



FLASH NEWS

3/17

NATIONAL DECISIONS OF INTEREST FOR THE UNION

OVERVIEW FROM 1st SEPTEMBER TO 10 OCTOBER 2017



Cyprus – Supreme court

Freedom of establishment - Freedom to provide services - National legislation pertaining to audiovisual media services

Upon a referral from the President of the Republic, the Supreme court noted the incompatibility with articles 49 TFEU and 56 TFEU of national provisions that limited, on the one hand, the freedom of establishment of new television bodies if this could compromise the economic viability of the television bodies that are already present in Cyprus as well as, on the other hand, the freedom to provide audio-visual media services from other Member states if they contained advertising. Based on the case-law of the Court and, mainly, on the rulings *Commission/Italy* (C-531/06) and *Commission/Portugal* (C-458/08), the Supreme court concluded that such restrictions cannot be justified solely on economic grounds.

Ανώτατο Δικαστήριο Κύπρου, *opinion of 06.09.2017, Πρόεδρος της Δημοκρατίας και Βουλή των Αντιπροσώπων*, n° 5/2016 (GR)



Ireland – Supreme court

Competition law - Document disclosure procedure

In the context of an application for disclosure of documents relating to an alleged abuse of a collective dominant position, as well as incidental applications, the Supreme court ruled that regulation no. 1/2003 allows the national court to apply national procedures to cases falling under the scope of competition law, subject to respect of the principles of equivalence and effectiveness. Thus, the Supreme court ordered the “proportional” disclosure of some relevant documents for the resolution of the dispute, while imposing strict conditions of access to the said documents in order to protect the confidential data.

Supreme Court, *ruling of 7.09.2017, Goode Concrete c. CRH plc, Roadstone Wood Limited and Kilsaran Concrete*, no. 2010/10685 P [2017] IESC 534 (EN)



Spain – Supreme court

Civil disputes - Ability of the government of Gibraltar to institute legal proceedings before the Spanish courts

The Supreme court recognised the Gibraltar government's ability to institute legal proceedings before the Spanish courts. The said government had filed an application for the rectification of certain journalistic information, which the Provincial court of Madrid, in the ruling struck down by the Supreme court, had dismissed stating that it could not institute legal proceedings as Gibraltar was not a State in terms of international law. Now, the Supreme court ruled that, as regards civil disputes, the ability of a government to institute legal proceedings is exclusively associated to the question of knowing whether, in accordance with its internal legislation, this government meets the conditions to be considered as a legal person with a legal personality.

Tribunal Supremo, Sala de lo Civil, *ruling of 13.09.2017, no. STS 3246/2017* (ES)

[Press release \(ES\)](#)



Croatia – Supreme court

European arrest warrant

The Supreme court cancelled the order to stay of the criminal proceedings in the principal action, issued by the referring court in the pending case AY, [C-268/17](#).

The Supreme court ruled that based on the response of the Court of Justice to the questions referred for a preliminary ruling in this case, which, as a whole, pertain to the European arrest warrant, the criminal proceedings will be continued in presence or *in absentia*. Therefore, insofar as the responses to the preliminary rulings have no impact on the application of the penal code as regards the substantive aspects of the offence (*in meritis*), in accordance with article 18, § 1, 3 and 5 of the law relating to criminal proceedings, the conditions for the stay of proceedings are not satisfied.

Vrhovni sud, *order of 19.09.2017, no. I Kž-Us102/17-4* (HR)

[Press release \(HR\)](#)



Belgium – Court of cassation

Asylum policy - Compliance with reasonable period - Preliminary question

Hearing an appeal against a decision ordering the extension of the detention of a foreign national deprived of freedom, the Court of cassation dismissed the application to refer a preliminary question, to the Court of Justice, relating to the period in which the Court of cassation must rule in such a situation. The latter stated that the right of the applicant that his cause be heard within a reasonable period would risk being violated if a preliminary question was referred. In addition, the Court stated that no provision of the Union law determines the period in which its decision should be delivered.

The applicant had mainly relied on articles 13 and 15 of directive 2008/115/EC, on common standards and procedures in Member States for returning illegally staying third-country nationals.

Court of cassation, [ruling of 20.09.2017, no. P.17.0933.F \(FR\)](#)



Germany – Federal Court of Justice

Copyright - Violation of the right to communication to the public by provision of hyperlinks

The Federal Court of Justice ruled that the provision of photos indexed with thumbnails by Google Images did not constitute communication to the public, even if the holder of the right had not authorised the publication prior to it being made available. The Federal Court of Justice justified this conclusion by “the special significance of search engines and links for the proper functioning of the Internet”.

This decision seems to question the criteria established in the ruling *GS Media*, [C-160/15](#), in order to determine whether the provision of a hyperlink constitutes communication to the public.

Bundesgerichtshof, [ruling of 21.09.2017, no. I ZR 11/16 \(DE\)](#)

[Press release \(DE\)](#)



Italy – Court of cassation

Criminal law - External complicity in a Mafia association

The Court of cassation, conforming to the decision of the ECHR *Contrada c. Italie*, in which the said Court had established a violation of article 7 of the ECHR by the Italian State, annulled, declared unenforceable and devoid of penal effects, in the context of an “enforcement incident”, the decision of convicting Mr Contrada for external complicity in a Mafia association. The said Court held that the enforcement incident, instrument allowing the verification of the legitimacy of the sentence during its enforcement, was the only instrument allowing to remedy the consequences of a violation of the ECHR by Italy.

Court of cassation, [ruling of 06.07.2017 \(filing of the ruling on 20.09.2017\), no. 43112 \(IT\)](#)



Greece – Council of State

Asylum policy - Refugee status - Safe third country

By its decisions, the Council of State dismissed the appeal pertaining to misuse of power, filed by two asylum applicants from Syria against the administrative decisions that, on the one hand, refused to grant them the refugee status as well as the right of asylum in Greece and, on the other hand, ordered their return to Turkey.

Based on the cumulative criteria stated by directive 2013/32/EU on common procedures for granting and withdrawing international protection, the EU-Turkey common action plan of 15/10/2015, the Turkish protection scheme for Syrians and the adherence to the principle of non-refoulement by the Turkish authorities, as well as the personal situation of the applicants who have expressed no fear for their life or liberty, the Council of State held that Turkey was a safe third country in this instance. It noted that the ratification of the Geneva Convention by a third country was not necessary, as such, for the condition of article 38, paragraph 1, under e), of the directive to be satisfied.

Symvoulia tis Epikrateias, Ass., [rulings of 22.09.2017, no. 2347/2017 and 2348/2017 \(link to the site of the court\) \(GR\)](#)



France – Court of cassation

Asylum policy - Holding in detention for the purpose of transfer of an applicant for international protection - Extension of the measure

The Court of cassation applied the reasoning formulated in the ruling *Al Chodor* ([C-528/15](#)) in which the Court of Justice interpreted regulation no. 604/2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, in the sense that it requires the Member states to set out, in a binding provision of general scope, objective criteria defining the existence of a risk of the applicant for international protection, who is being transferred, absconding.

Noting the absence of such a binding provision of general scope in the national law, the Court of cassation annulled the order of the President of a Court of Appeal of Paris, by which the administrative detention of the party concerned had been extended.

Court of cassation, 1st civil chamber, [ruling of 27.09.2017, no. 17-15.160 \(FR\)](#)



Germany – Federal Court of Justice

Common rules on compensation and assistance to air passengers - Obligation of compensation during the delay of the routing flight

The Federal Court of Justice ruled that an airline must pay compensation to a passenger pursuant to regulation no. 261/2004, establishing the common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or significant delay of a flight, if the booked flight has been cancelled and if the re-routing flight offered and executed by another airline is significantly delayed.

Simply offering a re-routing flight and the fact that the passenger could also claim its rights with respect to the airline responsible for the re-routing flight cannot justify an exception to the obligation of compensation.

Bundesgerichtshof, [ruling of 10.10.2017, no. X ZR 73/16 \(DE\)](#)

[Press release \(DE\)](#)



Germany – Federal Constitutional Court

Monetary policy- Public sector asset purchase programme

The Federal Constitutional Court dismissed the applications for interim measures to order the German federal central bank to stop purchasing sovereign debt instruments in the context of the public sector asset purchase programme of the European Central Bank.

It held that the applications for interim measures tended to anticipate the decision of the main proceedings. The applicants had filed a constitutional complaint in the context of which the Constitutional Court had referred a request for a preliminary ruling to the Court (Case pending *Weiss and others*, ____ ([C-493/17](#))).

Bundesverfassungsgericht, [decision of 10.10.2017, no. 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 \(DE\)](#)

[Press release \(DE\)](#)