

## Newsletter n°30/2015

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## Editorial



### President Susan Denham

Having embarked upon my term as President of the Network in January 2015, I look forward to building on the work of my predecessor, Mr. Geert Corstens, President of the Supreme Court of the Netherlands. I am acutely aware of the high standards which he has set, and all Members and Observers of the Network are indebted to President Corstens for the valuable work which he has carried out during his presidency.

Under his leadership, the Network has seen enhanced cooperation and interaction with the Court of Justice of the European Union and the European Court of Human Rights, with the first tripartite meeting being held in Helsinki in September 2013. This important relationship continues to grow. The development and improvement of the tools of the Network, in particular its online activities, which have occurred under the initiative of President Corstens have been essential to the exchange of information within the Network.

Under his impetus, our Network, with EU financial backing, has successfully laid down the bases of a necessary cooperation and of an effective promotion of exchanges and collaboration between our supreme courts. Our discussions during the most recent colloquium in Rome in June 2014 on the relations between the supreme courts and the lower courts show how essential it is to pursue and amplify what has already been started, and to ensure that the work done is built upon. Plans are underway for the next meeting of the Network, which will take place in Dublin in November 2015.

I am delighted that President Corstens remains involved in the Network through his involvement in the Comparative Law Liaisons group, which was created in 2014. This Newsletter publishes a summary, established by Ms Katarína Žipulová of the Supreme Court of the Czech Republic, of the activities of the first Comparative Law Liaisons group.

## Comparative Law Liaisons

### Background

One of the objectives of the Network of the Presidents of the Supreme Judicial Courts of the European Union, as laid down in article 3 of its Articles of Association, is 'to promote exchanges of views and experience on matters concerning the case law (and) particularly with regard to Community Law' and to 'promote contacts and exchanges of information between its Members'. Based on this notion, the Network seeks to improve the quality of justice in the European Union.

Comparative Law Liaisons was created in April 2014 following the initiative of the President of the Supreme Court of the Netherlands and President of the Network (2011-2014). The aim is to contribute to the process of building a structure within the Network for the easy and rapid exchange of high quality information on comparative law.

Comparative Law Liaisons group (so-called 'pilot group') consists of the representatives (usually two law clerks for civil and two for criminal/administrative law) of six supreme courts so far: Belgium, Czech Republic, Finland, France, Germany, and Netherlands.

First meeting of the Comparative Law Liaisons, Hague, October 9 - 10, 2014

The first meeting of the group took place on 9 - 10 October 2014 in Hague at the Dutch Supreme Court. The kick-off meeting of the pilot group aimed at brief introduction of the members and logistic questions regarding the future cooperation.

### I. Model of future cooperation

In the first part of the meeting, the participants exchanged national experience with analytical work of legal clerks. This brief introduction turned out as very useful for better understanding in internal decision-making procedures in every court and helped the adjustment of the system of communication and the range of questions and topics resolvable by the group.

The members agreed on following model of the exchange of information:

A) Questions and inquiries are to be sent by the email (apart from the Forum on the Network's Web site) to respective person or group of persons. Following the email exchange, the contact person posting the question collects all answers and submits the results on the forum of the Network. This practice ensures broad access to useful information for as many interested parties and legal practitioners as possible.

B) The exchange of information should be as fast as possible. However, the deadline for the answers should reflect the complexity of the question, extent of the research and expected amount of time to solve the inquiry. In order to fasten the communication, the question should be constructed as clearly as possible.

C) The questions may deal with both jurisprudence of national courts and national legislation, literature, internal functioning of the supreme courts. The inquiries are not to be limited on the international law and its application.

## II. Content of the cooperation

During the meeting, the representatives addressed the questions both from civil and criminal law. Professionals from criminal law dealt with questions whether it is possible for a court to apply a directive, which has not yet been implemented, when the State is still within the transposition period (i.e. there is no obligation arising on the basis of liability for the breach of EU law).

The civil law group addressed the consumer law area and the Directive 93/13/EEC. The Directive on Unfair Terms in Consumer Contracts prohibits the use of unfair terms in business-to-consumer contracts (B2C). Consumers are often confronted with contract terms which are pre-formulated and confer rights upon the seller to the detriment of the consumer. It is often impossible for consumers to influence the use and content of the terms of a contract, because they find themselves in a weaker position vis-à-vis the seller. In order to remove this inequality, Directive 93/13 states that a non-negotiated unfair contract term cannot bind the consumer.

The use of unfair terms is widespread. Even though Directive 93/13 grants consumers rights in relation to the seller, the enforcement of these rights proves to be difficult. If the seller enters into a procedure against the consumer and refers to a (potentially) unfair contract term, Dutch law requires the consumer to raise a plea to the unfairness of the term in order for the court to be able to disregard this specific term. A Dutch court cannot go beyond the ambit of the dispute, unless it involves matters of public order. Consumer law is not regarded as a matter of public order, at least not in the Netherlands. This could lead to the situation that an EU Directive confers rights upon a consumer which the latter cannot enforce because he is unaware of these rights or lacks the financial means to effectively defend himself before court.

The CJEU finds this outcome undesirable and has ruled in multiple judgments that consumers cannot be required to raise a plea to the rights that Directive 93/13 confers upon consumers, because otherwise such rights cannot be effectively enforced by consumers. Therefore, a national court has to *ex officio* annul an unfair term, notwithstanding the fact that a consumer has not referred to the unfairness of the term and that such an annulment would require the court to go beyond the ambit of the dispute.

These rulings have led to intensive debate in legal doctrine and divergent judgments of courts of first instance and courts of appeal. The Dutch Supreme Court has ruled on this matter in September 2013. According to the Supreme Court the judgments of the ECJ require Dutch courts to *ex officio* apply provisions transposed as a result of Directive 93/13 and to investigate factual elements that could lead to the application of such provisions. Clearly such an interpretation increases pressure on the judicial system in view of the amount of claims filed against consumers.

The representatives answered following questions:

1. Do cases on the *ex officio* application of consumer law arise in your legal system?
2. How are the judgments of the CJEU on Directive 93/13 received in your legal system?
3. How are these rulings interpreted by your national courts?
4. The ECJ formulates a duty to investigate whether a case on a B2C-contract falls within the scope of Directive 93/13 ([ECJ 9 November 2010, C-137/08, Jur. 2010, p. I-10847](#) <sup>[1]</sup>). Are your national courts equipped to fulfil this task?
5. Are the judgments on Directive 93/13 awarded a wider scope of application in your legal system (for example, are they considered to be applicable to all consumer cases)?

### III. Following cooperation

Since The Hague introductory meeting, law liaisons group has dealt with several topics seeking information both on relevant national case-law and legislation:

- indirect effect of directives and *contra legem* application (especially in consumer protection),
- insolvency proceedings,
- criminal liability and relevant case law relating to HIV (HIV-positive defendant non-disclosing his/her condition to the partner),
- criminal liability for circumcision of boys,
- selection of appeals before the supreme courts,
- return directive (Directive 2008/115/EC): case law on the possibility to impose prison sentences to illegally staying foreigners who refuse to leave the state's territory,
- criminal procedural law and interpretation of bias in criminal cases (prosecutors obtaining leave of absence for an appointment to non-permanent judge position),
- confiscation of proceeds of a crime, namely the drug trafficking.

The answers to the questionnaires exchanged between the participants of this group will be published on the Intranet of the Network.

As of time, cooperation proved to be of valuable help for the national judges in providing in-depth understanding of foreign legal measures and approach of courts towards various EU or internal legal norms in their jurisprudence.



**Germany:** Mrs Bettina Limperg has been appointed President of the Supreme Federal Court (Bundesgerichtshof) on 1 July 2014 succeeding Mr. Klaus Tolkdorf who had retired.



**France:** Mr. Bernard Louvel has been appointed First President of the Cour de cassation on 16 July 2014 succeeding Mr. Vincent Lamanda who had retired.



**Cyprus:** Mr. Myron Michael Nicolatos has been appointed President of the Supreme Court on 25 July 2014 in succession to M. Demetrios Hadjihambis.



**Netherlands:** Mr. Maarten Feteris has been appointed President of the Supreme Court on 1 November 2014 succeeding Mr. Geert Corstens, former President of the Network, who had retired.



**Lithuania:** Dr. Rimvydas Norkus has been appointed President of the Supreme Court on 19 December 2014 in succession to M. Märt Rask.

**Czech Republic:** Prof. JUDr. Pavel Žámal has been appointed President of the Supreme Court on 22 January 2015 in succession to Mrs. Iva Brožová

**Greece:** Mr. Athanasios Koutromanos has been appointed President of the Supreme Court on 12 August 2014 in succession of M. Michail Theocharidis.

**Slovakia:** Mrs. Daniela Žvecová has been appointed President of the Supreme Court on 16 September 2014 M. Ľudovít Harabin.

**Attached file:**

[Newsletter n°30/2015.pdf](#)

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