07
JULY 2024

CRUZ VILAÇA
ADVOGADOS

IN THIS EDITION

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FOREWORD

Membership of a particular social group as a ground for asylum in the case law of the Court of Justice of the European Union

On 11 June 2024, the Court of Justice of the European Union ("Court of Justice" or "Court") delivered its judgment in case *KL* (C-646/21), which clarifies the protection of stateless persons and third-country nationals in the European Union ("EU") who may be victims of gender-based violence upon return to their country of origin. With this judgment, the Court contributes to the development of the case law on whether and how gender-based violence can constitute a ground for claiming and receiving asylum, at a time when the Istanbul Convention on preventing and combating violence against women and domestic violence has already entered into force in the Union.

This Foreword focuses on the Court of Justice's approach to the question whether a woman may fall within the "membership of a particular social group" clause enshrined in Article 10(1)(d) of the Qualification Directive ("QD"). Being a member of a particular social group is one of the conditions for qualification for refugee status where there is a causal link between this membership and the persecution.

According to Article 10(1)(d) of the QD, when they examine the "membership of a particular social group", Member States must confirm that two conditions are fulfilled: (1) members of a social group must share at least one of three identifying features, an innate characteristic, a common background that cannot be changed, or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and (2) that group must have a distinct identity in its country of origin, so that it is perceived as being different by the surrounding society.

In previous case law (see, in this respect, *X, Y and Z*, joined cases C-199/12 to C-201/12), the Court of Justice had already addressed the interpretation of Article 10(1)(d) and the concept of "membership of a particular social group". In response to the question whether homosexuals could be regarded as being members of a particular social group (*X, Y and Z*, para. 41), the Court stated that Article 10(1)(d) of the QD gives a definition of a particular social group, membership of which may give rise to a genuine fear of persecution (*X, Y and Z*, para. 44). With regard to the conditions set out in that provision, the Court held that they must be read cumulatively and not alternatively (*X, Y and Z*, para. 45). The Court did not, however, give any guidance on the precise meaning of "membership of a particular social group", but confined itself to the particular circumstances of the case.

It was only in January this year that the Court of Justice seized the opportunity to clarify what constitutes "membership of a particular social group".

WS (C-621/21), delivered by the Grand Chamber of the Court of Justice on 16 January 2024, examined the situation of women facing domestic violence and answered the question of whether women can be recognised as refugees by virtue of being women. The Court of Justice held that women, as a whole, may be regarded as belonging to a "particular social group" within the meaning of Article 10(1)(d) of the QD if they are likely to be victims of gender-based violence (physical or

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psychological violence, including sexual violence and domestic violence) in their country of origin (*WS*, para. 57).

This is because they share an "innate characteristic", thus fulfilling the first of the two cumulative conditions for the identification of a "particular social group", according to the wording of the QD (*WS*, para. 49). In addition, "women who share an additional common feature", such as having escaped from a forced marriage or, in the case of married women, having left their homes, may be regarded as a having a "common background that cannot be changed" (*WS*, paras. 50 and 51).

In *WS*, the Court also recognised that women may be perceived by the surrounding society (entirety of the third country of origin of the applicant for international protection or a more restricted territory) as being different "*and recognised as having their own identity in that society, in particular because of social, moral or legal norms in their country of origin*" (*WS*, paras. 50 and 52), thus also satisfying the second part of the QD's test to be considered a "particular social group".

The case *KL* (C-646/21), decided by the Court of Justice on 11 June 2024, concerned two young women who lived in the Netherlands for a significant part of their lives. During their stay in the EU, they have fully embraced European fundamental rights standards and values and therefore faced the risk of persecution upon return to their country of origin. Asked whether "westernised women" could be recognised and regarded as members of a "particular social group" within the meaning of Article 10(1)(d) of the QD, the Grand Chamber of the Court held that refugee status may be granted to women who identified with the value of equality between women and men.

In finding that women who support equality between women and men could be recognised as belonging to a "particular social group", the Court first held that they met the first part of the relevant test for defining "membership of a particular social group" because they were women ("innate characteristic") and also because the importance of equality in their everyday life, in matters such as choice of partner and economic independence, meant that support for the principle was "a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it" (*KL*, paras. 42-44). In addition, since they developed their belief in equality as part of their identity during their prolonged stay in the Netherlands, they had a "common background that cannot be changed" (*KL*, paras. 41-45). In addition to fulfilling the first cumulative condition of the test set out in Article 10(1)(d) of the QD, they also met the second part of the test because it was possible that the surrounding society would regard them as having a distinct identity (*KL*, para. 48).

In *KL*, the Court appeared to go a step further in relation to previous case law (C-222/22) when it emphasised that the development of a genuine belief in gender equality during a prolonged stay in a Member State could not be regarded as an attempt to abuse the asylum procedure, and that women could not be expected to hide their belief in gender equality if they returned to their country of origin (*KL*, para. 62).

In this way, the Court's two recent judgments extend the scope of the persecution ground "membership of a particular social group", in line with the second subparagraph of Article 10(1)(d) ("*Gender related aspects, including gender identity and gender expression, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group*") and Recital 30 of the QD. The fact that the QD, when it refers to gender

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related aspects, does not address the situation of women, highlights the importance of the Court's interpretative role in these matters.

One of the most notable aspects of both judgments is that the Court of Justice stated that the interpretation of QD's provisions had to be consistent with the Geneva Convention, the Istanbul Convention and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (*WS*, para. 37 and 44-48; *KL*, para. 36). The Istanbul Convention (in particular Articles 60(1) and (2)) requires the Contracting Parties to interpret the Convention in a gender-sensitive manner (and to recognise gender-based violence as a form of persecution (see *KL*, para. 55), and lays down obligations that fall within the scope of Article 78 of the Treaty on the Functioning of the European Union. For that reason, the provisions of the QD, in particular Article 10(1)(d), must be interpreted in conformity with this Treaty provision, even though some Member States have not ratified the Convention (*WS*, paras. 46 and 47). Appropriate regard to these international law instruments is not only a major step to ensure the protection of refugee women fearing gender-based violence, but also a form of creating a coherent legal framework at the international and European levels.

Concluding remarks

At the heart of the Court of Justice's recent judgments on asylum claims is the question of whether women can be considered as "members of a particular social group" on the basis of their exposure to various forms of gender-based violence upon return to their country of origin. In *KL*, by recognising the two young women's belief in gender equality as a fundamental part of their identity, the Court followed its previous judgment in *WS* and reinforced the importance of a gender-sensitive interpretation of refugee law, as advocated by the Istanbul Convention – thus demonstrating how accession to this Convention positively influences the interpretation of EU law, in particular the QD.

The Court's conclusions in its judgments open the way for the promotion of a more nuanced gender perspective in its case law in future cases. They do not offer an unqualified open door in all situations, but they do set clear interpretative standards. The pending joined cases *AH* (C-608/22) and *FN* (C-609/22) can benefit from this: the Court will have to decide whether the requirement of an individual assessment can be waived for women fleeing the Taliban regime in Afghanistan, as suggested by Advocate General de la Tour in his Opinion in these cases.

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PORTUGUESE COMPETITION AUTHORITY RECOMMENDS TO THE GOVERNMENT AND ANA EQUALITY IN ACCESS BETWEEN TAXIS AND RIDE-HAILING SERVICES AT PORTUGUESE AIRPORTS

The Portuguese Competition Authority (AdC) has issued a recommendation regarding the conditions for picking up and dropping off passengers at Lisbon, Porto and Faro airports. The AdC aims to promote a fair and favourable competitive environment for consumers in the transport sector, encouraging the adoption of measures that guarantee equal conditions between the different operators, namely ride-hailing services (TVDE, in Portuguese) and taxis. In particular, the AdC identified that, by being equated with private vehicles (which do not carry out an economic activity), TVDE's are subject to payments for picking up and dropping off passengers, after exceeding a certain number of free daily accesses. These payments do not apply to other competing operators, such as taxis, raising questions of equality. In addition, TVDE's are placed at a competitive disadvantage when it comes to terminal access, as they are the only type of operator without direct access to the terminal door.

PORTUGUESE COMPETITION AUTHORITY ALERTS COMPANIES TO RECONCILE SUSTAINABILITY AND COMPETITION

Source: website of the AdC

The Portuguese Competition Authority (AdC) warns companies to the need to reconcile sustainability objectives with a competitive perspective to avoid infringements of the competition law. The transition to sustainable development may sometimes require collaboration between competitors, although such agreements can hinder competition and may, as a result, be prohibited. Therefore, companies must ensure that in pursuing sustainability goals, they do not breach competition law. To further assist in this objective, the AdC issued a Best Practices Guide on Sustainability Agreements, which was open for public consultation until 20 June.

EUROPEAN COMMISSION CLOSES ARTICLE 7(1) TEU PROCEDURE AGAINST POLAND AFTER RULE OF LAW IMPROVEMENTS

On 6 may 2024, the European Commission has finalised its analysis on the rule of law situation in Poland in the context of the Article 7(1) of the Treaty on European Union (TEU) procedure. The Commission considers that there is no longer a clear risk of a serious breach of the rule of law in Poland within the meaning of Article 7(1) TEU. This decision comes after Poland has launched a series of legislative and non-legislative measures to address the concerns on independence of judicial independence, after it has recognised the primacy of EU law and because it has committed to implementing all the judgments of the Court of Justice and the European Court of Human Rights related to rule of law.

Source: website of the European Commission

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EUROPEAN COMMISSION SENDS STATEMENT OF OBJECTIONS TO MICROSOFT OVER POSSIBLY ABUSIVE TYING PRACTICES REGARDING *TEAMS*

On 25 June, the European Commission has informed Microsoft of its preliminary view that Microsoft has breached EU antitrust rules by tying its communication and collaboration product, Teams, to its popular productivity applications included in its suites for businesses Office 365 and Microsoft 365. The Commission is concerned that, since at least April 2019, Microsoft has been tying Teams with its core SaaS productivity applications, thereby restricting competition on the market for communication and collaboration products and defending its market position in productivity software and its suites-centric model from competing suppliers of individual software. If confirmed, these practices would infringe Article 102 of the Treaty on the Functioning of the European Union, which prohibits the abuse of a dominant market position.

THE COUNCIL OF THE EUROPEAN UNION ADOPTS THE EU PACT ON MIGRATION AND ASYLUM

On 14 May, the Council of the EU adopted a new reform of the European asylum and migration system, consisting of 10 legislative acts, that will help to manage arrivals in an orderly way, by creating efficient and uniform procedures and ensuring fair burden sharing between Member States. Such legislative acts include the screening regulation, the updated Eurodac database, the asylum procedure regulation, the return border procedure regulation, the asylum and migration management regulation, the qualification regulation and reception conditions directive, and the resettlement regulation. Member states will now have two years to put the acts that were adopted into practice. The European Commission will soon present a common implementation plan to provide assistance to member states in this process.

EUROPEAN COUNCIL DECISIONS ON TOP JOBS PUBLISHED IN THE OFFICIAL JOURNAL OF THE UNION

On 28 June, the European Council made significant decisions regarding key leadership roles within the European Union. Firstly, the Council elected António Costa as the new President of the European Council, succeeding Charles Michel. Costa's term will begin on 1 December 2024 and will run until 31 May 2027. Secondly, the Council proposed Ursula von der Leyen as the candidate for President of the European Commission. This proposal follows the recent European Parliament elections held from 6 to 9 June 2024. Lastly, Kaja Kallas was considered to be the appropriate candidate for High Representative of the Union for Foreign Affairs and Security Policy.

Source: Euronews website

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ENERGY CHARTER TREATY: COUNCIL GIVES FINAL GREEN LIGHT TO EU'S WITHDRAWAL

The European Union and Euratom have formally decided to withdraw from the Energy Charter Treaty (ECT) after the European Parliament approved it during its last plenary session in April 2024. The ECT is a multilateral agreement established in 1998 and contains provisions on investment protection and trade in the energy sector. However, the ECT is considered outdated and no longer in line with the Paris agreement and the EU ambitions regarding the energy transition, which led to a process of modernisation in 2018. Member states are free to leave the ECT or to remain and support its modernisation during the next Energy Charter Conference.

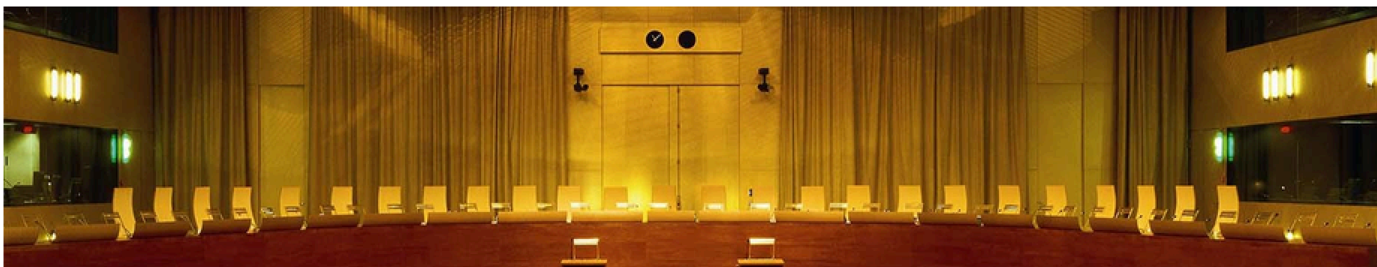
PARLIAMENT RE-ELECTS URSULA VON DER LEYEN AS COMMISSION PRESIDENT

On 18 July, the European Parliament elected Ursula von der Leyen as President of the European Commission. This will be Ursula von der Leyen's second term as Commission President. As the Parliament is currently composed of 719 Members, the necessary majority was 360 votes. The vote was held by secret paper ballot. 401 members of Parliament voted in favour, 284 against, and 22 cast blank or invalid votes. The Commission President-elect will now send official letters to member state heads of state or government inviting them to put forward their candidates for European Commissioner posts.

Source: website of the European Parliament

COURT OF JUSTICE SAYS THAT A MEMBER STATE IS NOT REQUIRED TO AUTOMATICALLY RECOGNISE REFUGEE STATUS GRANTED IN ANOTHER MEMBER STATE

In case Bundesrepublik Deutschland (Effect of a decision granting refugee status) (C-753/22), the Court of Justice found that, as EU law currently stands, Member States are not required to recognise automatically decisions granting refugee status adopted by another Member State. However, Member States are free to do so. In the particular circumstances of the case, Germany did not exercise that option. Where the competent national authority cannot reject as inadmissible an application for international protection of an applicant to whom another Member State has already granted such protection, on account of a serious risk to that applicant of being subjected, in that other Member State, to inhuman or degrading treatment, it must carry out a new, individual, full and up-to-date examination of the qualification for refugee status (para. 80). If the applicant qualifies as a refugee, the authority must grant him or her refugee status, and it does not have any discretion (para. 62).



Source: website of the CJEU

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GENERAL COURT DISMISSES ACTION SEEKING PARTIAL ANNULMENT OF COMMISSION DECISION FINDING PORTUGUESE INCOME TAX SCHEME AS UNLAWFUL STATE AID

On 19 June, the General Court has delivered its judgment in a case concerning an action seeking the annulment of Articles 1 and 4 to 6 of Commission Decision (EU) 2022/1414 of 4 December 2020 on aid scheme SA.21259 (2018/C) implemented by Portugal for Zona Franca da Madeira: Vima World v Commission (Zone franche de Madère) (T-671/22). The contested decision was adopted by the Commission in relation to a scheme adopted by the Portuguese Republic taking the form of a reduction in income tax applicable to legal entities on profits resulting from activities actually and materially carried out in Madeira, an exemption from municipal and local taxes and an exemption from real estate transfer tax for setting up a business in the Zona Franca, up to maximum aid amounts based on the tax base ceilings applicable to the beneficiaries' annual tax base. The General Court has dismissed the applicant’s action, upholding the Commission Decision: (i) it rejected the applicant's argument that the recovery ordered by the Commission would lead to double taxation and infringe competition law; (ii) it noted that, since the scheme was implemented in disregard of the 2007 and 2013 decisions, so that it was substantially modified in relation to the scheme authorised by those decisions, the Commission was right to conclude that there was new unlawful aid; and (iii) in so far as the Commission was entitled to find that the scheme had granted its beneficiaries State aid which was unlawful and incompatible with the internal market, the recovery of the aid ordered by the contested decision cannot constitute an infringement of the principle of proportionality, such recovery being a logical, proportionate and inherent consequence under Articles 107 and 108 TFEU.

TRIBUNAL JUDICIAL DA COMARCA DO PORTO HAS LODGED A REQUEST FOR A PRELIMINARY RULING WITH THE EUROPEAN COURT OF JUSTICE

On 24 June, a request for a preliminary ruling from the Tribunal Judicial da Comarca do Porto (Juízo Local Criminal de Vila Nova de Gaia) was published in the Official Journal of the EU. The request concerns the enforcement of a European arrest warrant in criminal proceedings against an individual referred to as YX. The Portuguese court seeks clarification on several legal questions arising from the interplay between European Union framework decisions and national law (Fira, C-215/24).

COURT OF JUSTICE RULES ON THE EXISTENCE OF AGREEMENTS, DECISIONS AND CONCERTED PRACTICES AND OF ABUSE OF A DOMINANT POSITION ON THE PERINDOPRIL MARKET

On 27 June 2024, the Court of Justice delivered several judgments (C-176/19 P, Commission v Servier and Others; C-201/19 P, Servier and Others v Commission; C-151/19 P, Commission v Krka; C-144/19 P, Lupin v Commission; C-164/19 P, Niche Generics v Commission; C-166/19 P, Unichem Laboratories v Commission; C-197/19 P, Mylan Laboratories and Mylan v Commission; C-198/19 P, Teva UK and Others v Commission; and C-207/19 P, Biogaran v Commission) examining the patent dispute settlement agreements concluded by the Servier group with manufacturers of generic medicines. These agreements were found by the Commission to constitute restrictions of competition and that Servier had implemented a strategy of exclusion that constituted an abuse of a dominant position. The generic manufacturers concerned decided to appeal the Commission’s decision. In 2018, the General Court annulled parts of the 2014 Commission decision: while confirming that the agreements constituted infringements were prohibited under Article 101 TFEU (except the one with Krka, it did not agree that Servier abused its dominant position. Now, the First Chamber of the Court of Justice, by upholding the Commission’s appeal, confirmed most of the Commission’s findings included in the 2014 decision. At the same time, the Court of Justice referred back to the General Court the assessment of certain findings for it to rule on them.

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GENERAL COURT RULES THAT THE EUROPEAN COMMISSION DID NOT GIVE THE PUBLIC SUFFICIENTLY WIDE ACCESS TO THE PURCHASE AGREEMENTS FOR COVID-19 VACCINES

In two recent judgments (T-689/21, Auken and Others v Commission, and T-761/21, Courtois and Others v Commission), the General Court found that the European Commission did not adequately provide public access to information about Covid-19 vaccine purchase agreements, particularly concerning those agreements' provisions on indemnification and conflict of interest declarations of the negotiating team members. These cases arose after the Commission partially disclosed the documents in response to requests from Members of the European Parliament (MEPs) and private individuals on the basis of the regulation on access to documents. As the Commission granted only partial access to those documents, which were put online in redacted versions, the MEPs concerned and private individuals brought actions for annulment before the General Court. In its judgments, the General Court upholds the two actions in part and annuls the Commission's decisions in so far as they contain irregularities.

PORTUGUESE COMPETITION COURT HAS LODGED A REQUEST FOR A PRELIMINARY RULING WITH THE EUROPEAN COURT OF JUSTICE REGARDING AGREEMENTS BETWEEN SPORTS CLUBS

On 1 July, a request for a preliminary ruling from the Tribunal da Concorrência, Regulação e Supervisão (Portugal) was published in the Official Journal of the EU (C-133/24, *CD Tondela and Others*). The request concerns the conclusion of no poach agreements by which the main incorporated sports clubs in the Portuguese Primeira Liga (First League) and Segunda Liga (Second League) agreed not to sign up as between themselves professional football players who had unilaterally terminated their employment contract on account of issues arising from the COVID-19 pandemic or from any exceptional decision adopted as a result of it, in particular to extend the sports season, can be classified as an agreement of an association of undertakings that is restrictive of competition by object.

Source: website of the CJEU

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JOSÉ LUÍS DA CRUZ VILAÇA IN CAPDC CONFERENCE

On May 21, 2024, José Luís da Cruz Vilaça, managing partner of CVA, took part in the conference "20 Anos da ADC, 15 Anos do CAPDC: Que Balanço da Aplicação do Direito da Concorrência em Portugal?", organised by the Circle of Portuguese Competition Lawyers (CAPDC), in conjunction with the Portuguese Competition Authority. The aim of this conference was to debate some of the issues that mark the daily lives of the main players in this area of the law. José Luís da Cruz Vilaça chaired the third panel entitled "Reflexão sobre a arquitetura institucional: uma oportunidade de reforma?", which dealt with effective judicial protection, specialised jurisdiction, the location of the Competition, Regulation and Supervision Court (TCRS), the single judge and the lack of appeal on matters of fact.

JOSÉ LUÍS DA CRUZ VILAÇA IN WORKSHOP AT THE LISBON PUBLIC LAW RESEARCH CENTRE

On 23 May 2024, José Luís da Cruz Vilaça, managing partner of CVA, took part in the workshop "Estarão os tribunais superiores a assegurar os direitos fundamentais?", organised by the Lisbon Public Law Research Centre and the EUI Centre for Judicial Cooperation. The aim of this initiative is to debate the role of top national courts in guaranteeing the standards of protection of fundamental rights required by the European Union acquis as an essential element of the rule of law. This workshop is part of the European Commission-funded project "TRIIAL 2 - Trust, Independence, Impartiality and Accountability of Legal Professionals under the EU Charter of Fundamental Rights", which offers training activities and tools for judges, lawyers and prosecutors on the rule of law, mutual trust, judicial independence, impartiality and accountability. José Luís da Cruz Vilaça took part in the second panel, entitled "The top-down perspective: the view from the Court of Justice of the EU and from the European Court of Human Rights", together with three other speakers, Maria José Rangel de Mesquita, Patrícia Fragoso Martins and Tiago Antunes.

SIGNING OF THE JOINT DECLARATION OF ENERGY SECTOR ASSOCIATIONS

On 29 May, a public ceremony was held to sign a Joint Declaration regarding the World Energy Day 2024, an initiative of the Portuguese Energy Association (APE) and signed by 21 associations in the energy sector. The ceremony took place in the Luís de Freitas Branco Room at the Belém Cultural Centre. José Luís da Cruz Vilaça, managing partner of CVA and chairman of the board of the Portuguese Energy Law Association (APDEN), one of the associations that signed the Joint Declaration, took part in this civic intervention event.

MANIFESTO POR UMA REFORMA DA JUSTIÇA EM DEFESA DO ESTADO DE DIREITO DEMOCRÁTICO

On 31 May, José Luís da Cruz Vilaça, managing partner of CVA, together with four other signatories of the ‘Manifesto por uma Reforma da Justiça em Defesa do Estado de Direito Democrático' met with the Prime Minister, Luís Montenegro, and the Minister of Justice, Rita Alarcão Júdice, at the S. Bento Palace. The signatories of the Manifesto had already been received by the President of the Republic, Marcelo Rebelo de Sousa, to whom they expressed the same concerns. The Manifesto was made public on the 1st of May, with a group of 100 personalities signing the document in defence of a ‘civic upsurge’ that would put an end to the ‘worrying inertia’ of political agents regarding justice reform.

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INÊS DOMINGUES ALVES PARTICIPATES IN "JACQUES DELORS AGORA: EUROPE'S NEXT GENERATION"

CVA associate Inês Domingues Alves took part in the "Jacques Delors Agora" event, co-organised by three partners committed to promoting citizenship and European values: the Académie Notre Europe (Paris), the Scuola di Politiche (Rome) and the Academia Europea Leadership (Barcelona).
The event, which took place from 1 to 4 July in Lisbon, brought together 130 young people selected from all over Europe to discuss with European decision-makers and experts the main challenges facing the EU and the priorities for the next five years. Among the topics covered at the event, the enlargement of the Union, the climate and digital transition, the elections to the European Parliament and the European defence strategy were the most prominent.

JOSÉ LUÍS DA CRUZ VILAÇA IN LECTURE "COMPENSATION IN THE PRIVATE ENFORCEMENT OF COMPETITION LAW: A EUROPEAN AND IBERIAN PERSPECTIVE"

José Luís da Cruz Vilaça, founding partner of CVA, took part as a speaker in the lecture "Compensation in the private enforcement of competition law: a European and Iberian perspective", organised by IE University and the Pérez-Llorca law firm. The lecture, which took place on 28 June in Madrid, was also attended by Juliane Kokott (Advocate General at the Court of Justice of the EU), María Vidales Picazo (Director of the CNMC's Competition Promotion Department) and Patricia Pérez (PhD in Law and Adjunct Professor at IE Law School) and was moderated by Juan Rodríguez Cárcamo (EU Law Partner at Pérez-Llorca). The aim of the lecture was to discuss the most pressing issues in relation to actions brought by private individuals for damages resulting from infringements of competition law (commonly known as "private enforcement"), in particular the case law of the Court of Justice of the EU, the academic perspective and the experience of the practical application of that case law by the Portuguese and Spanish competition authorities.

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