CENTRAL AND EASTERN EUROPEAN MOOT COMPETITION
25-28TH APRIL- WARSAW POLAND.
2014 COMPETITION QUESTION

1. Duorp Nital is a national of Eripme, which has been a Member State of the European Union (EU) since 1992. Duorp's grandfather was a fierce supporter of national and cultural rights in his native country Ynoloc, a former colony of Eripme and was greatly concerned at the impact of globalisation on the modern world and the consequent threat this posed to Ynoloc's culture and traditions. Duorp spent much of his childhood in Ynoloc under the influence of his grandfather. In his career choice however Duorp followed in his father's footsteps, first taking a degree in in computer programming and technology before taking up employment in his father's computer software company from 2005. Upon his father's death, Duorp was appointed managing director of the company which continued to develop and prosper under his management to become a leading specialist in creating and designing specialist software for the banking and securities market. Duorp made his first million euros in 2008 and became a billionaire in 2010. Throughout this period he maintained close emotional and personal contacts with his Ynoloc-based grandfather and other Ynoloc family members, the majority of whom were environmentalists and activists who were known for their regular anti- government protests and organisation of demonstrations intending to highlight alleged human rights breaches and environmental destruction caused by a series of corrupt Ynoloc governments.

2. Given their intertwined colonial histories, Eripme and Ynoloc had entered into a number of long-standing bilateral treaties dealing with numerous issues such as trade agreements, support and co-operation in the industrial and agricultural sectors etc. One such treaty provided for co-operation, training and logistical support for criminal investigation, policing and defence issues (The Bilateral Treaty). This Treaty was adopted in 1980. The Bilateral Treaty guaranteed logistical and practical training and support between the two countries in the area of police and criminal investigations. It authorised and enabled the exchange of data and information between the police investigation authorities in both countries, which could be initiated by a simple request from either authority to the other; simply setting out the detail of the information required and certifying that it was necessary for the purposes of a current criminal investigation. The Bilateral Treaty contains no guarantees that the transferred data would be securely retained or protected with due attention paid to considerations of human rights and data protection by the recipient authority. However, until 2012 Eripme had included Ynoloc on a statutory list of countries which were deemed to provide acceptable levels of data protection control and human rights protection. Nevertheless, following a change of government in Ynoloc in 2013, concerns had arisen with regard to the sufficiency of both securing data and protection of human rights in Ynoloc. Draft legislation had been proposed by the Eripme Ministry of Foreign Affairs, but no legislation had yet resulted. The Bilateral Treaty remained fully in force following Eripme's accession to the EU in 1992 and was regularly used by both countries.

3. On his brief annual family visit to Ynoloc in 2012, Duorp was shocked to hear that his nephew Suriv had been arrested and imprisoned, having been found guilty of a failed attempt to sabotage a number of Ynoloc's energy providers by placing a virus in one of their central computers. At the time of his arrest, Suriv had been reported to have shouted "watch out, I'm not alone… it'll be your financial system next".

4. Duorp decided it was time that he provided more tangible support to his family and Ynoloc using his skills, knowledge and resources. Accordingly, in January 2013 he spent a month in Ynoloc visiting a number of towns and villages to investigate the availability of computer facilities for the local population and opportunities they had to access to the internet. He was appalled by the limited facilities available both in the private and the public sector which he was told resulted from a lack of public investment and highly restrictive national laws.

5. In February 2013, whilst attending a computer software conference in Timsnart (an EU Member State), Duorp was introduced to Deliaj (a national of Timsnart), whose expertise was in developing software banking programmes for use in third world countries. The two instantly struck up a rapport and agreed that they would meet again whenever possible to discuss business and develop their friendship.

6. In March 2013 Duorp made a substantial transfer of funds from his personal accounts in Eripme to a new account opened in his name in Ynoloc, in order to ensure that monies would be in place for a number of charitable development programmes he planned. These programmes were to commence in 2015 under the banner of "Ynoloc's 2015 Internet revolution", with the aim of increasing internet availability to the general population in poorer regions of Ynoloc. The funds, amounting to one million euros, were transferred to a local bank which was managed by Duorp's uncle.

7. Unknown to Duorp, Deliaj is a highly active and vocal campaigner against corruption and a lack of transparency in the Timsnart government. He spent a year in prison in 2011 for crimes involving computer hacking and criminal damage and, since his release Timsnart's security services had kept him under close observation. The Timsnart security services accordingly recorded and photographed meetings between Duorp and Deliaj which took place between April-May 2013. The audio recordings of these meetings were processed by the Timsnart security services' audio-technology software and found references to "corrupt government", "banking software programmes", "Timsnart", "Eripme", "Ynoloc", "internet" and "revolution". These findings resulted in the conversations were automatically categorised, implicating Duorp and Deliaj in a conspiracy to commit criminal offences.

8. In May 2013, being aware that Eripme was also concerned at possible security threats created by computer hacking and that Eripme had been mentioned in the recorded conversations between Duorp and Deliaj, Timsnart 's police authorities transferred the audio and photographic information recorded by them concerning their meetings to Eripme. The Timsnart authorities also provide a general consent to allow the Eripme authorities to both process and use the transferred data for any related criminal investigations, in accordance with the terms of ***Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (hereinafter referred to as the 2008 FD).***

   In accordance with Article 16 (2) of the 2008 FD, the Timsnart Police requested that Eripme refrain from informing Duorp of the transfer of the recorded observation data by them in order to prevent Deliaj becoming aware of the surveillance and investigation undertaken by the Timsnart security services.

9. Having received this information from Timsnart, the Eripme Police Authority (EPA) carried out a thorough background check on Duorp and began monitoring his internet activity and phone calls. In the course of their investigation, they obtained and retained information about Duorp's ethnic background, religious and philosophical beliefs, hisYnoloc familial connections and also obtained copies of his transfer of funds to Eripme.

10. In Eripme, the 2008 FD had been implemented in Timsnart on a "copy and paste" basis (*mutatis mutandis*), albeit it with a few variations set out below, by the ***Criminal Investigations (Data Protection) Act 2010*** (hereinafter referred to as the ***CIA 2010***) or with the Articles suitably adapted, in the following manner (based on the example of Article17(2) of the FD 2008):

"~~The Member States may adopt legislative measures~~ [The national supervisory authorities may] restrict~~ing~~ access to information pursuant to paragraph 1(a), where such a restriction, with due regard for the legitimate interests of the person concerned, constitutes a necessary and proportional measure

Criminal Investigations (Data Protection) Act 2010 (CIA 2010)

"Section 5: National supervisory authorities
The Eripme Police Authority shall function as the national supervisory authorities in accordance with Article 25 of the 2008 FD.

Section 6: Processing of special categories of data
The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership and the processing of data concerning health or sex life shall be permitted only when this is strictly necessary. The assessment of whether such processing is strictly necessary on any particular occasion shall be within the sole discretion of the Eripme Police Authority, on the understanding that all necessary safeguards securing and protecting such information already exists in national law. "….

Section 19: Right to compensation

1. Any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Act shall be entitled to receive compensation for the damage suffered from the Eripme Police Authority or other authority competent under national law.

2. Where the Eripme Police Authority has transmitted personal data, the recipient cannot, in the context of its liability vis-à-vis the injured party in accordance with national law, cite in its defence that the data transmitted were inaccurate. If the recipient pays compensation for damage caused by the use of incorrectly transmitted data, the Eripme Police Authority shall refund to the recipient the amount paid in damages, taking into account any fault that may lie with the recipient.

Section 20: Judicial remedies

Without prejudice to any administrative remedy for which provision may be made prior to referral to the judicial authority, the data subject shall have the right to a judicial remedy before the High Court of Eripme. The decision of the High Court shall be final."

11. In July 2013, the Ynoloc Police Authority (YPA) asked the EPA for any information it may possess regarding suspicious activities which involved Ynoloc nationals and that might be linked to the criminal investigation currently underway in Ynoloc regarding the sabotage threat made by Suriv.

12. The EPA searches its databases and discovers data (comprising data originally transferred from Timsnart to Eripme, together with that subsequently gathered by the EPA itself) which indicates that Duorp is related to Suriv and that Duorp has met with Deliaj on a number of occasions and held conversations of the kind noted ante (paragraph 7). The EPA transferred all such available data on Duorp it holds to the YPA in accordance with the terms of the Bilateral Treaty. The EPA also advises the Timsnart security services of the transfer of the data to Ynoloc.

13. In July 2013, immediately after having received the information from the EPA, the YPA obtained a court order from the Ynoloc High court (the "freezing order") which prevented Duorp from accessing or using the funds he had earlier transferred to Ynoloc, as well as preventing the monies being returned to Eripme or transferred out of Ynoloc to another country. Duorp's lawyers unsuccessfully challenged the freezing order. During this challenge, the Ynoloc High court advised Duorp's lawyers that the information leading to the granting of the freezing order had been transferred from Eripme, but it was unwilling to divulge any further information on the matter. The consequence of the freezing order is that the funds cannot be used to pay sub-contractors for much of the preparatory work done in anticipation of Duorp's planned "2015 Internet revolution" programme and so when Duorp is sued by sub-contractors in the Ynoloc courts he decides to settle the claim using more funds from his private accounts in Eripme.

14. Duorp's lawyers immediately requested that the EPA divulge full information concerning the data transferred to Ynoloc, in accordance with Article 17(1) of CIA 2010 17 (1) 2008 FD). The EPA is willing to disclose details of the data which it obtained as a result of its own national investigations (referred to in paragraph 9 above) but, being conscious of Timsnart's request for confidentiality (see above), replies that it is merely willing to confirm that it has also received data concerning Duorp from the Timsnart authorities and that it transferred both sets of data on Duorp to the YPA. The reply concludes that by giving this confirmation the EPA has complied with its obligations under Article 17(1)(a) of CIA 2010 (s 17 (1)(a)2008 FD).

15. Duorp's lawyers immediately request that the EPA erases all data concerning Duorp that was either obtained from or is retained in Eripme, especially personal data concerning Duorp. Duorps' lawyers notify the EPA that a claim for compensation would be lodged at the Eripme seeking damages to compensate Duorp for the direct and indirect losses caused by the freezing order made in Ynoloc which had been based on the information supplied by the Eripme authorities.

16. Duorp initiated proceedings in the Eripme High Court against the EPA seeking the erasure of all of Duorp's private data held by the EPA, pursuant to section 4 of the CIA 2010 (Art 4 of the 2008 FD) and compensation for damage caused by the freezing order, pursuant to sections 19- 20 CIA 2010 (see ante, paragraph 10). During the course of the hearing, Duorp's lawyers argue, *inter alia*, that:

Data collected in Eripme

a) the collection and retention of data by the Eripme Police Authority (EPA) constituted a breach of the terms of section 1 of the CIA 2010 (identical to Article 1 of the 2008 FD) as it did not ensure the necessary level of protection of Duorp's fundamental rights and freedoms and in particular constituted a breach of the rights of privacy and data protection protected by Article 7 of the Charter of Fundamental Freedoms (the Charter) and Article 8 of the European Convention on Human Rights (ECHR)

b) the collection and retention of data by the Eripme Police Authority (EPA) constituted a breach of the terms of section 3 of the CIA 2010 (identical to Article 3 of the 2008 FD) as the processing of Duorp's data was not necessary or proportionate and was excessive within the meaning of this section.

c) the collection and retention of data by the Eripme Police Authority (EPA) concerning Duorp's racial or ethnic origin, political opinions, religious or philosophical beliefs constituted a breach of the terms of section 6 of the CIA 2010, since it was neither strictly necessary nor protected by adequate safeguards in national law. Furthermore, Eripme's implementation of Article 6 of the 2008 FD (s.6 of the CIA 2010) was unlawful, since it grants unfettered discretion to the EPA to decide whether the processing of such is "strictly necessary" in any given situation and assumes that adequate safeguards exist in national law.

d) the collection of Duorp's data breached Articles 1, 3, 6 and 13 of the 2008 FD and Duorp's rights to privacy and data protection which were protected by Articles 7 and 8 of the Charter of Fundamental Freedoms (the Charter), Article 8 of the European Convention on Human Rights (ECHR) and by the Eripme Constitution (revised in 2010) The revised Eripme Constitution contains a clause which states that: *The fundamental freedoms arising from the Charter of Fundamental Rights of the European Union shall be deemed to constitute constitutional freedoms within the constitutional law system of Eripme"*

Data collected in Timsnart

e) the transfer of data to Ynoloc by the Eripme Police Authority (EPA) constituted a breach of section 13 of the CIA 2010 (identical to Article 13 of the 2008 FD) since Timsnart had not formally consented to the transfer to Ynoloc as required by s.13(1)(c) and that s.13(2) was inapplicable. Furthermore, the fact that the Eripme government had concerns about the sufficiency of data protection and human rights in Ynoloc, following its change of government in 2013, indicated that Ynoloc did not ensure an adequate level of protection for the intended data processing, as required by s.13(1)(d), and that s.13(3) was inapplicable.

f) by permitting the data to be transferred to Ynocol under the authority of the Bilateral Treaty, the EPA breached both Articles 13 and 26 (2) of CIA 2010 as interpreted in the light of the rights to privacy and data protection protected by Articles 7 and 8 of the EU Charter of Fundamental Freedoms, Article 8 of the European Convention on Human Rights (ECHR) and the Eripme Constitution.

The Bilateral Treaty

g) The fact that the Bilateral Treaty between Eripme and Ynoloc was in force prior to November 2008 (thereby falling within the scope of Section 26 CIA 2010) did not prevent the Bilateral Treaty from being subject to the provisions of Articles 7 and 8 of the Charter and Article 8 of the ECHR. In fact, Eripme had already received a formal notice from the European Commission in January 2013 stating its intention to commence infringement proceedings unless Eripme renegotiated the Bilateral Treaty to render it compatible with the Charter pursuant to its obligations under Article 351(2) Treaty of the Functioning of the European Union (TFEU).

h) Moreover, and in any event, by virtue of Art 26(2) of the FD, the Bilateral Treaty should be applied in a way which is consistent with Art 13(1)(c) or 13(2) of the FD.

Causation and damage

i) The freezing order in Ynoloc was adopted as the direct consequence of the transmission by the EPA of Duorp's data which had been unlawfully obtained and processed. The freezing order caused Duorp direct loss which should be compensated pursuant to the provisions of sections 19 and 20 CIA 2010.

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17. In response to Duorp's claim, the EPA supported by the Ministry of Internal Affairs for Eripme replied, *inter alia*, that:

    a) Neither the FD 2008 nor the CIA 2010 impose obligations on the EPA in situations concerning the obtaining of and subsequent processing of data within the state of Eripme, since this is regulated solely by national law; the CIA 2010 being intended not only to implement the 2008 FD in accordance with Eripme's obligations as an EU Member State, but also to regulate and protect the processing and transmission of data obtained within Eripme as a matter of national law.

       Or, in the alternative (in the event that the court rejects the argument that the claim should be decided purely on the basis of national law, with no reference to the FD 2008)

    b) Section 26 CIA 2010 clearly removed the Bilateral Treaty from the permissible scope of review under the terms of the 2008 FD. Issues concerning the validity of this Treaty remain a matter for national constitutional law.

    c) Timsnart had provided unlimited consent to any transferring and processing of the information it sent to Eripme, which includes further transmission to non-EU Member States, so no breach of s 13 CIA 2010 occurred.

    d) Eripme had ensured full protection of human rights to the standard required by the 2008 FD when revising the Eripme Constitution in 2010.

18. The High Court rejected Duorp's claim and ruled that there had been no breach of the CIA 2010, also finding that there had been no wrongful implementation of the FD 2008. In the course of the hearing Duorp's lawyers had argued that (1) the interpretation and validity of the 2008 FD, (2) the impact of the 2008 FD on the Bilateral Treaty and (3) the question whether Eripme had correctly and adequately implemented the 2008 FD were all questions which were within the sole competence of the Court of Justice to the European Union (CJEU) and that a preliminary reference under Article 267 TFEU should be made to the CJEU before judgment was given.
    Nevertheless, the Eripme High Court refused to make any such reference, stating that all three questions leave no scope for any reasonable doubt, "account being taken of the different language versions of the relevant EU law instruments, of the terminology that is peculiar to EU law and of EU law as a whole". On this basis, it concluded that, under the so-called acte clair exception, it was competent to answer all questions itself and so was under no obligation to refer any preliminary questions to the Court of Justice of the EU.

    According to Article 20 CIA 2010, the decision of the High Court cannot be further appealed.

19. Duorp instructed his lawyers to refer the case to the Eripme Constitutional Court, claiming that the both the High Court decision and the transmission of data by EPA violated his fundamental rights as guaranteed under the Eripme Constitution. In doing so, Duorp relied on Article 80 of the Eripme Constitution, which states as follows:
    Article 80.
    The Eripme Constitutional Court has jurisdiction over constitutional complaints against final decisions or other encroachments by public authorities infringing fundamental rights and basic freedoms guaranteed by the Eripme Constitution.

20. At the Constitutional Court Duorp's lawyers repeated its arguments to the effect that a preliminary reference should be made to the CJEU prior to a full consideration of the case by the Constitutional Court. However the Constitutional Court firmly rejects this notion, stating that its competence is limited to deciding issues of Eripme constitutionality and ruling on potential violations of fundamental rights guaranteed by the Eripme Constitution, not on questions of interpretation of EU law. Moreover, in addition to this, the CC also rules that:

    (1) The constitutional complaint only challenges data collected in Eripme and by EPA. It is thus purely national dispute with no EU law element involved.

(2) The only "international" element is the fact that the case relates to actions taken under the terms of the Bilateral treaty, which is, however, outside the competence of the European Union.

For these reasons, the CC states that it does not consider itself a court or tribunal within the meaning of Art 267 TFEU and adds that as a result it is not, and has never been, under any obligation to submit a request for a preliminary ruling pursuant to Art. 267 TFEU, when it considers whether national law is compatible with the Eripme Constitution. As a result, the CC finds there has been no breach of Duorp's rights and so rejects all linked claims for compensation.

Although arguments are also raised before the Constitutional Court as to whether the 2008 FD has been correctly implemented by the CIA 2010, the Court make no reference to any of these issues during the course of its judgment.

21. Duorp's lawyers advise him that the Eripme Constitutional Court was grossly mistaken in its interpretation of the facts and law, that both the High Court and Constitutional Court are national courts against whose decisions there is no judicial remedy within the Eripme legal system and so that each Court was individually obliged, pursuant to Article 267 of the TFEU, to refer the issues by way of preliminary reference to the CJEU.

22. Duorp initiates a claim against the State of Eripme claiming compensation in accordance with the principles of state liability laid down in CJEU jurisprudence, in particular the principles set out in Case C-6/90 ***Francovich v Italy***, Joined Cases C-46/93 and C-48/93. ***Brasserie du Pêcheur* SA *v. Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others***; and Case C-224/01 ***Gerhard Köbler v Republik Österreich***. The claim seeks damages arising from:

(1) the failure of the Eripme High Court and Constitutional Court to take EU law into account in interpreting the national law which implements the 2008 FD and/or the transfer of data which took place pursuant to the Bilateral Treaty; and
(2) the failure of the Eripme High Court and Constitutional Court to comply with the obligations imposed upon it to make a preliminary reference under Article 267 TFEU; and
(3) the failure of the Eripme Parliament to adequately and correctly implement the terms of 2008 FD; and
(4) the failure of the EPA to correctly retain, protect and transfer data in accordance with the terms imposed both by the 2008 FD as interpreted in accordance with Articles 7 and 8 of the Charter of Fundamental Freedoms (Charter).

The claims are heard by the Administrative Court of Eripme, which decides to refer the following questions to the CJEU pursuant to Article 267 TFEU:-

QUESTIONS SUBJECT OF PRELIMINARY REFERENCE

1. a) Is the statement 'no belief in politics', such as that which was recorded by the Timsnart security services, data revealing political opinions within the meaning of Article 6 of the Framework Decision?

b) As regards personal data to which Article 6 of the Framework Decision applies, what are the criteria to be applied by a national authority in determining whether processing of these special categories of personal data is 'strictly necessary' within Article 6 of the Framework Decision, and is Article 8 of Directive 95/46 relevant in that regard?

In particular does Article 6 preclude Member States from granting their police authorities unfettered discretion to assess whether processing is strictly necessary in circumstances where national law provides for all necessary safeguards securing and protection of that data?

2. **a) Does Article 13(1)(c) of the Framework Decision prevent a Member State from transferring personal data to a third state in circumstances where the Member State from which the data was obtained has given a general consent that the transferring Member State may process and use the transferred data for any related criminal investigations and without specifying whether or not that data can be transferred to another Member State or third state?**

b) When special categories of data within the meaning of Article 6 of the Framework Decision are transferred to a third State does Article 13 of the Framework Decision require that the Member State transferring the data verify whether the third State will process that data in accordance with the requirements under Article 6 which apply to Member States?

3. **Does an EU Member State "implement" EU law within the meaning of Art 51(1) of the Charter, by applying a bilateral treaty, signed prior to the accession of that MS to the EU with a third state, which allows the transfer of personal data? In particular:**

a) Are the Member States bound by Arts 7 and 8 of the Charter when they apply such a bilateral treaty? Are Arts 1(2), 13 and 26 of the FD, on the one hand, and Arts 3, 25 and 26 of Directive 95/46/EC, on the other hand, of any relevance in this regard?

b) Are the Member States under the obligation, pursuant to Art 351(2) TFEU, to renegotiate such a bilateral treaty in order to render it compatible with the Charter? Can a Member State, which fails to fulfill this obligation, be regarded as failing to "implement" EU law for the purpose of applying the Charter?

4. **Is a national constitutional court that is called to decide on constitutional complaints claiming violation of fundamental rights guaranteed under the national constitution, such as the Eripme Constitutional Court in the present case, a "court or tribunal" within the meaning of Art. 267 TFEU, entitled to submit a request for a preliminary ruling to the Court of Justice?**

5. **a) Can the mere failure of a national court of last instance (such as the Eripme High Court or the Eripme Constitutional Court) to make a preliminary reference to the Court of Justice of the EU - i.e. regardless of whether on the substance the judicial decision is compatible with EU law – be considered a "manifest" breach of EU law, for which the State of Eripme should be held liable according to the conditions of state liability for judicial breaches of EU law established in Köbler? In this regard, does the failure of the national court to examine some of the elements spelled out by the Court in *CILFIT* for the purpose of invoking the acte claire exception, amount per se to such a "manifest" breach of EU law?**

b) Is the condition for a "manifest" breach of EU law, as spelled out in *Köbler*, different from the condition for a "sufficiently serious" breach of EU law, as spelled out in *Brasserie de pêcheur*? If yes, how?

c) Should the State of Eripme be held liable according to the conditions of state liability for either (i) incorrect implementation of the terms of 2008 FD and/or (ii) failure of the Eripme Police Authority to process the personal date in accordance with the 2008 FD and/or Articles 7 and 8 of the EU Charter.