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ECHR and national jurisdiction - The Görgülü Case*

- 1 The *Görgülü* case is the case of a Turkish citizen in Germany, Mr. Görgülü, seeking custody of and access to his son. In this case, the Second Senate of the German Federal Constitutional Court (FCt) has rendered a decision concerning the relationship between national and international law and jurisdiction (Fn. 1). The president of the European Court of Human Rights (ECtHR), Lucius Wildhaber, expressed his concern about this decision (Fn. 2), and he was not the only one to interpret it as denying binding force to ECtHR judgments and setting a bad example with counterproductive effects in other countries.
- 2 Let us have a look at the case. Mr. Görgülü's child was born in August 1999. The mother, who was not married to Mr. Görgülü and did not, at first, name him as the father, gave the boy up to adoption the day after his birth. Four days later, the child was put to the care of a foster family, where he has lived since. In October 1999, the father learned about the birth of his child, and he then attempted to adopt the child himself. After a long story of suits in German Courts, concerning adoption, custody and interim access to his child, Görgülü turned to the European Court of Human Rights which, in February 2004, decided that his right to respect for private and family life under Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had been violated and that at the present state of the judicial proceedings concerning custody it must be made possible for him at least to have access to his child (i.e. to meet the child from time to time) (Fn. 3). Accordingly, the competent German Local Court issued a temporary injunction giving Mr. Görgülü the right to see his child for two hours every Saturday. Upon appeal, however, this decision was reversed by the Higher Regional Court which found that the ECtHR's judgment pronounced an obligation for the Federal Republic of Germany, but was not binding upon *him*.

- 3 Against this decision, by which he was again denied access to his child, Mr. Görgülü filed a constitutional complaint. By order of October 14, 2004, the Federal Constitutional Court (FCt) ruled that Mr. Görgülü's right to have his family life protected under Article 6 of the Constitution had indeed been violated (Fn. 4). In its reasons, however, this judgment specified the legal status of the Convention and of ECtHR decisions within the German legal system in a way that has caused some consternation, not only in Germany. What aroused particular criticism is that the Court used the terms "take into account" and "consider" (rather than: abide by, obey or implement) to specify the national courts' duties in dealing with ECtHR judgments, that it referred to certain reservations of "sovereignty", and that it seemed to disapprove of enforcing ECtHR judgments in a "schematic" way (Fn. 5).
- 4 So what did the Constitutional Court do? Did it in fact question the authority and binding nature of the Convention and of the decisions of the European Court of Human Rights?
- 5 The Convention, as an international agreement, is binding upon the states party to it. The Convention itself, however - as the FCt points out with reference to relevant decisions of the ECtHR -, does not determine the internal mechanisms by which member states secure that its organs will observe the Convention; its imperatives are output-oriented. Accordingly, different states party to the Convention have chosen different ways of integrating it into their national legal systems (Fn. 6). Some states accord it the status of constitutional law (Austria) or even give it precedence over any domestic law, including the constitution (Netherlands). In a greater number of western and eastern European countries, the Convention ranks below the constitution, but above normal statutory law. In others, it has just the status of normal statutory law.

- 6 In its *Görgülü* decision, the FCt stated that, in Germany, the latter is the case: the Convention and its protocols have the status of a federal statute. (Fn. 7) This implies that, in Germany like in any other country whose domestic law does not treat the Convention as the supreme law of the land, there is a theoretical possibility of conflict between the exigencies of the Convention and those of domestic law. (Fn. 8)
- 7 As long as domestic law differs from the Convention *only* by giving citizens more extensive rights, without thereby restricting the rights of anyone else, a conflict cannot arise, since Art. 53 of the Convention makes it clear that the Convention is not meant to prevent states from granting, by their domestic law, rights which go beyond those granted by the Convention. However, as the German Constitutional Court has pointed out in *Görgülü*, a problem can arise in areas where the rights of different parties are connected in a conflicting way, to the effect that any extension of the right of one party will be tantamount to a restriction of the right of another or may conflict with other provisions of the domestic constitution (Fn. 9). In such areas, an extensive interpretation, by the ECtHR, of one of the rights

involved may result in a conflict with domestic constitutional law in so far as domestic constitutional law protects conflicting rights of others. The Constitutional Court mentions family law as one of several examples. (Fn. 10) In fact, giving an extensive reading to the rights of a biological father under Art. 8 of the Convention may theoretically result in restricting constitutionally protected rights of foster parents or of the children who live with them. It is with a view to constellations of this type that the reasons of the *Görgülü* decision expound the possibility of conflict between the Convention and domestic law, and the obligations of German courts with respect to this possibility.

HFR 2006, Beitrag 12, Seite 4

- 8 As the Constitutional Court puts it, the Basic Law - the German Constitution - has not "taken the greatest possible steps in opening itself to international-law connections" (Fn. 11) . The greatest possible step would have been to endow international agreements and other international law with the status of constitutional law - or an even higher status - and thereby to reduce to a minimum or even exclude the possibility of conflict between national and international law. This step has not been taken in Germany - neither generally nor with respect to the Convention in particular. The Convention has only been given the status of a normal federal statute. Accordingly, there is the possibility of conflict between the Convention and higher-ranking domestic law, and the Constitutional Court has made it clear that in the event of such a conflict, it is the Constitution - not the conflicting international agreement - which German Courts would have to apply (Fn. 12) .
- 9 The *Görgülü* decision dwells on the issue of conflict at some length and insists on the national sovereignty which the German state has reserved by not submitting to international law unconditionally. (Fn. 13) On an atmospheric level, this has probably contributed to the impression that the Constitutional Court is questioning the authority of the Convention or even seeking conflict with the ECtHR. Sticking to the hard legal doctrines set out in the decision, however, you will find that there is little to worry about. By stressing the obligation of all German Courts, including the CCt, to interpret not only ordinary law, but also *constitutional law* in accordance with the Convention as read by the ECtHR, and by stating that in a case of failure by a court of ordinary jurisdiction to take due account of a decision of the ECtHR, the party concerned may take this to the Constitutional Court as a violation of the relevant constitutional right (Fn. 14) , the decision even enhances and strengthens the role of the Convention in German Law (Fn. 15) .

HFR 2006, Beitrag 12, Seite 5

- 10 In pointing out the supremacy of the constitution in the German hierarchy of law, the Constitutional Court has professed a truism. It is by definition true that in *any* legal system which assigns to international law a rank below the constitution, the constitution will have precedence over international law in case of conflict between the two.
- 11 Note that in such a legal system the statement that the national constitution has precedence is a statement made *from the point of view of domestic law*. The Constitutional Courts has stressed that explicitly (Fn. 16) . From the point of view of international law, the matter looks very different. Obviously, a national court which, in a case of conflict between the national constitution and an international agreement, gives precedence to the constitution, will, in doing so, produce a violation of international law (Fn. 17) . It is in the nature of the conflict between the two legal orders which can arise in a system differentiating between international and domestic law, that in case of such a conflict, it will be impossible to do justice to both national and international law.
- 12 In such a case, *future* conflicts of the same type can be avoided by changing the relevant law. As has been pointed out correctly in various articles concerning the *Görgülü* decision, in case of a conflict between the Convention and a national constitution, international law requires that the national constitution be adapted to the exigencies of the Convention (Fn. 18) . It is important to notice that the FCCt has never denied that. On the contrary, the necessity to amend national law where it runs counter to the convention is explicitly mentioned in the Court's *Görgülü* decision (Fn. 19) . But as long as a necessary adaptation of national law has not been effected, there is a conflict between the two legal orders to which there is no present legal solution. The conflict is precisely about which of the two legal orders should prevail. It is a conflict of aspirations to precedence.

HFR 2006, Beitrag 12, Seite 6

- 13 Where there is no legal solution to a conflict, we seem to be in something like a state of nature, at least a partial and limited one. As *Thomas Hobbes* and others have told us convincingly, the state of nature is a hazardous state of affairs that one should get out of as soon as possible and avoid getting into. Fortunately, the state of affairs that we are in with respect to possible conflicts between the European Convention of Human Rights and national constitutional law is not as bad as that, and one should probably better call it a state of delicate equilibrium than a state of nature.
- 14 What is important in a system which contains the possibility of conflict between national and international law is to

avoid such conflict (Fn. 20) , and that is precisely what the Constitutional Court´s decision in the case of *Görgülü* directs German courts to do.

- 15 The decision sets forth that, as many of its provisions show, the Basic Law aims at incorporating Germany into the community of states. (Fn. 21) It is therefore an aim of the constitution itself that the German state conform to international law. Accordingly, the Court points out that German law, including the constitution, must as far as possible be interpreted in such a way as to be in harmony with Germany´s obligations under international law (Fn. 22) .

HFR 2006, Beitrag 12, Seite 7

- 16 As to judgments of the ECtHR, the Constitutional Court points to Art. 46.1 of the Convention, according to which the contracting parties undertake to abide by the final judgment of the ECtHR "in any case to which they are parties". From this, the Constitutional Court had concluded in earlier judgments that the substantive "res judicata" effect of ECtHR judgments is defined by the personal, material and temporal limits of the matter in dispute; this was confirmed in *Görgülü* (Fn. 23) . In addition, the Constitutional Court noted that this binding effect is more restricted than the overall binding effect which the German Federal Constitutional Court Act (§ 31.1) assigns to judgments of the Federal Constitutional Court (Fn. 24) , and that ECtHR judgments do not have a cassatory, but only a declaratory effect (Fn. 25) . This is definitely not to be interpreted as belittling the legal effect of ECtHR decisions declaring an act of state contrary to the Convention. The Constitutional Court makes it clear expressly that after such a decision, the state party

- may no longer hold the view that its acts were in compliance with the Convention,
- that in principle, the state party has to restore, as far as possible, the status which existed before the violation, and
- that if the violation is still continuing, the state party is obliged to put an end to it (Fn. 26) .

HFR 2006, Beitrag 12, Seite 8

- 17 All of this is important not only for the state party, but also for the domestic Courts. As I have explained above, the Constitutional Court´s decision in the case of *Görgülü* holds that German law, including the constitution, must as far as possible be interpreted in such a way as to be in harmony with Germany´s obligations under international law (Fn. 27) . This is an obligation for all German Courts. If the Constitutional Court has used soft words like "take into account" in order to circumscribe the duties of German Courts vis à vis ECtHR judgements, this is not to deny German duties under the Convention but *only* to provide for consideration of changes which may have occurred after an ECtHR judgment (Fn. 28) and for the theoretical possibility of a conflict between domestic law and the Convention. And this latter possibility should normally never come to be realized, because, as the Constitutional Court has stressed, courts and other state organs are obliged to do anything legally possible to interpret German law in such a way as to avoid its realization.
- 18 In my view, the obligation circumscribed by the phrase "take into account" definitely means *more* in the German legal context, where the Convention has the status of normal domestic law, than it has so far been taken to mean in Great Britain, where "taking" decisions of the ECtHR "into account" is exactly what Art. 2 (1) of the British Human Rights Act of 1998 (Fn. 29) asks British courts and tribunals to do when determining a question which has arisen in connection with a Convention right, but where, if I understand the legal situation properly, the convention itself lacks the status of directly binding domestic law (Fn. 30) .
- 19 As a result of the reasoning outlined above, the Federal Constitutional Court rejected the Regional Court´s assumption that the judgment of the ECtHR was binding only upon the Federal Republic of Germany, not on him, and reversed the decision of the Higher Regional Court for failure to take account of that judgment. (Fn. 31)

HFR 2006, Beitrag 12, Seite 9

- 20 Many commentators have asked themselves why the Second Senate has found it necessary to dwell extensively on the possibility of conflict between obligations under the Convention and higher-ranking national law in this particular case (Fn. 32) . Individual members of the Senate do not necessarily have a reliable and convincing answer to that question, so I hope you will pardon me for not answering it. In the further course of the affair, at any rate, no such conflict turned out to exist, and subsequent decisions of the Constitutional Court (Fn. 33) have left no doubt that the Second Senate´s decision in *Görgülü* would be misunderstood when read as relaxing the duties of German Courts to respect decisions of the European Court of Human Rights.
- 21 Generally, Germany has been willing to take its obligations under the convention seriously. Not that there haven´t

been any mistakes. Like other states parties, Germany has faced statements by the ECtHR that it has violated the convention. So far - e.i. until July 2006 - this has happened 62 times, all in all. In almost half of the cases concerned (28 cases), the violation consisted in a failure to meet the requirement under Art. 6 of the Convention that judicial proceedings take place and come to an end within a reasonable time. This is in line with the generally high percentage of objections concerning the duration of judicial proceedings in the jurisprudence of the ECtHR. Maybe, we have taken a little too much time to understand that not only individual, but systemic answers to the problem of delayed proceedings are necessary, so that in the recent *Surmeli* case, the ECtHR had to tell us that German law does not provide a sufficiently effective remedy against unduly protracted proceedings (Fn. 34) .

22 Whatever the assessment of German compliance in individual fields or cases may be - as far as the general attitude is concerned, Germany has certainly always, and with the support of its judiciary, been a willing party to the convention and ready to fulfil its obligations under Art. 46, and I hope to have made it clear that the FCCt's *Görgülü* decision does not mark or try to bring about *any* change in that attitude.

Fussnoten

Fn. :* This paper was first presented at a conference on "The implementation of decisions of the European Court of Human Rights in the jurisprudence of Constitutional Courts in European Countries", arranged by the Institute for Law and Public Policy under the aegis of the Constitutional Court of the Russian Federation, in Moscow in December 2005. I would like to thank the Institute for Law and Public Policy for the valuable opportunity to exchange information and views with colleagues from many other - mainly middle and eastern European - countries.

Fn. 1: Most constitutional complaints concerning matters of family go to the First Senate of the German Constitutional Court. This one, however, raised mainly questions concerning the relevance of international law - a matter which the Court's schedule of responsibilities assigns to the Second Senate. Before and after this decision, a Chamber of the First Senate has repeatedly had to deal with applications by either Mr. *Görgülü* or his opponents. Consequently, there are several decisions of the Federal Constitutional Court concerning Mr. *Görgülü*'s rights with respect to his son. For the sake of brevity, I will nevertheless refer to the Second Senate's decision as "the" *Görgülü* decision. (According to the CCT's assignment-of-business-plan, family law cases normally go to the First Senate - and there to the First Chamber, if the Constitutional Court Act does not require a Senate decision. Cases which mainly raise questions of international law, however, go to the Second Senate.)

Fn. 2: See interview in *DER SPIEGEL* of November 15, 2004.

Fn. 3: ECHR, No. 74969/01, Judgement of 26 February 2004 - *Görgülü*.

Fn. 4: Decision of October 14, 2004, reg. nr. 2 BvR 1481/04, http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html; in print: BVerfGE 111, 307 et seq. All published decisions of the German Federal Constitutional Court made after January 1, 1998, are available on the Court's website. The easiest access is: www.bverfg.de, there enter "Entscheidungen" and search by registration number, date or text element. Some of the more important decisions, including the above one, are available in English as well as in German.

Fn. 5: Cf. paragraphs 35, 46 et seq. of the decision (note 4). For critical comments see Jochen Abr. Frowein, *Die traurigen Missverständnisse: Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte*, in: *Weltinnenrecht. Liber amicorum Jost Delbrück*, Berlin 2005, 279 (particularly pages 284 ff.); Dirk Buschle, *Ein Neues "Solange"? - Die Rechtsprechung aus Karlsruhe und Straßburg im Konflikt*, VBIBW 2005, 293 (295 ff.); Stefan Kadelbach, *Der Status der Europäischen Menschenrechtskonvention im deutschen Recht*, JURA 2005, 480 ff.; Marten Breuer, *Karlsruhe und die Gretchenfrage: Wie hältst Du's mit Straßburg?*, in: *NVwZ* 2005, 412 (413 ff.); Ingolf Pernice, *BVerfG, EGMR und die Rechtsgemeinschaft*, *Europäische Zeitschrift für Wirtschaftsrecht* 2004, 705; Hans-Joachim Cremer, *Zur Bindungswirkung von EGMR-Urteilen*, *EuGRZ* 2004, 683 ff.; Thorsten Purps, *Das Bundesverfassungsgericht auf Abwegen*, *Zeitschrift für offene Vermögensfragen* 2004, 278 ff. For the necessity to interpret the passages concerning "consideration" properly cf. also Eckart Klein, *Anmerkung (Note on the Görgülü decision)*, *Juristenzeitung* 2004, 1176

Fn. 6: For a more detailed account see Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, 2. ed., 2005, p. 15 et seq.

Fn. 7: Paragraph 32 of the judgement. This is in line with the general opinion, cf. Stefan Mückl, *Kooperation oder Konfrontation? _ Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte*, in: *Der Staat* 2005, S. 403 (407), with further references.

Fn. 8: In fact, such conflict may even arise in countries which do give the Convention the rank of constitutional law in their domestic system, since there is always the possibility of a subsequent domestic legislative act of the same rank running counter to the Convention and demanding precedence - from the point of view of domestic law - according to the principle *lex posterior derogat legi priori*. According to the German Constitutional Court, this type of conflict should

and can normally be avoided by interpreting domestic law in line with international agreements even where the relevant domestic law has entered into force after conclusion of the relevant agreement, since it cannot be presumed that the German legislator wants to deviate from international agreements, see BVerfGE 74, 358 (379); 82, 106 (120).

Fn. 9: Paragraph 58 of the judgement.

Fn. 10: Paragraph 58 of the judgement. Other examples mentioned are the law on the protection of personality rights (this refers to the problem of balancing freedom of the press against the personality rights of persons who are objects of press reports; a matter in which the ECtHR has disapproved of the balance struck by the Federal Constitutional Court in the case of *Caroline v. Hannover*, BVerfGE 101, 361; see ECtHR, judgment in the case of *Caroline v. Hannover/Germany* of June 24, 2004, Appl. no. 59320/00, accessible via <http://www.echr.coe.int/echr>, HUDOC) and, remarkably, the law of aliens (in this latter area, it is not easy to see what the conflicting individual rights at stake could be).

Fn. 11: Paragraph 34 of the judgement.

Fn. 12: Paragraphs 34 et seq. of the judgement. Paragraph 33 of the judgement.

Fn. 13: For criticism of this use of the concept of sovereignty see Kadelbach (note 5), 484; Cremer (note 5), 688. Obviously, the Constitutional Court was not as unaware of international law as to stipulate that Germany has a sovereign right, under international law, to disregard the Convention as interpreted by the ECtHR in cases of conflict with domestic constitutional law.

Fn. 14: See par. 63 of the decision.

Fn. 15: Cf. also Hans-Jürgen Papier, *Execution and Effects of the Judgments of the European Court of Human Rights - From the Perspective of German National Courts*, HRLJ 2006, 1 (2); Oliver Dörr, *Rechtsprechungskonkurrenz zwischen nationalen und europäischen Verfassungsgerichten*, Deutsches Verwaltungsblatt 2006, 1088 (1092); Jens Meyer-Ladewig/Herbert Petzold, *Die Bindung deutscher Gerichte an Urteile des EGMR - Neues aus Straßburg und Karlsruhe*, Neue Juristische Wochenschrift 2005, 15 (19); Steffen Roller, *Die menschenrechtskonventionsgemäße Auslegung*, Deutsche Richterzeitung 2004, 337; Christoph Vedder, *Integrierter Grundrechtsschutz in Europa: Görgülü und Bosphorus*, to appear in: Hartmut Bauer et al. (eds.), *Festschrift für Rainer Schmidt*.

Fn. 16: See paragraph 34 of the decision.

Fn. 17: See also Kadelbach (note 5), 480; Klein (note 5), 1176.

Fn. 18: Meyer-Ladewig/ Petzold (Fn. 15), p. 19; R. Esser, *Die Umsetzung der Urteile des Europäischen Gerichtshofs im nationalen Recht - ein Beispiel für die Dissonanz völkerrechtlicher Verpflichtungen und verfassungsrechtlicher Vorgaben?*, in: *Strafverteidiger* 2005, 348 (350).

Fn. 19: See par. 39 of the decision.

Fn. 20: Cf. N.W. Barber, *Legal Pluralism and the European Union*, *European Law Journal* Vol. 12, 2006, 306 (328).

Fn. 21: Paragraph 33 of the judgement.

Fn. 22: See Paragraph 32 of the judgement: The Convention and the case-law of the ECtHR serve "as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law". Cf. also paragraph 61: "As long as applicable methodological standards leave scope for interpretation and weighing of interests, German Courts must give precedence to interpretation in accordance with the Convention." As the president of the Federal Constitutional Court, Prof. Dr. Hans-Jürgen Papier, has pointed out in a lecture at the 3rd European Jurists' Forum (Papier, *Koordination des Grundrechtsschutzes in Europa aus der Sicht des Bundesverfassungsgerichts*), the role of the Convention in German Law is stronger than in many other countries, due to this doctrine: Although Convention rights do not have the status of constitutional rights directly invocable in a constitutional complaint, alleged violations of the Convention can be brought before the Federal Constitutional Court as alleged violations of the duty to interpret constitutional rights in line with the Convention. Since in Germany, constitutional complaints may be directed against decisions of all ordinary (nonconstitutional) courts, this means that the jurisprudence of all German Courts is under potential Constitutional Court review for compliance with the Convention.

Fn. 23: Paragraph 39 of the decision, with reference to earlier decisions. The relevance of material and temporal limits of the matter in dispute implies that national organs are under certain conditions entitled to consider new circumstances. Suppose, for instance, that after an ECtHR judgment concerning access of a person to a child it turned out (for the first time) that the person in question has abused the child on former occasions and that any contact would retraumatize the child, - in such a case, national courts and other national authorities must be held entitled to draw new conclusions.

Fn. 24: Paragraph 39 of the decision, with reference to earlier decisions.

Fn. 25: Paragraph 40 of the decision.

Fn. 26: Paragraph 41 of the decision; the additional statement that the state party would commit a new violation of the Convention if it repeated or failed to terminate the conduct which had been declared to violate the Convention (*loc. cit.*) follows from the former ones.

Fn. 27: See text with note 22, above.

Fn. 28: See above, text with note 23.

Fn. 29: <http://www.opsi.gov.uk/ACTS/acts1998/80042--a.htm#1>.

Fn. 30: For the understanding of this clause in Great Britain see Elizabeth Wicks, *Taking Account Of Strasbourg? The British Judiciary's Approach To Interpreting Convention Rights*, *European Public Law* 11 (2005), 405 ff.

Fn. 31: Paragraphs 64 and 67 of the decision. Soon after the FCCt had reversed the decision of the Higher Regional Court, this latter Court again barred Mr. Görgülü from access to his son, so that another proceeding before the Constitutional Court was necessary to secure respect for the judgment of the European Court of Human Rights and for Mr. Görgülü's right to have access to his child. This time, according to the CCt's schedule of competences, it was for the First Chamber of the First Senate to decide. By temporary injunction of december 28, 2004 - 1 BvR 2790/04 - the Court (temporary injunction), and of june 10, 2005 - 1 BvR 2790/04 -, both available under www.bverfg.de (see note 4 above).

Fn. 32: ECtHR Judge Renate Jaeger, formerly member of the First Senate of the Constitutional Court, when confronted with this question in an interview, said she could only share the interviewer's amazement, see interview in *Frankfurter Allgemeine Zeitung* of september 8, 2005. Cf. also Frowein (note 5), 280; Kadelbach (note 5), 484, 486; Matthias Hartwig, *Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights - Part I/II*, in *German Law Journal* No. 5 (1 May 2005), C.I.3.; Buschle (note 5), 295 f.

Fn. 33: Soon after the CCt had reversed the decision of the Higher Regional Court, this latter Court again barred Mr. Görgülü from access to his son, and Mr. Görgülü again applied to the CCt. This time, according to the CCt's assignment-of-business plan, it was for the First Chamber of the First Senate to decide (cf. note 1). The Chamber secured Mr. Görgülü's right to have access to his child by a temporary injunction and later accepted his complaint as well founded in its definitive decision, see orders of december 28 - 1 BvR 2790/04 - (temporary injunction), and of june 10, 2005 - 1 BvR 2790/04 -, both available under www.bverfg.de (see note 4 above).

Fn. 34: *Surmeli v. Germany* - 75529/01 [2006] ECHR 607 (8 June 2006). On September 27, 2006, a draft bill for the institution of such a legal remedy has been presented by the Federal Ministry of Justice.