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CRIMINAL CASES

318 I. From the aspect of research on humans, the existence or non-existence of research licence is not only a formal question, or administrative condition. The official licence (as specified therein) is supposed to verify the compliance with all preconditions and ensure the minimisation of risk factors, which are required by the regulations based on international conventions, taking into account the standpoint of an independent body.

II. The marketing of grafts and suspensions containing stem cells gained from abortions for the purpose of acquisition of wealth is clearly and expressly forbidden (violating the prohibition of acquisition of wealth), and as such, is a behaviour to be sanctioned by criminal law.

Mistakes may be made with regard to the therapeutic effect of such treatment – even with the violation of the law – (this may give grounds to rejection in the matter of danger for society), but not in the matter that such method is sold for money (asking and receiving money). If the perpetrator is aware of the fact that such acquisition of wealth is prohibited, the awareness of the unlawfulness of the action shall exclude mistake in the matter of danger for society

1436

319 The tutor in a penitentiary watching the minors – noticeably by the same – under his/her supervision for a sexual purpose, starting sexual conversation, and approaching the same with sexual intent shall constitute a severe violation of obligations, and thus shall be evaluated as child endangerment. A further factual element of child endangerment – as a result – is the endangerment and not the damage of the physical, mental, emotional or ethical development of the minor, thus the crime is committed, if as a result of the accused person's action, the opportunity for damage is established. 1445

320 I. Gratuity is a benefit, which is given by the patient or the patient's relative subsequent to the use of a health care service, as a thanks, to the health care worker contributing in the health care service. Payments given in advance as well as payments given by the patient involuntarily are not regarded as such gratuity.

Benefits requested and thus received are not classified as gratuities. Request means all behaviours – such as implications, and calling attention to how things normally go –, which excludes the voluntary nature, and thus the gratuity nature of the payment.

II. Right to take measures independently shall have significance from the aspect of special subjectivity, with regard to the performance of the actual activity, the existence of certain decision rights and the manner of the performance of a given process (management). The chief physician shall undoubtedly make decisions, which affect the patient's life, and such decisions might not only be related to therapy. Such duties may include the selection of an operation date (order), registry of incapacity for work, issue of the discharge note, determination of the guidelines and method of the patient's further treatment.

The subjectivity of such actions to unlawful benefits, the request of unlawful benefits for the performance of such activities shall obviously mean that the person with the right of decision, thus being in a position of power, using (abusing) such position, aims at gaining financial benefits.

In the scope of the performance of medical activities, the abuse of such position (of power, which obviously arises from the performance of such activities), the marketing of certain partial activities may arise not only in the scope of the procurement of supplies within the health care institution, but in the doctor-patient relation, in the course of the healing process, which has more dangerous consequences to society, and thus results in more severe criminal consequences too. 1449

321 The decision related to the refusal of the appeal shall fall in the scope of the non-definitive decisions of the court. The court's decision shall be provided to the party, which is affected by the same, and except for the decision made in the scope of the conduct of the trial and the maintenance of the order of the same, the district attorney's office. Thus the right of appeal against non-definitive decisions shall be related to the party, to which the court provided the decision – unless otherwise specified by the law. Thus the defence attorney shall be entitled to lodge an appeal against the decision related to the refusal of the appeal of the same, the accused person shall not have any right of remedy with regard to this decision. 1455

322 I. Appeals may be lodged at the court of second instance against the definitive decision of the court of first instance. In the event of a non-definitive decision, appeals may be lodged, if permitted by the law. The decision related to the organisation of procedures may not be appealed by legal remedy. If the court's decision or measure may not be appealed, the party entitled to lodge an appeal against the definitive decision, may contest the court's decision or measure in an appeal against the definitive decision.

II. The decision refusing the motion related to the termination or suspension of proceedings shall be regarded as a decision related to the organisation of proceedings, because this decision shall mean the determination of the further proceedings so that the court does not see that the conditions are met for either the termination or the passing of a definitive decision. If the party submitting the motion contests the same, legal remedy may be exercised in an appeal against the definitive decision; however independent and immediate appeal may not be lodged.

III. Formal decision shall not be made related to the suspension or termination of the proceedings; and no justification is necessary. Appeal lodged against such decision put in writing shall be rejected by the court of first instance, and if the same fails to do so, by the court of second instance. 1456

323 I. The imposition of the sentence is a major subject, the deliberation related to the imposition of the sentence, the impartial and objective nature of which is such a requirement, which is the essence of the public trust in the judge.

In accordance with Article XXVIII, paragraph (1) of the Constitution, everybody has the right to have his/her case, or rights or obligations before an independent and impartial court in a fair and public trial within a reasonable time.

The requirement of impartiality shall support that the adjudicating court acts and makes a decision impartially with regard to the parties to the case and free from prejudice or bias.

The lack of enforceability of the principle of impartialness implies the danger of arbitrary decision.

The objective judgement of cases may be guaranteed, if the judges are able to examine and assess only the facts of the case, the evidences providing the basis of facts and the laws necessary for the judgement of the facts separately. All circumstances, which fall outside of this scope and are related to the parties or the case, imposes a risk to the impartial judgement of the case, because the judge's deliberation activity may be influenced.

II. In the justification of the case, sentences intended as critical but actually personal shall give grounds to the bias by the judge (comparing and criticising the salaries of the accused person and the military judge acting in the case).

The actions of the partial, and thus recused judge, may only be remedied by the repeal of the verdict, the disregard of certain sections may not remedy the absolute procedural violation.

In consideration of all this, the matter whether the imposed penalty was in line with the judicial practice is irrelevant, procedural violation resulting in unconditional repeal shall exclude review as to substance. 1463

CIVIL CASES

324 I. In the review proceeding, the Curia shall interpret the legal provisions referred to as violated in the review request, in accordance with the Fundamental Law.

II. The defendant, when submitting its counter-claim and upon the notification of the same related to the adjourn of the hearing, may not know whether the court considers the reference to lapse well founded, thus its counter-claim shall be submitted irrespective of the same. The right to remedy is not violated, when during the decision of the court performing the review as to the substance – in compliance with the relevant procedural rules – the decision of first instance is amended. 1468

325 Review shall not be performed, if the court of second instance upholds the judgement of first instance with fundamentally the same legal justification, nevertheless, the further arguments are added to the decision. If in such a case, the party does not submit a request related to the approval of the review, the Curia shall refuse the review request. 1471

326 If the request related to the approval of the review is not in compliance with the provisions of Civil Departmental Opinion number 2/2017 PK (of 13 November 2017), the Curia shall be entitled to refuse the review. 1472

327 Joint dangers, as a reason for exclusion from inheritance, cannot be established, if one of the testators cannot help the other due to a sudden sickness, and there is no such joint reason, which could have cause the two deaths. 1474

328 The review request is not sufficiently specific, if the party only requests a “decision in compliance with the relevant provision of the Code of Civil Procedure”. The Curia shall refuse such review requests ex officio. 1477

329 I. Claims related to the compensation of damages caused by the violation of the prohibition of refraining from unnecessary disturbance based on the violation of neighbourhood law, shall be judged based on the general rules related to the liability for damages caused outside of the agreement.

II. Disturbance is a question of fact to be proven, the establishment of the unnecessary nature of the disturbance is a question of law requiring the court’s deliberation action. The pure fact of disturbance shall not give grounds to liability for damages, and the fact whether the value of the disputed properties decreased due to the same shall only be examined, if the court, in its scope of deliberation, refers to the unnecessary nature of the disturbance.

III. In each case, individual judgement shall be related to the fact whether the establishment and operation of a cell tower near residential properties violate the right of owners related to the undisturbed use of their properties, and the interest related to the use of existing environmental conditions to the extent that would exceed the general tolerance threshold.

1478

330 I. One of the conjunctive legal conditions of the change of care is a material legal violation, which evaluates the other conjunctive legal condition, objective change of circumstances on the side of the party submitting the motion.

II. The parent taking care of a minor shall provide care in nature, thus the amount of care may not be decreased with reference to the fact that the parent’s salary was increased. The financial and material conditions of the parent shall be taken into account upon the amount of care with regard to the rate of sharing burdens between the parents. 1481

331 The review request, the wording of which is general, and which fails to detail the legal standpoint considered correct by the same, and fails to collide its legal arguments with the justification of the binding judgement, may not succeed. 1485

332 The plaintiff judged by the rate of a normally informed and careful average consumer, could not have thought based on the information provided to the same that exchange rate risk is not real, or is not related to the same. 1487

333 I. The court shall ensure that the private experts are allowed to review the documents.

II. The person assigned by the party shall only be considered as a private expert, if the same is qualified as a registered judicial expert or individual expert. Failing this, the opinion given by such person shall not be considered as an opinion of a private expert, and may only be regarded as the presentation of the party in the given special area, thus cannot be evaluated in the scope of evidences, is not suitable for the collision with the opinion of the judicial expert summoned in the case, and with regard to the content of the same, new expert may not be summoned. 1490

334 With regard to the prohibition of damages benefits, in the course of the determination of the amount of damages, the financial gain of the damage party arising in the course of the harmful event shall be deducted from the financial loss incurred by the same. Thus in the case, the value adding effect of the project shall be deducted from the amount of the costs of the project, as damage, which became necessary in the course of the harmful incident.

1494

ECONOMIC CASES

335 If, in the proceedings, compared to the previous trial, there is no difference in the persons of the parties, the facts of the case or the right to be enforced, there is res judicata, and the proceedings shall be terminated.

1497

336 Interest in the legal dispute shall be upheld all along the judgement of the legal dispute. However, procedural violation is not committed by the court, if for the lack of such information, the locus standi of the plaintiff is not examined, even if subsequent to the defendant's referring to the lack of the same, the plaintiff's comments are heard. The motion shall not be rejected, if at the time of the decision as for the substances the plaintiff has the disputed claim.

1498

337 I. Foreign exchange leasing agreements are invalid, if the provisions related to exchange risk are not in accordance with the requirement of understandable and clear wording.

II. The court shall give information in alignment to the content of the right enforced by the motion. Notification obligation is not inclusive of the fact that the submitted motion is likely to not be thorough, thus the plaintiff shall enforce another right based on other facts.

1501

LABOUR CASES

338 I. Based on the employer's legal declaration related to the termination of the employment, the employer may be condemned with regard to the legal consequences of unlawful termination. There shall not be any universal liability with regard to the employer and the operator of the employer.

II. Section 3:9 and section 3:32, paragraph (2) of the Civil Code shall be applicable to the civil legal relationship between the operator and the public education institution, the employee may not base rights on these laws arising from the employment for the underlying actions of the founder in a labour case.

1505

339 In accordance with section 166, paragraph (2), point b) of the Labour Code, two conditions shall be met for the exemption from liability for damages; one is that the accident may not be related to any reason falling outside of the employee's scope of behaviour, and the other is that such reason shall be objectively impossible for the employer to avert. If the damage was caused not only by the employee's unavoidable behaviour, or the reason of the damage unprovable, the proof of excuse reason cannot be established from the side of the employer obliged to provide proof.

1511

340 I. In the anti-competition agreement, the parties shall be entitled to agree on penalty, for the other party's contractual violation. Such penalty shall be expressed.

II. If the parties agree in indemnification – instead of a penalty – in the agreement, the rules of the Labour Code related to liability shall be applicable, thus for the lack of the proof of damages arising from the contractual violation, it shall not be enforced. And the specification of a penalty of a predetermined amount is invalid, thus no claim shall be based on the same.

1515

PUBLIC ADMINISTRATION CASES

341 Portfolio approach in the course of transfer pricing gives guidelines for not the calculation of operating profit, but determines the cases, when deviation from analysis per transaction as specified in the main rule is possible. 1520

342 During the suspension of tax number, tax may not be deducted, and the taxpayer may not refer to this in the course of a later audit performed during the suspension. From the aspect of the prohibition, the period to which the tax determination is related, is irrelevant.

1523

343 Compulsory vaccines related to age shall be administered from the age of 11, in the scope of school campaign vaccinations, and if necessary, the school doctor shall qualify as vaccinating doctor. 1525

344 In the proceeding related to the designation of a universal electronic telecommunications service provider, in accordance with the principles specified in section 119, paragraph (2) of the Electronic Communications Act, the authority – amongst others – shall evaluate the service provider, the designation of which would eliminate the distortion of the competition and result in the most efficient services provider procedure taking into account market conditions and cost efficient management. 1528

345 The decision made in the scope of deliberation is not against the law just because of the mere fact that out of the deliberation factors specified by the law, only the ones are presented, which are considered relevant by the authority in the case, and non-essential, non-evaluated and uninterpreted elements are not listed. 1531

346 If the appropriated part of the property by is specified as an independent property, and it may be the subject of an independent sale, then the value of property shall be evaluated as a matter of the sale of the property in order for the provision of the entire compensation.

1535

347 The public administration authority shall be obliged to enforce the factors given by the court in the course of the renewed decision, follow the guidelines of the definitive court decision. The justification and necessity of these guidelines may not be deliberated, limited or re-interpreted. 1538

348 Judicial practice does not require an exact evidence standard of a specific competition content. The court follows a lawful practice even, if the defendant's decision based on the chain of indirect evidences is accepted as lawful. 1543

349 The confiscating nature of the amount of tax shall only be determined in an exceptional and extreme case in alignment with the taxpayers' ability to pay. The taxpayers' ability to pay, however, shall not be examined one by one, by property: the tax burden may not be related only to the market value of the properties, but upon the determination of the nature of the tax taking away assets, the taxpayer's ability to pay shall be taken into account in consideration of the assets owned by the taxpayer. 1549

DECISIONS OF THE COURT OF THE EUROPEAN UNION

I. Judgement made on 8 September in Case C-265/19, Recorded Artists Actors Performers Ltd. versus Phonographic Performance (Ireland) Ltd and co.

1. Article 8, paragraph (2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property must, in the light of Article 4, paragraph (1) and Article 15, paragraph (1) of the World Intellectual Property Organisation Performances and Phonograms Treaty, be interpreted as precluding a Member State from excluding, when it transposes into its legislation the words 'relevant performers' which are contained in Article 8, paragraph (2) of the directive and designate the performers entitled to a part of the single equitable remuneration referred to therein, performers who are nationals of States outside the European Economic Area (EEA), with the sole exception of those who are domiciled or resident in the EEA and those whose contribution to the phonogram was made in the EEA.

2. Article 15, paragraph (3) of the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty and Article 8, paragraph (2) of Directive 2006/115 must, as EU law currently stands, be interpreted as meaning that reservations notified by third States under Article 15, paragraph (3) of the WIPO Performances and Phonograms Treaty that have the effect of limiting on their territories the right to a single equitable remuneration laid down in Article 15, paragraph (1) thereof do not lead in the European Union to limitations of the right provided for in Article 8, paragraph (2) of Directive 2006/115, in respect of nationals of those third States, but such limitations may be introduced by the EU legislature, provided that they comply with the requirements of Article 52, paragraph (1) of the Charter of Fundamental Rights of the European Union. Article 8, paragraph (2) of Directive 2006/115 therefore precludes a Member State from limiting the right to a single equitable remuneration in respect of performers and phonogram producers who are nationals of those third States.

3. Article 8, paragraph (2) of Directive 2006/115 must be interpreted as precluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram concerned receives remuneration, and does not share it with the performer who has contributed to that phonogram. 1552

II. Judgement made on 3 September in Case C-186/19, Supreme Site Services GmbH and co. versus Supreme Headquarters Allied Powers Europe

1. Article 1, paragraph (1) of Regulation (EU) number 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that an action for interim relief brought before a court of a Member State in which an international

organisation invokes its immunity from execution in order to obtain both the lifting of an interim garnishee order executed in a Member State other than that of the forum and a prohibition on levying such an order in the future on the same grounds, brought in parallel with substantive proceedings concerning a claim arising from alleged non-payment for fuel supplied for the purposes of a peacekeeping operation carried out by that organisation, is covered by the concept of “civil and commercial matters”, in so far as that action is not pursued under public powers, within the meaning of EU law, which is a matter for the assessment of the referring court.

2. Article 24, paragraph (5) of Regulation number 1215/2012 is to be interpreted as meaning that an action for interim relief brought before a court of a Member State in which an international organisation invokes its immunity from execution in order to obtain both the lifting of an interim garnishee order executed in a Member State other than that of the forum and a prohibition on levying such an order in the future on the same grounds, does not fall within the exclusive jurisdiction of the courts of the Member State in which the interim garnishee order was executed. 1558

III. Judgement made on 3 September in Case C-84/19, Profi Credit Polska S.A. z siedzibą w Bielsku- Białej and co. versus QJ

1. Article 3, point (g) and Article 22 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC must be interpreted as not precluding a national provision on consumer credit that lays down a method of calculating the maximum non-interest credit cost which may be charged to the consumer, even if that calculation method allows the seller or supplier to have the consumer bear a proportion of the general costs relating to the exercise of his or her business activity, provided that, by means of its provisions relating to that maximum amount, that legislation is not contrary to the rules harmonised by that directive.

2. Article 1, paragraph (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, as amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, must be interpreted as meaning that a contractual term which sets the non-interest credit cost in accordance with the maximum upper limit laid down by national legislation on consumer credit, where that legislation provides that non-interest credit costs are not payable in respect of the part exceeding that upper limit or the total amount of credit, is not excluded from the scope of that directive.

3. Article 4, paragraph (2) of Directive 93/13, as amended by Directive 2011/83, must be interpreted as meaning that terms of a consumer credit agreement which impose on the consumer costs other than repayment of the principal loan amount and payment of interest do not fall within the exception provided for in that provision, where those terms do not specify either the nature of those costs or the services which they are intended to remunerate and where they are formulated in such a way as to give rise to confusion on the part of the consumer as to his or her obligations and the economic consequences of those terms, which it is for the referring court to ascertain.

4. Article 3, paragraph (1) of Directive 93/13, as amended by Directive 2011/83, must be interpreted as meaning that a contractual term relating to non-interest credit costs, which sets

that cost below a statutory upper limit and which passes on, to the consumer, the costs of the lender's economic activity, is liable to cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer, where it imposes on the consumer costs which are disproportionate to the services provided and to the amount of the loan received, which it is for the referring court to ascertain. 1563

IV. Judgement made on 3 September in Case C-530/19, NM, NIKI Luftfahrt GmbH versus ON (as the receiver)

1. Article 9, paragraph (1), point (b) of Regulation (EC) number 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) number 295/91, must be interpreted as meaning that the obligation of the air carrier under that provision to offer hotel accommodation free of charge to the passengers referred to therein does not mean that that carrier is required to take care of the accommodation arrangements as such.

2. Regulation number 261/2004 must be interpreted as meaning that an air carrier which, under Article 9, paragraph (1), point (b) of that regulation, has offered hotel accommodation to a passenger whose flight has been cancelled cannot be required, on the basis of that regulation alone, to compensate that passenger for damage caused by fault on the part of employees of that hotel. 1570

FORUM

Actual correction after entry into effect – renewal of cases in criminal proceedings

Summary opinion

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