

08 October 2019

Legal Alert



EU Law

In this issue:

1. Relevant case law of the ECJ - September 2019

Case Law

Judgment of the Court (Fifth Chamber) of 18 September 2019. European Commission v Italy (Case C- 526/17)

Failure of a Member State to fulfil obligations - Article No. 258 TFEU - Directive 2004/18/CE - Coordinating the procedures of granting public procurement contracts for construction services - Concession of public construction - Extending the duration of an existing concession for building and exploiting a highway without publishing a participation announcement.

Through the act of extending the deadline for public concession works for the Livorno-Civitavecchia A12 section of the highway which connects Livorno and Cecina (Italy) from the 31st of October 2028 to the 31st of December 2046 without publishing a participation announcement, Italy has failed in its obligations stemming from articles 2 and 58 of Directive 2004/18/CE of the European Parliament and the Council of the 31st of March 2004 regarding the coordination of procedures of granting public procurement contracts for goods and services, as modified by Regulation (CE) No. 1422/2007 of the Commission on the 4th of December 2007.¹

Judgment of the Court (Eighth Chamber) of 18 September 2019. AQ and DN v Ministre de l'Action et des Comptes publics. Requests for a preliminary ruling from the Conseil d'État. (Joined Cases C-662/18 and C-672/18)

References for a preliminary ruling – Direct taxation – Directive 90/434/EEC – Directive 2009/133/EC – Article 8 – Capital gains relating to exchange of securities transactions – Transfer of securities received at the time of the exchange

¹ Unofficial translation.

– Capital gain on which tax has been deferred – Taxation of the shareholders – Taxation on the basis of different bases of assessment and rate rules – Reductions of the basis of assessment taking into account the period for which securities have been held.

Article 8(1) and (6) of Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States and Article 8(1) and the second subparagraph of Article 8(2) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States must be interpreted as meaning that, in the context of an exchange of securities, they require the application, to the capital gain relating to the securities exchanged and deferred for taxation and to the capital gain resulting from the transfer of the securities received in exchange, of the same tax treatment, in the light of the tax rate and the application of a tax allowance to take account of the length of time the securities were held, as that which would have been applied to the capital gain which would have been realised on the transfer of the securities existing before the exchange if the exchange had not taken place.

Judgment of the Court (Sixth Chamber) of 18 September 2019. Finanzamt Kyritz v Wolf-Henning Peters. Request for a preliminary ruling from the Bundesfinanzhof. (Case C-700/17)

Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 132(1)(b) and (c) – Exemptions – Hospital and medical care – Provision of medical care in the exercise of the medical and paramedical professions – No confidential relationship between the person providing the care and the patient.

1. Article 132(1)(b) and (c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the provision of medical care such as that at issue in the main proceedings, supplied by a medical specialist in clinical chemistry and laboratory diagnostics, is capable of falling within the scope of the exemption from VAT under Article 132(1)(c) of that directive, where it fails to meet all the conditions for the application of the exemption under Article 132(1)(b) of the directive.

2. Article 132(1)(c) of Council Directive 2006/112 must be interpreted as meaning that the exemption from VAT that it provides for is not subject to the condition that the

medical care in question is supplied within the framework of a confidential relationship between the patient and the person providing the care.

Judgment of the Court (Third Chamber) of 19 September 2019. Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt. Request for a preliminary ruling from the Fővárosi Ítéltábla. (Case C-34/18)

Reference for a preliminary ruling – Consumer protection – Directive 93/13/CEE – Unfair terms in consumer contracts – Article 3(1) and (3) – Annex to Directive 93/13/EEC – Point 1(m) and (q) – Loan agreement secured by a mortgage – Notarial instrument – Affixation of the enforcement clause by a notary – Reversal of the burden of proof – Article 5(1) – Plain and intelligible drafting.

1. Article 3(3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with point 1(q) of the Annex to that directive, must be interpreted as meaning that it does not qualify as unfair, in a general manner and without any further examination, a contractual term which has not been individually negotiated and which has the effect or object of reversing the burden of proof to the detriment of the consumer.

2. Article 3(3) of Directive 93/13, read in conjunction with point 1(q) of the Annex to that directive, must be interpreted as meaning, first, that it does not cover a term which has the object or effect of giving the consumer good reason to believe that he is required to fulfil all his contractual obligations, even though he considers that certain payments are not due, provided that that term does not alter the consumer's legal position in view of the applicable national legislation and, secondly, that it covers a term which has the object or the effect of hindering the consumer's right to take legal action or exercise any other legal remedy where the outstanding amount is determined by a notarised instrument with probative force making it possible for the lender to put an end to the litigation unilaterally and definitively.

3. Article 5 of Directive 93/13 must be interpreted as meaning that it does not require the seller or supplier to provide additional information relating to a term which is drafted clearly, but the legal effects of which may be determined only by interpreting provisions of national law in respect of which there is no consistent case-law.

4. Article 3(3) of Directive 93/13, read in conjunction with point 1(m) of the Annex to that directive, must be interpreted as meaning that it does not cover a contractual term which authorises the seller or supplier to assess unilaterally whether the consumer's obligations were performed in accordance with the contract.

Judgment of the Court (Third Chamber) of 19 September 2019. Criminal proceedings against EP. (Case C- 467/18)

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Articles 6, 47 and Article 51(1) of the Charter of Fundamental Rights of the European Union – Directive 2012/13/EU – Article 8(2) – Directive 2013/48/EU – Article 12 – Directive (EU) 2016/343 – Article 3 – National legislation authorising, on therapeutic and safety grounds, the committal to a psychiatric hospital of persons who, in a state of insanity, have committed acts representing a danger to society – Right to information about rights – Right of access to a lawyer – Right to an effective remedy – Presumption of innocence – Vulnerable persons.

1. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, must be interpreted as applying to judicial proceedings, such as those provided for by the national legislation at issue in the main proceedings, which authorise, on therapeutic and safety grounds, the committal to a psychiatric hospital of persons who, in a state of insanity, have committed acts representing a danger to society. Directive 2012/13 must be interpreted as meaning that persons suspected of having committed a criminal offence must be informed as soon as possible of their rights from the moment when they are subject to suspicions which justify, in circumstances other than an emergency, the restriction of their liberty by the competent authorities by means of coercive measures and, at the latest, before they are first officially questioned by the police.

2. Article 47 of the Charter of Fundamental Rights of the European Union, Article 8(2) of Directive 2012/13 and Article 12 of Directive 2013/48 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for judicial proceedings authorising, on therapeutic and safety grounds, the committal to a psychiatric hospital of persons who, in a state of insanity, have committed acts representing a danger to society, where that legislation does not enable the court with jurisdiction to verify that the procedural rights covered by those directives were respected in proceedings prior to those before that court, which were not subject to such judicial review.

3. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, and Article 51(1) of the Charter of Fundamental Rights must be interpreted as meaning that neither that directive nor that provision of the Charter of Fundamental Rights applies to judicial proceedings for

the committal to a psychiatric hospital for therapeutic purposes, such as those provided for in Article 155 et seq. of the Zakon za zdraveto (Health Law), at issue in the main proceedings, on the ground that there is a risk that, in view of his state of health, the person concerned represents a danger to himself or others.

4. The principle of the presumption of innocence referred to in Article 3 of Directive 2016/343 must be interpreted as requiring, in judicial proceedings for the committal to a psychiatric hospital, on therapeutic and safety grounds, of persons who, in a state of insanity, have committed acts representing a danger to society, such as that at issue in the main proceedings, that the Public Prosecutor's Office provides proof that the person whose committal is sought is the perpetrator of acts deemed to constitute such a danger.

Order of the Court (Sixth Chamber) of 24 September 2019. KE v LF. (Case C-185/19)

Reference for a preliminary ruling - Charter of Fundamental Rights of the European Union - The right to an effective judicial protection - Legal precedent - Arbitration court - Manifest inadmissibility and lack of competence of the Court - Article No. 53 para. (2) and Article No. 94 of the Court's Procedure Rulebook.

18 In that regard, it must be pointed out that the reference for a preliminary ruling is manifestly inadmissible in the light of Article 94 (c) of the Rules of Procedure, given that the elements set out in that application do not allow its admissibility to be ascertained from the point of view of the condition for issuance from a "court" within the meaning of Article 267 TFEU. Thus, the Arbitral Tribunal next to the Arbitration Association near the Cluj Bar lacks any element that can prove that it has this quality.

19 To the extent that national law does not require recourse to this court as the sole means of resolving the main dispute and excludes the possibility of the parties to address the ordinary courts, the arbitral tribunal should have set out the reasons why its referral was required in this case. On the other hand, in the referral decision, no reference is made to the provisions of the Romanian Civil Procedure Code governing institutionalized arbitration. Accordingly, it must be held that this reference for a preliminary ruling is manifestly inadmissible.²

² Unofficial translation.

Judgment of the Court (Grand Chamber) of 24 September 2019. Google LLC, venant aux droits de Google Inc. v Commission nationale de l'informatique et des libertés (CNIL). Request for a preliminary ruling from the Conseil d'État. (Case C- 507/17)

Reference for a preliminary ruling – Personal data – Protection of individuals with regard to the processing of such data – Directive 95/46/EC – Regulation (EU) 2016/679 – Internet search engines – Processing of data on web pages – Territorial scope of the right to de-referencing.

On a proper construction of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and of Article 17(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 (General Data Protection Regulation), where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request.

Judgment of the Court (Grand Chamber) of 24 September 2019. GC and Others v Commission nationale de l'informatique et des libertés (CNIL). Request for a preliminary ruling from the Conseil d'État. (Case C- 136/17)

Reference for a preliminary ruling – Personal data – Protection of individuals with regard to the processing of personal data contained on websites – Directive 95/46/EC – Regulation (EU) 2016/679 – Search engines on the internet – Processing of data appearing on websites – Special categories of data referred to in Article 8 of Directive 95/46 and Articles 9 and 10 of Regulation 2016/679 – Applicability of those articles to operators of a search engine – Extent of that operator's obligations with respect to those articles – Publication of data on websites solely for journalistic purposes or the purpose of artistic or literary expression – Effect on the handling of a request for de-referencing – Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union.

1. The provisions of Article 8(1) and (5) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as meaning that the prohibition or restrictions relating to the processing of special

categories of personal data, mentioned in those provisions, apply also, subject to the exceptions provided for by the directive, to the operator of a search engine in the context of his responsibilities, powers and capabilities as the controller of the processing carried out in connection with the activity of the search engine, on the occasion of a verification performed by that operator, under the supervision of the competent national authorities, following a request by the data subject.

2. The provisions of Article 8(1) and (5) of Directive 95/46 must be interpreted as meaning that the operator of a search engine is in principle required by those provisions, subject to the exceptions provided for by the directive, to accede to requests for de-referencing in relation to links to web pages containing personal data falling within the special categories referred to by those provisions.

Article 8(2)(e) of Directive 95/46 must be interpreted as meaning that, pursuant to that article, such an operator may refuse to accede to a request for de-referencing if he establishes that the links at issue lead to content comprising personal data falling within the special categories referred to in Article 8(1) but whose processing is covered by the exception in Article 8(2)(e) of the directive, provided that the processing satisfies all the other conditions of lawfulness laid down by the directive, and unless the data subject has the right under Article 14(a) of the directive to object to that processing on compelling legitimate grounds relating to his particular situation.

The provisions of Directive 95/46 must be interpreted as meaning that, where the operator of a search engine has received a request for de-referencing relating to a link to a web page on which personal data falling within the special categories referred to in Article 8(1) or (5) of Directive 95/46 are published, the operator must, on the basis of all the relevant factors of the particular case and taking into account the seriousness of the interference with the data subject's fundamental rights to privacy and protection of personal data laid down in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, ascertain, having regard to the reasons of substantial public interest referred to in Article 8(4) of the directive and in compliance with the conditions laid down in that provision, whether the inclusion of that link in the list of results displayed following a search on the basis of the data subject's name is strictly necessary for protecting the freedom of information of internet users potentially interested in accessing that web page by means of such a search, protected by Article 11 of the Charter.

3. The provisions of Directive 95/46 must be interpreted as meaning that

- first, information relating to legal proceedings brought against an individual and, as the case may be, information relating to an ensuing conviction are data relating to 'offences' and 'criminal convictions' within the meaning of Article 8(5) of Directive 95/46, and

- *second, the operator of a search engine is required to accede to a request for de-referencing relating to links to web pages displaying such information, where the information relates to an earlier stage of the legal proceedings in question and, having regard to the progress of the proceedings, no longer corresponds to the current situation, in so far as it is established in the verification of the reasons of substantial public interest referred to in Article 8(4) of Directive 95/46 that, in the light of all the circumstances of the case, the data subject's fundamental rights guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union override the rights of potentially interested internet users protected by Article 11 of the Charter.*

Order of the Court (Second Chamber) of 24 September 2019. Criminal proceedings against QR. Request for a preliminary ruling from the Spetsializiran nakazatelen sad. (Case C- 467/19 PPU)

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – Directive (EU) 2016/343 – Article 7(4) – Strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings – Right to remain silent and right not to incriminate oneself – Agreement between the prosecutor and the offender – Approval of such an agreement by the court – Condition – Consent of the other accused persons – Charter of Fundamental Rights of the European Union – Not applicable.

Article 7(4) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as meaning that it does not govern the issue of whether or not the approval, by a court, of an agreement on the imposition of a negotiated sentence, such as the agreement at issue in the main proceedings, concluded between a person accused, on the basis of his alleged membership of a criminal group, and the prosecutor, may be rendered subject to the condition that the other persons accused, on the basis of their membership of that criminal group, must give their consent to the conclusion of that agreement.

Judgment of the Court (Fifth Chamber) of 26 September 2019. Vitali SpA v Autostrade per l'Italia SpA. Request for a preliminary ruling from the Tribunale Amministrativo Regionale per la Lombardia. (Case C- 63/18)

Reference for a preliminary ruling – Articles 49 and 56 TFEU – Public procurement – Directive 2014/24/EU – Article 71 – Subcontracting – National legislation limiting the possibility of subcontracting to 30% of the total amount of the contract.

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission

Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.

Judgment of the Court (Eighth Chamber) of 26 September 2019. UTEP 2006. SRL v Vas Megyei Kormányhivatal Hatósági Főosztály, Hatósági, Építésügyi és Oktatási Osztály. Request for a preliminary ruling from the Szombathelyi Közigazgatási és Munkaügyi Bíróság. (Case C-600/18)

Reference for a preliminary ruling – Road transport – Articles 91 and 92 TFEU – Regulation (EU) No 165/2014 – Article 32(3), Article 33(1) and Article 41(1) – Infringement of the rules on the use of tachographs – Duty of Member States to make provision for effective, dissuasive and non-discriminatory penalties – Resident and non-resident small and medium-sized enterprises – Differential treatment.

Article 41(1) of Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, repealing Council Regulation (EEC) No 3821/85 on recording equipment in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport, must be interpreted as precluding an administrative practice of a Member State according to which, unlike non-resident small and medium-sized road transport enterprises, those that are established in the territory of that Member State are liable to receive a lesser penalty, in the form of a warning rather than an administrative fine, where such enterprises commit, for the first time, an infringement of Regulation No 165/2014 of the same degree of gravity.

Judgment of the Court (Grand Chamber) of 1 October 2019. Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH. Request for a preliminary ruling from the Bundesgerichtshof. (Case C-673/17)

Reference for a preliminary ruling – Directive 95/46/EC – Directive 2002/58/EC – Regulation (EU) 2016/679 – Processing of personal data and protection of privacy in the electronic communications sector – Cookies – Concept of consent of the data subject – Declaration of consent by means of a pre-ticked checkbox.

1. Article 2(f) and of Article 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, read in conjunction with Article 2(h) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Article 4(11) and Article 6(1)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation), must be interpreted as meaning that the consent referred to in those provisions is not validly constituted if, in the form of cookies, the storage of information or access to information already stored in a website user's terminal equipment is permitted by way of a pre-checked checkbox which the user must deselect to refuse his or her consent.

2. Article 2(f) and Article 5(3) of Directive 2002/58, as amended by Directive 2009/136, read in conjunction with Article 2(h) of Directive 95/46 and Article 4(11) and Article 6(1)(a) of Regulation 2016/679, are not to be interpreted differently according to whether or not the information stored or accessed on a website user's terminal equipment is personal data within the meaning of Directive 95/46 and Regulation 2016/679.

3. Article 5(3) of Directive 2002/58, as amended by Directive 2009/136, must be interpreted as meaning that the information that the service provider must give to a website user includes the duration of the operation of cookies and whether or not third parties may have access to those cookies.
