Tracol** observes, for example, that "[t]he Grand Chamber did however not consider Article 8 of the Charter. The reasons for this omission are unknown. This omission is even more regrettable since Advocate General Bot [had gone as far as to suggest that] the Commission had exceeded the limits imposed by compliance with the principle of proportionality in the light of [the Charter] by adopting decision 2000/520 and then maintaining it in force"[16].

Finally, a part of the doctrine considers that the Court will have to avoid ruling on the Safe Harbour agreement: this is the case with **Voigt** and **Posedel,** according to whom "it is surprising that the Court actively opts for confrontation and the possible shut-down of data transfers to the US in order to protect the European Fundamental Rights. The Court could have easily refrained from evaluating the Safe Harbour Commission Decision 2000/520/EC and left this question to the national regulators"[17].

On the notion of "adequate level of protection"

[10] POLLICINO, O. and BASSINI, M., cit. *supra* note 5, p. 756.
[11] CARRERA, S. and GUILD, E., "The end of Safe Harbour: What future for EU-US data transfers?", Maastricht Journal of European and Comparative Law, n° 5, 2015, p. 651-655, p. 655.
[12] KARDACHAKI, A., "Schrems (Facebook). Transfer of personal data to the United States. Commission's US Safe Harbour Decision is invalid", Court of Justice, Highlights & Insights on European Taxation, nº 12, 2015, p. 28-31, p. 29.
[13] TRACOL, X., cit. *supra* note 7, p. 8.
[14] DEBET, A., "L'invalidation du Safe Harbour par la CJUE : tempête sur les transferts de données vers les États-Unis", La Semaine Juridique - general edition, no. 46-47, 2015.
[15] VLACHOPOULOS, S., "Diavivasi prosopikon dedomenon stis HPA", Dioikitiki Diki, 2015, p.903-904, p. 904.
[16] TRACOL, X., cit. *supra* note 7, p. 11.
[17] VOIGT, P. and POSEDEL, J., "Safe Harbour invalidated – What next?", PinG - Privacy in Germany, 2016, p. 40-44, p. 42.

While, for some authors, the judgment of the Court "has […] brought some clarity on what an 'adequate level of data protection' in a third country means for the purposes of EU law"[18], others like **Marx** and **Wüsthof**, observe: "[a] clear disappointment in the Court's reasoning is the hesitation concerning a precise definition of the 'adequate level of protection' […]. The CJEU only talks about an equivalent level of protection which meets the demands of Article 8 para 1 EU Charter. A level being identical with the EU legal order is not required […]. It would have been worth giving clear guidance to the Commission for future negotiation of contracts"[19]. In this respect, as regards the notion of "level of protection substantially equivalent to that guaranteed within the Union", several authors note that the Court appears to be guided by the decisions of other courts, such as the "Solange II" ruling of the German Constitutional Court or the Bosphorus ruling of the ECtHR.[20][21][22] For **Piroddi,** the concept of "effective" and "equivalent" protection amounts, in practice, to the idea of a protection substantially identical to that guaranteed by EU law[23]. Moreover, some commentators, such as **Wolff** and **Stemmer,** seem surprised that the standard of EU law chosen by the Court is that of the Charter, and not that of Directive 95/46/EC: "[der EuGH] beruft […] sich überraschenderweise nicht auf die Datenschutzrichtlinie, sondern auf die europäischen Grundrechte"[24].

In any event, and in terms of the scope of the concept of "adequate level of protection", **Tracol** notes that it is applicable only in respect of Directive 95/46/EC and that, therefore, it does not apply "to EU organisations such as Eurojust and Europol which implement their own legal frameworks to assess whether third countries ensure an adequate level of data protection and accordingly determine whether they may sign agreements with them to exchange personal data"[25].

That being said, many authors consider that the judgment is likely to have considerable impact in many areas. For example, regarding adequacy decisions other than those referred to in this case, **Debet** believes that "the requirements of the ECJ for adequacy decisions are extremely strong, particularly the requirement of a protection of a "substantially equivalent" level. It is therefore likely that other adequacy decisions of the Commission also need to be revised"[26]. In this

[18] CARRERA, S. and GUILD, E., cit. *supra* note 11, p. 655; see also DEBET, A., cit. *supra* note 14, point 2, and EL KHOURY, A., "The Safe Harbour is not a Legitimate Tool Anymore. What Lies in the Future of EU-USA Data Transfers?", European Journal of Risk Regulation, no. 4, 2015, p. 659-664, p. 662.

[19] MARX, L. and WÜSTHOF, L., "CJEU shuts down Safe Harbour for Transatlantic Data Transfer – Case EUGH Aktenzeichen C-362/14 Maximilian Schrems v Data Protection Commissioner", Journal of European Consumer and Market Law, nº 6, 2015, p. 242-245, p. 243.

[20] Judgment of 22 October 1986 - 2 BvR 197/83 (Solange II).

[21] ECtHR, judgment of 30.06.05, Bosphorus v. Ireland.

[22] URÍA GAVILÁN, E., cit. *supra* note 5, p. 270, POLLICINO, O. and BASSINI, M., cit. *supra* note 5, p. 773-774.

[23] PIRODDI, P., cit. *supra* note 5, p. 847.

[24] WOLFF, H.A. and STEMMER, B., cit. *supra* note 4, p. 186.

[25] TRACOL, X., cit. *supra* note 7, p. 9.

[26] DEBET, A., cit. *supra* note 14, point 3; see also ÁLVAREZ CARO, M. and RECIO GAYO, M., "La declaración de invalidez del acuerdo de puerto seguro entre la UE y los EEUU por el TJUE (C-362/14)", Revista Española de Derecho Europeo, nº 57, 2016, p.

regard, **Moos** and **Schefzig** now consider it necessary to assess the appropriateness of the level of protection on a case by case basis[27]. But it is mainly the negotiations of the new general regulations on data protection on the one hand, and of the Transatlantic Trade and Investment Partnership, better known as TTIP on the other hand, that many authors consider likely to be affected by the judgment of the Court.[28][29]

On the immediate consequences of the judgment for the continuity of the transfer of data to the United States

A significant part of the doctrine observes that, following the Court's judgment, the standard contractual clauses or the "Binding Corporate Rules" (hereinafter "BCR") may replace the "Safe Harbour" agreement, subject to decision 2000/520/EC[30]. However, many commentators temper the usefulness of this solution[31]. For example, **Voigt** and **Posedel** note that the judgment "criticizes that the Safe Harbour Principles are only binding for data importing entities, not the authorities of the recipient third country. Even if the Safe Harbour Principles bound US data importers adequately, US authorities would still be free to act without limitations. Similar issues come up with respect to other transfer mechanisms, such as Binding Corporate Rules and EU Standard Contractual Clauses. Accordingly, the ECJ Schrems decision may have consequences for data transfers based on these alternative transfer mechanisms too"[32].

In the same vein, **Debet** states that "it is possible that all data transfers to the United States are now challenged, regardless of their basis: standard contractual clauses and BCR. The ECJ notes the insufficiency of the guarantees provided by the American law because of the uncontrolled access of the public authorities to these data. However, no contractual clause, no binding corporate rule can protect European citizens against this public intrusion in their private sphere. The only viable solution would be a profound change in US legislation and the negotiations between Europe and the United States could be disappointing from

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107-136, p. 136, PIRODDI, P., cit. *supra* note 5, p. 859.

[27] MOOS, F. and SCHEFZIG, J., "„Safe Harbour" hat Schiffbruch erlitten", Computer und Recht, 2015, p. 625-633, p. 629.

[28] Regulation (EU) 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

[29] With regard to the regulation, see GIATTINI, A., "La tutela dei dati personali davanti alla Corte di giustizia dell'UE: il caso Schrems e l'invalidità del sistema di approdo sicuro", Diritti umani e diritto internazionale, 2016, p. 247-253, p. 253, PIRODDI, P., cit. *supra* note 5, p. 851-859; as regards the TTIP, see MANTELERO, A., "L'ECJ invalida l'accordo per il trasferimento dei dati personali fra EU ed USA. Quali scenari per i cittadini ed imprese?", Contratto e impresa / Europa, 2015, p. 719-733, p. 733, SALVATORE S., cit. *supra* note 1, p. 635, URÍA GAVILÁN, E., cit. *supra* note 5, p. 282.

[30] DE SIMONE, R., "Corte di giustizia dell'Unione europea, Grande Sezione, sentenza 6 ottobre 2015, in causa C-362/14, Maximillian Schrems c. Data Protection Commissioner", Rivista italiana di diritto pubblico comunitario, 2015, p. 1793-1795, p. 1795, BLACK, J. et DAMIANO, M., "Now What Did Facebook Do to the Internet? The Invalidation of the US Safe Harbour Agreement", European Law Reporter, 2016, p. 26-32, p. 29.

[31] See, for example, LEISSLER, G. and WOLFBAUER, V., "Rote Ampel am Datenhighway: Der EuGH kippt „Safe Harbour"", Ecolex 2015, p. 1117-1118, p. 1118, BERGT, M., "EuGH: Safe Harbor-Abkommen ist ungültig", Multimedia und Recht, 2015, p. 759-762, p. 762, AMBROCK, J., "Nach Safe Harbour: Schiffbruch des transatlantischen Datenverkehrs?" Neue Zeitschrift für Arbeitsrecht 2015, p.1493-1497, p. 1496.

[32] VOIGT, P. and POSEDEL, J., cit. *supra* note 17, p. 42.

this point of view. Is it then necessary to prohibit any transfer to the United States and look to exclusively European solutions for data storage?[33]".

Black and **Damiano** concede, for their part, that "[a]nother option is to stop the data flow. European data would stay in Europe". However, they warn that "[w]hile simple and safe, [this solution] would not only inhibit commerce, but also the ability of companies to have programmes such as unified employee databases, which many multinationals have long integrated into the fibre of their corporate culture"[34].

Conclusions

Regarding the assessment of the scope of the judgment of the Court as a whole, **Padova** noted, like other authors, that "[t]he invalidation of the Safe Harbour agreement is primarily a decision of symbolic value. It is part of a two-fold continuation of the assertion of the liberal values attached to the European model of data protection on the one hand, that of the preservation of powers and the independence of the supervisory authorities, the true guarantors of data protection, on the other hand"[35].
According to **Zeno-Zencovich,** this decision is a further step in affirming the "digital sovereignty" of the Union; a sovereignty that allows the Union to control, de jure and de facto, a certain space and the activities that take place there, as well as the administrative, judicial and security powers in that space[36]. In the same spirit, for **Perraki,** the judgment can be understood as a conscious effort of the EU courts to monitor, and above all, respond to the development of digital technology and the fact that, now, large amounts of personal data are stored in a virtual global space, where neither the Union nor the Member States effectively have any authority or particular influence[37].

Moreover, some authors note the impact that the judgment may have on the Member States themselves. For example, **Tracol** warns that "the 'elephant in the room' is the massive surveillance in Member States of the EU and European double standards on surveillance laws and practices. The judgment is in line with the approach in the case law of the ECHR. The latter may apply the reasoning of the Grand Chamber in its own case law. The judgment may thus have ripple effects on Member States"[38]. In the same line but on a more general note, **Debet** notes that "this judgment, because of the vast scope it gives to Articles 7 and 8 of the Charter, strengthens the controls that may be exercised on national rights of the Member States on this basis. From this point of view, the Schrems judgment is therefore also a 'major judgment' for the protection of fundamental liberties"[39].

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[33] DEBET, A., cit. *supra* note 14, point 3; see also PADOVA, Y., "Le Safe Harbour est invalide. Et après ? Analyse des fondements de l'arrêt de la CJUE et de ses conséquences", Droit de l'immatériel, No. 120, 2015, p. 7-31, p. 20, MANTELERO, A., cit. *supra* note 29, p. 728-730, PERRAKI, P., cit. *supra* note 3, p. 496.
[34] BLACK, J. and DAMIANO, M., cit. *supra* note 30, p. 29.
[35] PADOVA, Y., cit. *supra* note 33, p. 25.
[36] ZENO-ZENCOVICH, V., "Intorno alla decisione nel caso Schrems: la sovranità digitale e il governo internazionale delle reti di telecomunicazione", Il diritto dell'informazione e dell'informatica, 2015, p. 683-696, p. 683.
[37] PERRAKI, P., cit. *supra* note 3, p. 494.
[38] TRACOL, X., cit. *supra* note 7, p. 18; see also SKRINJAR VIDOVIC, M., cit. *supra* note 2, p. 275, URÍA GAVILÁN, E., cit. *supra* note 5, p. 277.
[39] DEBET, A., cit. *supra* note 14, point 3; see also PERRAKI, P., cit. *supra* note 3, p. 496-497, or SALVATORE S., cit. *supra* note 1, p. 637.

Furthermore, the doctrinal reactions to the judgment often underline the significant impact it can have on the digital economy. Thus, **Simon** warns that, "[i]n light of the systemic failures of the American mechanism of processing of personal data, the risk of misuse of exemptions from the 'safe harbour' requirements, and it must be said, practices which have amply demonstrated that these abuses of fundamental rights were not theoretical, we can only welcome a judgment that will force drastic revisions of the functioning of social networks and search engines towards effective protection of personal data. As we had anticipated following the Digital Rights and Google Spain rulings [...], the requirements of e-citizenship are therefore increasingly taken into account by the Court of Justice"[40].

Some authors also raise the question of the possible effects of the judgment on the US legal order: thus for **Tracol**, "[i]n the longer term, the most satisfying solution would involve important changes to US legislation to offer adequate legally binding protection to the personal data of EU data subjects and introduce effective judicial remedies for EU data subjects in all sectors including national security"[41].

For his part, **Finocchiaro** notes that, even if the judgment in the Schrems case may lead to a strengthening of the European model of protection of personal data, it is necessary to make a serious deliberation on this model[42]. Similarly, **Piroddi** warns that a level of protection as high as that required by the Court in the judgement commented upon leads to a risk of fragmentation of the global information market, which could result in an obstacle to international competitiveness of companies established in the EU[43]. Finally, for some authors, such as **De Miguel Asensio,** the Schrems judgment should be a turning point for ending the current situation, characterised by a legal framework for data protection which is highly stringent, but that is subject to insufficient application especially vis-à-vis the operations in Europe of major companies that benefit the Safe Harbour principles[44].

[OROMACR] [LOIZOMI] [KAUFMSV]

[40] SIMON, D., "Protection des données personnelles", Europe, nº 12, comm. 468, 2015, p. 10-12, p. 12.

[41] TRACOL, X., cit. *supra* note 7, p. 16; see also SALVATORE S., cit. *supra* note 1, p. 634.

[42] FINOCCHIARO, G., "La giurisprudenza della Corte di Giustizia in materia di dati personali da Google Spain a Schrems", Il diritto dell'informazione e dell'informatica, 2015, p. 779-799, p. 798.

[43] PIRODDI, P., cit. *supra* note 5, p. 863; see also QUÉMÉNER, M., "La fin du Safe Harbour au nom de la protection des données personnelles : enjeux et perspectives", Droit de l'immatériel : informatique, médias, communication, nº 120, 2015 p. 22-24, p. 25.

[44] DE MIGUEL ASENSIO, P.A., "Aspectos internacionales de la protección de datos: las sentencias *Schrems* y *Weltimmo* del Tribunal de Justicia", La Ley Unión Europea, nº 31, November 2015, p. 1-10, p. 6.

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