From the Editors

Two sets of judgments from the CJEU lead to speculation of whether or not there exists an 'EU-bias' in the case law of the Court. Does the Court treat the Union-legislature more favourably than the legislator of the Member States? Can the Court be accused of applying double standards? Let us have a look at a couple of recent judgments.

The first two concern the application of the proportionality principle. In Case C-210/10 *Márton Urbán*, the Court dealt with the interpretation of Article 19(1) and (4) of Regulation 561/2006 on the harmonisation of certain social legislation relating to road transport. According to its provisions Member States shall, i.a., lay down rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. Those penalties shall be effective, proportionate, dissuasive and non-discriminatory. According to the Hungarian implementing legislation, a fine of between HUF 50,000 and HUF 800,000 shall be imposed on anyone who breaches its provisions. On 25 March 2009, during a roadside inspection conducted by a patrol from the Debrecen (Hungary) Customs Office at the Ártánd border crossing, Mr Urbán, who was driving a Hungarian-registered heavy goods vehicle from Hungary to Romania, was stopped and an examination of the vehicle's recording equipment and recording discs was carried out. No faults were found in the use of the tachograph in the course of the inspection. However, one of the 15 recording discs produced by Mr Urbán did not show the kilometre count on arrival. Consequently, the customs authority at first instance, by a decision of 25 March 2009, ordered Mr Urbán to pay an administrative fine of HUF 100,000 (approximately EUR 332) for breach of the rules on the use of record sheets. Subsequently Mr Urbán brought judicial proceedings for annulment of that decision before the Regional Court of Hajdú-Bihar arguing that the fine was disproportionate. The Hungarian court referred the case to Luxembourg essentially asking whether a system of penalties, which does not adjust the amount of the penalty according to the gravity of the breach of the rules is consistent with the requirement of proportionality? According the CJEU it is not: the requirement of proportionality must be interpreted as precluding a system of penalties fixing the amount of fines for breaches of certain provisions concerning the transport by road of goods and persons which provides for the imposition of a flat-rate fine for all breaches, no matter how serious.

How does this judgment relate to the ruling in Case C-203/12 *Billerud Karlsborg a.o. v. Naturvårdsverket*. This judgment concerned the interpretation of Article 16(3) and (4) of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community. This provision deals with penalties for excess emissions:

'3. Member States shall ensure that any operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted by that installation for which the operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.

4. During the three-year period beginning 1 January 2005, Member States shall apply a lower excess emissions penalty of EUR 40 for each tonne of carbon dioxide equivalent emitted by that installation for which the operator has not surrendered allowances. ...'

In short: a system of penalties fixing the amount of fines for breaches of its provisions.

As of 30 April 2007, the Billerud companies, companies governed by Swedish law holding carbon dioxide emission allowances, had not surrendered the allowances equal to their emissions for 2006 (10,828 and 42,433 tonnes respectively). Consequently, the Naturvårdsverket imposed the penalty provided for by the law implementing the ETS Directive 2003/87, in the amount of SEK 3,959,366 for one company and SEK 15,516,051 for the other (EUR 433,120 and EUR 1,697,320). In support of their challenge to those penalties before the national court, the Billerud companies stated that, as of 30 April 2007, they had sufficient emission allowances in their holding accounts to cover their total emissions for 2006. They argued that this proved that they had not intended to circumvent their obligations, and that the alleged failure to surrender their allowances on time was due to internal administrative errors. The referring Swedish court wanted to know whether the Directive allows for mitigation of the fines where, although the operator had a sufficient number of emission allowances on 30 April, as a result of an oversight, an administrative error or a technical problem it did not surrender them correctly and on time.

In view of the *Márton Urbán* case one might expect a ruling in favour of the Billerud companies. However, the CJEU decided that Article 16(3) and (4) of Directive 2003/87 must be interpreted as meaning that the amount of the lump sum penalty provided for therein may not be varied by a national court on the basis of the principle of proportionality.

It is difficult to see how the ruling in *Márton Urbán* can be reconciled with the ruling in *Billerud*. Lump sum penalties provided by the national legislature conflict with the principle of proportionality, while the same approach by the European Union legislature are 'justified by the need to have infringements of

the obligation [...] treated in a stringent and consistent manner throughout the European Union.' Double standards or not? EU-bias or not? Future case law will tell.

The second set of judgments deal with the so called Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Sweden (*Djurgarden* case), Slovakia (*Brown Bear* case), Germany (*Trianel* case), the UK (*Edwards* case) and Ireland (*Streetman* case) have been confronted with CJEU rulings, making it clear that elements of their existing national legislation are in conflict with the Aarhus Convention. In case Case T-111/11 *ClientEarth v. European Commission*, the General Court had to deal with the question of whether or not the Commission's decision refusing to grant ClientEarth access to certain documents on the conformity of the Member States' legislation with European Union environmental law, was in line with the Aarhus Convention, in particular Article 4(4)(c) thereof. The General Court stated: 'However, Article 4(4)(c) is not sufficiently precise to be directly applicable*, at least in relation to the institutions of regional economic integration referred to in Article 2(d) of the Aarhus Convention*.' This indeed leaves open the possibility that the same provision can have direct effect vis-à-vis the Member States.

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This issue of *REALaw* contains a lead article by Kars J. de Graaf & Nicole G. Hoogstra on tacit authorisations in The Netherlands, Germany and France, a case law analysis by John Vervaele on the *Melloni* case, an article by Herman J. van Harten & Rosa H.M. Janssen providing a Dutch narrative on how to optimally equip judges for their specific role in the EU's judicial and a book review by Herman E. Bröring of Oswald Jansen (ed.), *Administrative Sanctions in the European Union*.

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