



FLASH NEWS

4/17

NATIONAL DECISIONS OF INTEREST FOR THE UNION

OVERVIEW FROM 11 TO 31 OCTOBER 2017



Belgium – Constitutional Court

Free movement of workers - Equality of treatment - Use of languages

Hearing an application for annulment, the Constitutional Court annulled article 2 of the law of 21 April 2016 amending the laws on the use of languages in administrative matters, in that it would create a difference in treatment between job applicants in the local departments of the German language region, on the one hand, and in the local departments of the bilingual Brussels Capital Region on the other hand, as regards the issuing of linguistic knowledge certificates. In this context, the Constitutional Court followed the case-law of the Court of Justice, by considering that the fact of asking the applicants concerned for a language certificate that is issued only by a Belgian body did not comply with the principle of free movement of workers.

Constitutional Court, [ruling of 05.10.2017, no. 109/2017 \(NL\)](#)



Germany – Constitutional Court

Fundamental right to personality - Law on the personal status not allowing the entry of a third sex

The Federal Constitutional Court ruled that the law on the personal status did not comply with the constitutional law, insofar as it did not allow entering a third indication beyond the mention of “masculine sex” or “feminine sex”. The fundamental right to personality, which results from articles 1 and 2 of the Constitution, also protects the identity of a person who does not fall under the male or female category. The Constitutional Court especially referred to the ruling of the Court of Justice of 30 April 1996, P./S. and Cornwall County Council, ([C-13/94](#)).

Bundesverfassungsgericht, [ruling of 10.10.2017 no. 1 BvR 2019/16 \(DE\)](#)

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



Poland – Administrative Supreme court

Administrative proceedings - Reopening of national proceedings following a judgment of the Court delivered under the preliminary ruling procedure

Hearing an application for interpretation of the law on the proceedings before the administrative courts, the Administrative Supreme court ruled that article 272, paragraph 3 of this law could not be interpreted as limiting the possibility of filing an application for the reopening of proceedings following a judgment of the Court of Justice delivered under the preliminary ruling procedure to only the parties to the case referred for a preliminary ruling before the said court. Other persons invoking the relevance of the ruling of the Court of Justice for their case can also file an appeal for the reopening of proceedings based on this article.

Naczelny Sąd Administracyjny, [ruling of 16.10.2017, sygn. akt](#)



Sweden – Administrative Supreme court

Free movement of capital - Income tax - Dividends

In a ruling pertaining to the taxation of dividends distributed to a resident by a Cypriot company, the Administrative Supreme court ruled that the criterion of “comparable taxation”, required by the national law on income tax as a condition to reduce the economic double taxation of distributed dividends, was likely to restrict the free movement of capital provided for by the TFEU and that this restriction could not be justified. The said court stated that the national dividends as well as the Cypriot dividends were subject to double taxation (objectively comparable situations). As the criterion of comparable taxation has a general scope, without specifically seeking to prevent artificial arrangements, it could not justify the restriction concerned.

Högsta förvaltningsdomstolen, [ruling of 16.10.2017, no. 6322-16 \(SE\)](#)



Poland – Supreme court

Procedure of information in the domain of technical regulations and standards - Concept of "technical regulation"

Hearing an appeal in cassation concerning a criminal case that ended in the acquittal of a person accused of having violated a provision of the law concerning the obligation to obtain an authorisation for the operation of games of chance, the Supreme court annulled the judgments of the lower courts and referred the case to the district court.

It ruled that, as stated in the ruling of the Court of Justice of 13 October 2016, M. and S. ([C-303/15](#)), the provision in question did not constitute a technical regulation under directive 98/34/EC. Therefore, the sole absence of notification to the Commission could not lead to its inapplicability and justify the acquittal declared in this case.

Sąd Najwyższy, [ruling of 17.10.2017, sygn. akt III K 88/17 \(PL\)](#)



United Kingdom – Supreme court

Charter of Fundamental Rights - Horizontal direct effect of article 47

In its ruling, the supreme court upheld the decision of the court of appeal, by which the latter had recognised the horizontal direct effect of article 47 of the Charter. The applicants, ex-employees of the embassies of Sudan and Libya in the United Kingdom, had filed proceedings against their ex-employers for, among other things, unfair dismissal, non-compliance with minimum wages, discrimination based on race and violation of the national regulation of transposition of directive 2003/88. In both cases, the defendant embassies had tried to avoid the proceedings by invoking State Immunity.

Based on the case-law of the Court of Justice, the court of appeal concluded that the rights granted by the Charter can have a horizontal direct effect. According to the Supreme court, the disputed acts in question cannot, whatever the circumstances, benefit from State immunity, in that they do not constitute the exercise of a sovereign authority.

Supreme Court, [Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs, decision \[2017\] UKSC 62 of 18.10.2017 \(EN\)](#)



Spain – Supreme court

Free movement of capital - Restrictions - Endowment and inheritance tax - Financial liability of the State

The Supreme court was referred an appeal of a German citizen, residing in Germany, concerning the refusal to reimburse a part of the tax on the inheritance and endowments on real estate located in Spain which was found to be unfair based on the ruling of the Court of Justice of 3 September 2014, Commission/Spain ([C-127/12](#)).

The Supreme court granted the requested reimbursement and recalled that the kingdom of Spain should have respected the criteria established in the aforementioned ruling of the Court, given that it preceded the facts of the case. It thus also recognised the financial liability of the Kingdom of Spain, on the grounds of the existence of a direct causal link, in the present case, between the economic damage invoked by the applicant and the application of a national provision contrary to the law of the European Union.

Tribunal Supremo, Sala de lo Contencioso, [ruling of 17.10.2017, no. STS 3661/2017 \(ES\)](#)



Greece – Council of State

Taxation - Electronic declaration of assets - Protection of personal data

Following illegality proceedings, the Council of State annulled a ministerial decree pertaining to the contents of the declaration of assets, declaration of interests as well as the electronic declaration system, on the grounds that the said ruling was based on legislative provisions that were contrary to the Constitution.

Among several grounds of unconstitutionality, the Administrative superior court held that the information concerning amounts more than 15,000 Euros in cash, not deposited in a bank as well as movable property of a value higher than 30,000 Euros that is the subject of the declaration, is personal data under article 2 under a) of directive 95/46. Interpreting the Constitution in light of this directive, the Charter of Fundamental Rights of the European Union and the principle of proportionality, the Council of State ruled that the obligation to declare the cited assets did not constitute a suitable measure in view of the purposes sought.

Symvoulío tis Epikrateias, Ass., [ruling of 20.10.2017, no. 2649/2017 \(EL\)](#)



Italy – Court of cassation

Immigration, asylum and border control - International protection - Applicant qualified as a threat to State security

The Court of cassation ruled that the national regulation, providing for the expulsion of any person, who has been granted international protection, representing a threat to public safety, is not applicable when there is a serious risk that he may be subjected to the death penalty, torture or other degrading or inhuman sentences or treatments in his country of origin.

In fact, according to the Court, the prohibition on removal, expulsion and extradition stated in article 19, paragraph 2, of the Charter of Fundamental Rights of the European Union, should be considered as absolute and does not provide for derogations. Thus, the court ruled that an applicant for international protection who is under the conditions stated in the said article of the Charter, although qualified as a threat to State security, cannot be removed.

Corte di cassazione, [ruling filed on 26.10.2017, no. 49242 \(IT\)](#)



Spain – Supreme court

Fundamental rights - Freedom of expression - Criminal conviction for having “retweeted” messages justifying terrorism

The Supreme court ruled that the fact of “retweeting” messages paying tribute to a terrorist as well as the terrorist organisation ETA fell under the crime of the glorification of terrorism, even though these messages had initially been posted on Twitter by third-parties, and the convicted person had only re-shared them. The Supreme court held that such distribution of messages glorifying terrorism cannot be justified by the freedom of expression or freedom of thought, under the Spanish Constitution as well as the ECHR.

Tribunal Supremo, Sala de lo Penal, [ruling of 27.10.2017, no. STS 3804/2017 \(ES\)](#)

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



France – Constitutional Council

Personal data - Advance erasure of data recorded in a criminal records file - Violation of the right to privacy

The Constitutional Council was referred a priority question of constitutionality concerning the first paragraph of article 230-8 of the code of criminal procedure, in its wording resulting from law no. 2016-731 strengthening the fight against organised crime, terrorism and their financing, and improving the effectiveness and guarantees of criminal proceedings. It ruled that by depriving the defendants in criminal proceedings, other than those having been the subject of a judgment of acquittal, discharge, no-case or discontinuation of proceedings, of any possibility of obtaining the erasure of their personal data recorded in a criminal records file, the contested provision disproportionately violated the right to privacy.

Constitutional Council, [decision of 27.10.2017, no. 2017/670 QPC \(FR\)](#)

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