



FLASH NEWS

1/19

NATIONAL DECISIONS OF INTEREST FOR THE UNION

OVERVIEW FROM OCTOBER TO DECEMBER 2018



Sweden – Industrial Property and Commercial Court

Approximation of laws - Tobacco products - Advertising

The Industrial Property and Commercial Court has stated that the exemption from the prohibition of the promotion of tobacco products, allowing a moderate promotion of these products in the relevant sales outlets, must be interpreted restrictively. In that sense, the court prohibited a company that produces and markets snuff (*snus*) – by attaching a penalty payment to this prohibition – from the use of concepts similar to “ecological tobacco” for the promotion of snuff products on packets, fridge stickers or hanging screens in these sales outlets, such advertisements being considered as an incentive to consume tobacco products.

Patent- och marknadsdomstolen, judgment of 24.09.2018, PMT No. 12882-17, unpublished, available on request.



Belgium – Constitutional Court

Asylum and immigration - Integration measures - Criteria related to judicial history

In the context of an action for annulment of a national rule stipulating that a foreigner intending to be admitted to stay in Belgium must show reasonable efforts at integration, the Constitutional Court considered that the judicial history of the foreigners concerned is not a valid criterion in this respect. Based on the Court's case-law concerning the concept of integration measures in Directive 2003/86 on the right to family reunification, the Constitutional Court held that contrary to a criterion such as language ability, the criterion according to which any infringement is likely to demonstrate the lack of willingness to integrate will not be proportionate to the objective of integration and participation pursued.

Cour constitutionnelle, [judgment of 10.04.2018, no. 126/2018 \(FR\) \(NL\)](#)



Greece – Council of State

Privacy - Right to marry - Partnerships between homosexuals

The Council of State held that the legislative provision extending to homosexual couples the right to enter into a civil partnership is compliant with the Constitution as well as the case-law of the Court of Justice and the ECtHR. The protection of marriage and family, enshrined in the Hellenic Constitution, does not prevent the legislator from changing its scope and instituting alternative forms of partnership without harming these institutions. Since sexual life is part of the main core of the private life of individuals, as protected by the Constitution, any discrimination made by the State in this respect is illegal. This interpretation is supported by the evolving case-law of the ECtHR on Articles 8 and 14 of the ECHR as well as by that of the Court of Justice in matters of social policy and public service.

Symvoulío tis Epikrateias, [judgment of 4.10.2018, no. 2003/2018 \(EL\)](#)



Spain – Constitutional Court

Equality between men and women - Reconciliation between work and family life - Parental leave

The Constitutional Court ruled on the scope of the principle of equality in a case concerning the duration of paternity leave. It has held that such a principle does not require, where there is an objective and reasonable justification in this respect, that equal treatment be applied in all situations. According to this court, the differentiated duration of parental leave between men and women is intended to respond to two different situations provided for by the legislature, namely, on the one hand, the protection of the health of female workers (maternity leave), and on the other hand, the reconciliation of personal life, family life and professional life (paternity leave). It therefore considered that maternity leave granted to female workers, of a duration longer than that accorded to men, is not discriminatory.

Tribunal Constitucional, [judgment of 17.10.2018, no. STC 111/2018 \(ES\)](#)



Netherlands - Court of Appeal of The Hague

Liability of the State - Request for an order to act - Reduction of greenhouse gas emissions by 2020

The Court of Appeal dismissed an appeal brought by the Dutch State against an injunction issued by the Hague Tribunal to reduce greenhouse gas emissions by 25% from 1990 levels by 2020.

It found that the Dutch State had violated Articles 2 and 8 of the ECHR (protection of life and respect for private and family life) by failing to take the necessary measures to protect the lives of its citizens.

Gerechtshof Den Haag, [decision of 9.10.2018, 200.178.245/01 \(NL\)](#)

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



Poland – Supreme administrative court

Free movement of persons - Transcription of the birth certificate indicating same-sex parents - Rights of the child

In a dispute between the mother of a child, whose British birth certificate indicates another woman as the father and the Polish authorities responsible for the transcription of civil records, the Supreme Administrative Court allowed the applicant's appeal in cassation and annulled the judgment of the court of first instance refusing said transcription.

The Supreme Administrative Court held that the obligation to transcribe civil records into Polish law, which in this case is intended to protect the rights of the children of Polish nationality, is not contrary to the fundamental principles of public policy. In this context, it referred to the Coman judgment, [C-673/16](#).

Naczelny Sąd Administracyjny, [judgment of 10.10.2018, No. II OSK 2552/16 \(PL\)](#)



France – Court of Cassation

Compliance inspection of medical devices - Obligations of the notified body mandated by the manufacturer - Breast prostheses

The Court of Cassation once again had to hear the high-profile case of breast implants manufactured and marketed by PIP, which proved to present a risk of rupture. In this case, the liability of a German company responsible for evaluating, as the notified body under Directive 93/42, the quality system put in place for the design, manufacture and final control of these implants was sought. The Court of Cassation first had to rule on questions of private international law, relating to the jurisdiction of the French court (Brussels I Regulation), the applicability of French law (Rome II Regulation) and the deadlines for the exercise of the appeal on points of law (Regulation no. 1393/2007). Then, relying on the Court's Schmitt judgment ([C-219/15](#)), it ruled on the scope of the duty of care of a notified body, in the event that there are indications that a medical device does not comply with the requirements of Directive 93/42.

Court of Cassation, judgments of 10.10.2018, no [15-26093](#) and no [16-19430 \(FR\)](#)



Italy – Court of cassation

Ne bis in idem principle - Criminal and administrative penalties - Market manipulation - Respect for the principle of proportionality

The Court of Cassation, taking into account the judgment of the ECtHR *A and B vs. Norway* and the judgment of the Court of Justice *Garlsson Real Estate SA* ([C-537/16](#)), held that in the case of market manipulation, the double imposition of criminal and administrative penalties does not violate the ne bis in idem principle if the principle of proportionality is respected, i.e. if the cumulation of these penalties is not disproportionate to the seriousness of the infringement. In this case, the Court of Cassation ruled that “imposing only a criminal penalty does not seem appropriate to punish the crime in an effective, proportionate and dissuasive manner, and the system of penalties resulting from all the penalties incurred in practice does not seem excessively heavy for the parties involved.”

Corte Suprema di Cassazione, [judgment of 16.07.2018, filed on 10.10.2018, no. 45829 \(IT\)](#)



Italy – Court of cassation

Criminal law - Principle of legality of offences and penalties

The Court of Cassation, as per the principles set out in the Taricco-bis judgment ([C-42/17](#)) and repeated by the Constitutional Court (referring court of that case), held that, in this case, the laws concerning limitation must not be left unenforced by the national court. In fact, it considered that such non-enforcement would result in a violation of the principle of legality of the offences and penalties, given that the acts were committed before 8 September 2015, the date on which the first Taricco judgment ([C-105/14](#)) was pronounced.

Corte suprema di cassazione, [judgment of 18.10.2018, no. 47109 \(IT\)](#)



France – Council of State

Protection of personal data - Processing of passports and identification documents - Compliance with EU law

Several applicants, including the association La Quadrature du Net, have requested the annulment of a decree authorising the processing of personal data relating to passports and national identification documents. This association also requested the referral of a preliminary question. To conclude the dismissal of this referral and all the requests, the Council of State examined, inter alia, the compliance of the contested decree with EU law (Articles 7 and 8 of the Charter, Regulation No. 2252/2004 and Directive 95/46, repealed by Regulation 2016/679, known as GDPR). It considered that this processing, in view of the restrictions and precautions attached thereto, in particular the exclusion of searches based on biometric data and the limited duration of retention of the data in question, does not infringe the right of individuals to respect for their privacy in a manner that is disproportionate to the aims of protecting public order.

Council of State, [decision of 18.10.2018, no. 404996 \(FR\)](#)



Latvia – Supreme Court

Protection of personal data - Data necessary to bring an action

The Supreme Court overturned the judgment of the court of first instance dismissing an association's appeal aimed, inter alia, at forcing the population register to disclose personal data of ministers in order to allow the association to file compensation claims against them. Firstly, the Supreme Court reiterated the conditions for lawful processing of personal data, specified by the Court of Justice in the [C-13/16](#) judgement. Secondly, it found that knowledge of the first and last names and addresses of the persons concerned was essential to bring an action before a civil court, as the law prescribes the obligation to indicate them in the application. Lastly, it referred to the judgment of the Constitutional Court in which this obligation was found to be in compliance with the right to respect for private life.

Latvijas Republikas Augstākā tiesa, [31.10.2018 spriedums lietā no. SKA-20/2018 \(LV\)](#)

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



Spain – Supreme court

Fixed-term work - Principle of non-discrimination - Concept of "working conditions" - Criteria for assessment

After recalling the relevant case-law of the Court of Justice (Del Cerro Alonso, [C-307/05](#), Carratù, [C-361/12](#) and Nierodzik, [C-38/13](#) judgments), the Supreme Court held that the rank occupied by the civil servants must be included in the concept of "working conditions" within the meaning of the public employment status (Spanish law) because it is an employment-related element resulting from an working relationship.

It considered that the general regulation on career civil servants should apply to the situation of a temporary worker whose rank is comparable to that of a career civil servant.

Tribunal Supremo, Sala de lo Contencioso, [judgment of 7.11.2018, No. STS 3744/2018 \(ES\)](#)



Germany – Federal Court of Justice

Citizenship of the Union - Recognition of a name created by a unilateral act in another Member State - Inadmissibility - Conditions

The Federal Court of Justice held, particularly in the light of the principle of the equality of citizens, that a family name containing nobiliary elements, chosen by deed poll under the United Kingdom law, must not be recognised in Germany, as it clearly contravenes public order. To that end, the Federal Court of Justice referred in particular to the Bogendorff von Wolffersdorff judgment, [C - 438/14](#), according to which Article 21 TFEU must be interpreted as meaning that the authorities of a Member State are not obliged to recognise the name of a national of that Member State, when the person in question also has the nationality of another Member State in which he has acquired a name which he has freely chosen, for reasons of public order.

Bundesgerichtshof, [Ordinance of 14.11.2018, No. XII ZB 292/15 \(DE\)](#)

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



Greece – Council of State

Social policy - Access to becoming a professional notary - Discrimination due to age

The Council of State has ruled that setting a maximum age of 42 to become a professional notary is contrary to Directive 2000/78/EC. In this case, the applicant had been excluded from participating in the 2016 national notaries competition on the ground that she was over the prescribed age limit.

In the light of the Court of Justice's case-law on age discrimination, the Council of State considered that the code of notaries, which introduces the age limit, affects the conditions of access to employment without exposing the objectives pursued by this measure. In these circumstances, age is not an essential and decisive professional requirement that may justify the difference in treatment. The contested decree was found to be contrary to Articles 4 (1) and 6 (1) of the Directive and the Hellenic transposition law.

Symvoulío tis Epikrateias, [judgment of 15.11.2018, No. 2421/2018 \(EL\)](#)



Belgium – Council of State

Access to documents - Control of insurance activity - Obligation of professional secrecy

On the basis of the Court's judgment in the [C-15/16](#) judgment, the Council of State annulled a decision whereby the National Bank of Belgium had refused to grant a consumer association access to documents relating to the authorisation granted to insurance companies to increase the premiums of their hospitalisation insurance.

By analogy with the reasoning provided by the Court in the context of the application of Directive 2004/39, the Council of State held, with regard to the professional secrecy referred to in Directive 2009/138, that the obligation of professional secrecy referred to by the National Bank to refuse access to these documents does not automatically protect all the information and that it is up to the latter to identify the information that is actually covered by the said secrecy.

Council of State, [judgment of 16.11.2018, No. 242.960 \(FR\)](#)



Ireland – Supreme Court

European arrest warrant - Setting a new date of surrender

The case concerned the Irish law transposing the Framework Decision on the European Arrest Warrant, which allows a different date of surrender of the person sought to be set multiple times, when the surrender has failed because of the latter's conduct. The Court of Justice had found in January 2017 ([C-640/15, Vilkas](#)), in the context of a preliminary question referred by the Court of Appeal in the same case, that this possibility derives from Article 23 of the Framework Decision.

However, contrary to the opinion of the Court of Appeal, the Supreme Court held that the provisions of Irish law are clear and do not allow for a different date of surrender to be defined multiple times. The Judge rejected the Irish government's argument that the principle of consistent interpretation could make the provisions consistent with the decision of the Court of Justice.

Minister for Justice and Equality v Vilkas, [judgment of 5.12.2018 \(EN\)](#)



United Kingdom – Supreme Court

Brexit - Jurisdiction of the Scottish Parliament to legislate on the consequences of Brexit

The Scottish Government, and then the Scottish Parliament, adopted a text to maintain the legislative powers of Scotland following the withdrawal of the United Kingdom from the Union. This text, which aims to remedy any legal loopholes in the absence of an agreement between the EU and the United Kingdom, confers on the Scottish government the power to modify the provisions of EU law retained in domestic law which fall within its jurisdiction.

The Supreme Court accepted the jurisdiction of the Scottish Parliament to adopt the text, except in particular for a provision requiring consultation of the Scottish government by the British Parliament.

Supreme Court, [judgment of 13.12.2018, The UK Withdrawal from the European Union \(Legal Continuity\) \(Scotland\) Bill \[2018\] UKSC 64 \(EN\)](#)

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