



FLASH NEWS

1/18

NATIONAL DECISIONS OF INTEREST FOR THE UNION

OVERVIEW OF JANUARY AND FEBRUARY 2018



Italy – Court of cassation

Fundamental rights - Right to an effective remedy - Legal aid for foreign nationals residing lawfully

The Court of cassation was called upon to rule on the legal proceedings to grant the temporary right of entry or residence to foreign nationals who are parents of minor children residing in Italy. It ruled that in order to recognise the legal aid that should, as per the national law, be given to Italian citizens and foreign nationals residing lawfully, the concept of a foreign national residing lawfully should be interpreted in the sense that it includes the foreign national having applied for a residence permit and whose application is being reviewed. According to the Court of cassation, only such an interpretation is compatible with article 6 of the ECHR and with 47 of the Charter of Fundamental Rights of the European Union, insofar as, in the procedure provided for by the Italian law, the criterion of access to legal aid, that is to say, legal residence, is identical to the result that can be attained at the end of the said procedure.

Corte di Cassazione, [ruling of 05.01.2018, no. 164 \(IT\)](#)



Luxembourg – Court of appeal

Labour law - Workplace harassment

The court of appeal held, based on directive 2000/78/EC and the principle of execution in good faith of contracts resulting from article 1134 of the Civil Code, that workplace harassment manifests in any behaviour that, by its repetition or systematic nature, harms the dignity or physical and mental integrity of a person. In this instance, the court of appeal ruled that the fact of regularly informing one's own employee about numerous dismissals with notice and leaving him in the dark about the actions taken, and thereby about the stability of his job, constitutes workplace harassment.

Court of appeal, ruling of 11.01.2018, no. 44637, available on the website of the judicial network of the EU (not available online) (FR)



Luxembourg – Court of cassation

Criminal law - Whistleblowers

The Court of cassation partially reversed the ruling of the court of appeal sentencing the main whistleblower in the "Luxleak" case. Former auditor at the PricewaterhouseCoopers firm, M. D. was sentenced by the court of appeal for having shared with a journalist the content of about a hundred confidential fiscal agreements concluded between the administration of Luxembourg and PwC on behalf of big multinational companies.

For the first time, the justice system of Luxembourg recognised the status of whistleblower, developed by the case-law of the ECHR relating to article 10 of the Convention, seeking to outline the intrusion of public authorities, in this case the criminal courts, in the exercise by a person of his right to freedom of expression, and especially his right to communicate information.

Court of cassation, [ruling of 11.01.2018, no. 3912 \(FR\)](#)

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



Belgium – Council of State

Asylum policy - Starting point of the period of prohibition on entry

Hearing an appeal in cassation against a ruling annulling orders to leave the territory, the Council of State ruled that the lower court had incorrectly considered that the prohibition on entry that was previously instituted against the recipients of these orders became effective from the day of its notification and had, accordingly, expired. Based on the ruling C-225/16 of the Court, according to which the period of prohibition on entry starts only after the person concerned has actually left the territory, the Council of State held that the prohibition on entry in question was yet to expire, insofar as the parties concerned were still on Belgian territory.

Council of State, ruling of 11.01.2018, no. 240.394, available on the website of the judicial network of the EU (not available online) (FR)



Spain – Supreme court

Concept of transport service - Inclusion of the Uber entity

Based on the ruling of the Court of Justice in the Asociación Profesional Elite Taxi case ([C-434/15](#)), the Supreme court qualified the activities developed by the Uber B.V. entity as “transport service”, from the time that its activities became an integral part of a global service whose main element is transport service. In accordance with this conclusion, the Spanish court held that the national regulations on land transport are applicable to Uber, and the latter is therefore required to respect the obligations resulting from it, like the one relating to issuance of a transport licence.

Tribunal Supremo. Sala de lo contencioso [ruling of 25.01.2018. \(STS120/2018\) \(ES\)](#)



Romania- Constitutional Court

Status of magistrates - Activities exercised abroad - Recourse action of the State against the magistrates responsible for miscarriage of justice

Hearing a case in the context of the prior constitutionality check of the modifications made to law no. 303 of 2004 on the status of magistrates, the Constitutional Court declared the said status to be incompatible with the constitutional prohibition on the exercise by a magistrate of activities other than teaching and, mainly, the exercise of the said activities by a magistrate assigned abroad. Thus, the Court stated that magistrates are eligible for functions in the context of the institutions of the Union or other international organisations, when an international act expressly subordinates the access to the said functions to the status of magistrate but that, to this end, the legislator must find a normative solution that complies with the constitutional requirements. The Court also stated the unconstitutionality of the obligation of the State to initiate, a recourse action against the magistrates concerned, after having been held responsible for miscarriage of justice, without it been given the possibility of verifying whether the said magistrates exercised their functions in bad faith or had been severely negligent.

Curtea Constituțională, [rulings of 30.01.2018, no. 45 \(RO\)](#)



Poland – Supreme court

Insolvency - Recognition of decisions initiating insolvency proceedings - Rules of evidence

Hearing an appeal in cassation in a case concerning the registration of a legal mortgage in the land register, the Supreme court ruled on the matter of the procedural rules governing the proof of the initiation of insolvency proceedings in another Member State. In this regard, it noted that it is clear from articles 17 and 25 of regulation no. 1346/2000, read in conjunction with article 61 of regulation no. 1215/2012, that no additional formality is required for the recognition of the documents issued in a Member State in the context of insolvency proceedings that come under the scope of the first regulation. Therefore, a Polish court cannot refuse recognition of the initiation of such proceedings in another Member State solely on the grounds that the copy of the decision of the initiation submitted by one of the parties is not accompanied by an apostille.

Sąd Najwyższy, [order of 26.01.2018, II CSK 174/17 \(PL\)](#)



Poland – Supreme court

Trademarks - Directive no. 89/104 - Exhaustion of the right granted by the trademark

The Supreme court was referred an appeal in cassation in the context of a criminal procedure that resulted in the acquittal of an entrepreneur, who was taken to court for violating a provision of Polish law on industrial property prohibiting the use of protected and registered trademarks without a licence. In this instance, the said entrepreneur had been taken to court owing to the fact that his economic activity consisted of filling and selling gas in cylinders bearing the protected and registered trademark of their producer.

Based on the ruling of the Court of Justice Viking Gas ([C-46/10](#)), the Supreme court ruled that, when it comes to a product like the gas cylinder, in accordance with article 7, paragraph 1, of directive 89/104/EEC, putting it on the market results in the exhaustion of the right granted by the trademark under which the said product is marketed. Therefore, the activity of the defendant did not constitute an offence in this case.

Sąd Najwyższy, [order of 31.01.2018, V KK 297/17 \(PL\)](#)



France – Court of cassation

Insolvency proceedings in the Member State of the registered office - Secondary proceedings

Hearing an appeal against a ruling of the court of appeal of Paris prohibiting a director from managing a company based in Romania, for not having declared in France the suspension of payments of this company in France, the Court of cassation strikes down and annuls the said ruling. In this regard, it held that, in accordance with the provisions (of articles 3 and 16) of regulation (EC) no. 1346/2000, on insolvency proceedings, and the case-law of the Court, the French procedure was of a secondary character. In fact, even if its main interests had been located in France, it stated that the date of initiation of the collective proceedings of this company by a court of the Member State where it had its registered office was before the date of the initiation of the procedure of winding up by decision of the court in France. Therefore, its director was under no obligation whatsoever to declare its suspension of payments in France.

Court of cassation, [ruling of 07.02.2018, no. 17-10056 \(FR\)](#)



Portugal – Court of appeal of Porto

Third-party motor insurance - Competition between objective liability for risk and subjective liability

The court of appeal of Porto ruled that the case-law and the prevailing doctrine, still bound to the traditional concepts of subjective liability should be reviewed in light of the Union law in order to accept the competition between contributory negligence and the objective liability for risk. According to a new interpretation, the liability for risk of the vehicle driver involved in an accident is refused only when the accident is exclusively attributable to the victim.

This ruling is perfectly in line with the case-law of the Court of Justice (see rulings Ambrósio Lavrador, [C-409/09](#), and Marques de Almeida, [C-300/10](#)).

Tribunal da Relação do Porto, [ruling of 08.02.2018, no. 1091/15.5T8PVZ.P1 \(PT\)](#)



Netherlands – Court of Amsterdam

Citizenship of the Union - Brexit - Consequences - Intention of reference for a preliminary ruling - Appeal to a superior court

The court of Amsterdam expressed, in an interlocutory judgment, its intention of referring the consequences of the Brexit for the citizenship of the nationals of the United Kingdom, as long as the negotiations between the European Council and the United Kingdom do not end in this regard, to the Court of Justice of the EU.

After having heard both parties, the court accepted, as an exception, the appeal to a superior court initiated by the Dutch State and the Province of Amsterdam against this interlocutory judgment. Therefore, the referral of the case to the Court of Justice of the EU will be decided by the court of appeal of Amsterdam.

Court of Amsterdam, [decision of 07.02.2018, no. C/13/640244 / KG ZA 17-1327 \(NL\)](#) and [decision of 20.02.2018, \(FB/AA\) \(NL\)](#)



United Kingdom – Supreme court

Convention on the civil aspects of international child abduction

The Supreme court ruled on the interpretation of article 12 of the Convention, relating to the civil aspects of international child abduction, in a case where the child had left his State of residence, which was Australia in this case, to go to the United Kingdom, accompanied by his mother, who later decided to not return to Australia.

The Court ruled that the said article 12, which requires the national courts to order the return of the child when a period of less than one year has passed from his shifting, cannot be invoked when, like in this instance, the State, where this enforcement is sought, has become the place of usual residence of the child. However, it stated that the abandoned parent can invoke this provision if he demands the return shortly after the departure of the child and if he can prove that the other parent has no intention of returning.

Supreme Court, [ruling of 14.02.2018, In the matter of C \(Children\)\[2018\] UKSC 8](#)

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



France – Court of cassation

Protection of personal data De-listing of web links - Google

The Court of cassation was referred an appeal concerning a request for de-listing filed by a private individual criticising Google Inc. for using his personal data without his consent.

It held that, based on the ruling of the Court of Justice, Google Spain and Google ([C-131/12](#)), the court of appeal was required to carry out the balancing of the interests involved in a meaningful way. Therefore, it could not order a general injunction making the removal of the links to web pages containing information related to a person, from the list of results displayed after a search performed using this person's name, automatic. Therefore, the ruling of the court of appeal has been annulled.

Court of cassation, [ruling of 14.02.2017, no. 17-10.499 \(FR\)](#)



Italy – Court of cassation

Constitutionality check

The Court of cassation raised a question about constitutionality in a case pertaining to financial intermediation. More specifically, it held that there is a doubt about the compatibility of the national provisions providing for penalties following violations observed by the Stock exchange committee, not only with the Constitution but also with the Charter of Fundamental Rights, given that it refers to a subject coming under the scope of the Union law.

In accordance with the ruling of the Constitutional Court no. 269/2017 (published on flash news 6/17), the Court of cassation modified its *modus operandi*. In fact, in this case, it ruled that there was no need for a reference for a preliminary ruling before the Court of Justice of the European Union concerning the compatibility of the said provisions with the Charter, but that it was necessary to refer the case to the Constitutional Court so that it could carry out a compliance check of the provisions in question vis-à-vis the Constitution and the Charter.

Corte suprema di cassazione, [ruling of 16.02.2018, no. 3831 \(IT\)](#)



Germany – Federal Court of Justice

Fundamental rights - Informational self-determination - Obligation of deleting an entry on a website comparing physicians online

The Federal Court of Justice ruled that the website Jameda, for the comparison of physicians online, is required to delete the profile of a physician when requested by the latter. Unlike a case in 2014, the Federal Court of Justice held that, in the case in point, the right to informational self-determination of the physician, provided for in articles 1 and 2 of the Constitution as well as article 8 of the ECHR, took precedence over the freedom of expression of the company operating the website. In fact, according to the German court, the comparison site Jameda cannot be considered as a neutral operator passing on information, given that it promoted paid access for registration on the said site.

Bundesgerichtshof, [decision of 20.02.2018, VI ZR 30/17 \(DE\)](#)

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



Germany – Federal Administrative Court

Environment - Prohibition of the movement of vehicles with a diesel engine - Admissibility

The Federal Administrative Court ruled that the decisions of the administrative courts of Düsseldorf and Stuttgart, related to the prohibition of the movement of vehicles with a diesel engine, stated by a plan for air quality, should be maintained as a rule. However, it recalled that the measures, such as a prohibition of movement, intended to ensure the compliance with the environmental standards of the Union, should be necessary and proportionate.

Bundesverwaltungsgericht, [decision of 27.02.2018, 7 C 26.16, 7 C 30.17 \(DE\)](#)

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



Latvia– Supreme court

Immigration policy - Decision ordering return to the country of origin

The Supreme court was referred an appeal in cassation filed against the upholding of a decision of the national immigration authority having ordered the return of the applicant and her minor daughter from Latvia to their country of origin (the Democratic Republic of the Congo), with prohibition of entry in the Schengen zone for three years. The Supreme court ruled that even if the applicant had been refused the refugee status earlier by a court ruling, the lower court should have considered the present situation in the country of origin in a more detailed manner to check that the return does not lead to a violation of her fundamental rights.

Latvijas Republikas Augstākā tiesa, [decision of 22.02.2018 nr. SKC-288/2018 \(LV\)](#)

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

DECISIONS PRIOR TO 1ST JANUARY 2018



Belgium – Council of State

Fundamental rights - Right of access to a court - Fraud

Hearing judicial review proceedings, the Council of State struck down a ruling dismissing, due to lack of legitimate interest, the application for annulment filed by the applicant of a residence permit against the order to leave the territory, with a prohibition on entry. The Council of State ruled that the right of access to a court guaranteed by article 47 of the Charter of Fundamental Rights is disproportionately restricted when the applicant of a residence permit is deprived of the right to such an application for annulment examined on the merits on the grounds that he has committed a fraud with a view to obtain such authorisation.

Council of State, ruling of 16.11.2017, no. 239.887, available on the website of the judicial network of the EU (not available online) (FR)



Netherlands – Court of appeal concerning social security and public service

Social security - Migrants workers - Applicable legislation

The court of appeal ruled that the applicable legislation concerning social security with regard to Dutch Rhine boatmen, residing in the Netherlands and having worked in at least two other Member states, could not be definitively determined based on the presumption according to which a substantial part of their activity had been exercised in the Netherlands. According to the said court, the competent authority is supposed to examine all the relevant criteria to determine the Member State in which the substantial part of the activity is exercised.

Centrale Raad van Beroep, [ruling of 29.12.2017, no. 16/2703 \(NL\)](#)



Italy – Court of cassation

Judicial cooperation in civil matters - Brussels II bis - Lis pendens

The Court of cassation was referred an appeal pertaining to the determination of the competent court, filed against the decision of the court of appeal of Trento to stay the proceedings in the context of an application for divorce, owing to the existence of proceedings in Switzerland for the same purpose and involving the same parties. The Court of cassation had ruled that the decision to stay the proceedings is not a decision on the competence and that, therefore, the appeal procedure for determination of the competent court cannot result in the annulment of such a decision.

Based on the ruling of the Court of Justice Overseas Union Insurance Ltd and others / New Hampshire Insurance Company ([C-351/89](#)), the Court of cassation stated that under the assumption of lis pendens, the court hearing the case does not examine the jurisdiction of the other court hearing the case, but only verifies the existence of the conditions that call for the taking of a decision to stay the proceedings. According to the said court, under these circumstances, the party concerned must file another type of appeal for the purpose of the determination of the competent court.