



FLASH NEWS

3/19

NATIONAL DECISIONS OF INTEREST FOR THE UNION

OVERVIEW OF THE MONTHS OF FEBRUARY AND MARCH 2019

*(A new Flash for the month of April will be released on the coming 5 July)



Italy – Court of Milan

Non bis in idem - Criminal sentences and administrative sentences of penal nature - Respect of the principle of proportionality

The Court of Milan, taking into consideration the ruling of the Court of Justice [Garlsson Real Estate SA \(C-537/16\)](#) and the ruling of the ECHR [A and B v. Norway](#), ruled that, in the case of market manipulations, the double imposition of a criminal penalty and an administrative penalty of penal nature does not violate the *non bis in idem* principle if the principle of proportionality is respected, with the first penalty having to be taken into account at the time of determining the second one. In this case, the Court evaluated the proportionality of all the penalties imposed and recalled that it is the responsibility of the national judge to directly apply article 50 of the Charter, while ruling out the application of the standards defining the said penalties, when the latter violate the *ne bis in idem* principle.

Tribunale di Milano, judgment of 15.11.2018, filed on 01.02.2019 no. 14767/2018 (IT)

Corte Suprema di Cassazione, ruling of 16.07.2018, filed on 10.10.2018, no. 45829, (IT)



Austria – Data protection authority

Protection of personal data - Insufficient anonymisation of a published judgment

The data protection authority dismissed the claim of an applicant who complained about the insufficiently anonymised publication of a judgment of the Supreme court concerning him/it pursuant to article 55, paragraph 3, of regulation no. 2016/679 on data protection, on the grounds that the supervisory authority was not competent to check the processing operations carried out by the courts while exercising their judicial function.

Datenschutzbehörde, decision (individual administrative act) of 04.02.2019, DSB-D123.937/0001-DSB/2018 (DE)



Germany – Federal Constitutional Court

Right to respect for family life - Obligation of disclosing the name of a family member given a copyrights violation committed via the use of the Internet

The Federal Constitutional Court ruled that the fundamental right to respect for family life set out in article 6 of the Basic law (Grundgesetz) is not opposed to the obligation of disclosing, in the context of civil proceedings, which member of a family used an Internet connection in violation of copyrights. The Constitutional Court dismissed as inadmissible the complaint of a couple in which the members had been sentenced to pay damages for the violation of copyrights committed by the use of their Internet connection, while stating that those who claim such a right must assume the negative consequences of the same.

Bundesverfassungsgericht, order of 18.02.2019, 1 BvR 2556/17(DE)

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



Italy – Constitutional Court

Primacy and direct effect of the Union law - Constitutionality check

The Constitutional Court, following its rulings no. 269/2017 (see Flash news no. 6/17) and no. 20/2019 (see Information rapide, March 2019), delivered another ruling on the case in which a national law creates, in a community context, doubts as regards its lawfulness with regard to the rights protected by the Constitution as well as those guaranteed by the Charter of Fundamental Rights according to the Italian High Court, it is recommended to retain the possibility for the Constitutional Court to take a position having *erga omnes* effects, without prejudice to the possibility for the national judge to make a reference for a preliminary ruling and possibly leave unapplied, in the context of the dispute pending before it, the national provisions supposedly in conflict with the fundamental rights protected by the charter.

Corte Costituzionale, ruling of 20.02.2019, no. 63 (published on 21.03.2019), (IT)



Hungary – Constitutional Court

Applicability of the Union law - Authentic interpretation of the Constitution - Right of asylum

The Constitutional Court ruled that the applicability of the Union law is based on the Basic law. While stressing on its exclusive competence to provide an authentic interpretation of the Basic law, the high court confirmed that, by exercising this competence, it takes into consideration the obligations of Hungary in view of the international law and the Union law. In its ruling, the Constitutional Court also decided that the granting of the right of asylum does not result from a constitutional requirement if the asylum applicant comes from a country in which he was not exposed to persecutions or a direct risk of persecutions.

Alkotmánybíróság, [decision of 25.02.2019, 2/2019. \(III. 5.\) AB \(HU\)](#)

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



Italy – Constitutional Court

Market abuse - Penalties - Constitutionality check - Reference for a preliminary ruling

The Constitutional Court has been seized, by the Court of cassation, of two questions of constitutionality presented in the context of a dispute between the director of a company and the CONSOB (National Commission for Companies and the Stock Exchange) concerning insider trading penalised, among other things, by the confiscation of property and the refusal to respond to the questions of the CONSOB on certain financial operations.

As regards the first question, the Constitutional Court declared the unconstitutionality of the standards allowing the confiscation of the “product” of the illegal financial operations and property used to carry out these operations, because the confiscation is simply punitive in nature, such that this penalty is disproportionate in general.

As regards the second question, pertaining to the silence of the director with respect to the CONSOB, the Constitutional Court decided to stay the proceedings and file a request for a preliminary ruling.

Corte Costituzionale, [ruling of 06.03.2019, no. 112, filed on 10.05.2019](#) and [order of 06.03.2019, no. 117, filed on 10.05.2019 \(IT\)](#)



Hungary – Constitutional Court

Immigration - Assistance to illegal immigration - Ongoing infringement proceedings against Hungary

Amnesty International Hungary, a Hungarian non-governmental organisation, contested the constitutionality of a provision of the Criminal Code, which prohibits the assistance to illegal immigration, before the Constitutional Court. Although infringement proceedings had already been initiated by the Commission against Hungary on account of this provision, the Constitutional Court, considering that the Court of Justice had not yet been seized in this regard, had not intended to suspend the procedure and decided that the provision concerned conforms to the Basic Law.

Alkotmánybíróság, [decision of 25.02.2019, 3/2019. \(III. 7.\) AB \(HU\)](#)

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



Romania – Constitutional Court

Operationalisation of the Judiciary Crime Investigation Section at the public prosecutor's office - Mechanism for cooperation and verification (MCV) - Exclusive jurisdiction of the Member states

The Constitutional Court dismissed the request for a reference for a preliminary ruling filed by 92 deputies in the context of a constitutionality check whose subject is the law relating to the approval of the government emergency ordinance no. 90/2018 on certain measures for the operationalisation of the Judiciary Crime Investigation Section at the public prosecutor's office.

In its reasoning, the Court held, on the one hand, that the questions asked were not relevant and, on the other hand, that the procedures of organisation and functioning and the delimitation of the competences between the different structures established in the penal investigative bodies come under the exclusive jurisdiction of the Member states. In addition, it stressed that the Constitution, as an expression of the will of the people, cannot have its binding force reduced because of a potential incompatibility between its provisions and the European regulations.

Curtea Constituțională, [decision of 13.03.2019, no. 137 \(RO\)](#)



Poland – Constitutional Court

Fundamental rights - Right to an effective remedy - Independence of judges

In the context of a procedure bearing on the same subject as the one in question in the joined cases C-585/18, C-624/18 and C-625/18, pending before the Court of Justice, the Trybunał Konstytucyjny (Constitutional Court) gave a ruling on the constitutionality of the law of 12 May 2011 on the KRS (Conseil national de la magistrature (National Judicial Council)).

The said Court ruled that the terms of appointment of the members of the KRS by the Sejm conform to the constitutional nature of the KRS and the system of the Republic of Poland as a constitutional state. On the other hand, the appeal procedure before the Administrative Supreme court against the resolutions of the KRS refusing the presentation of applications for the positions of judge of the ordinary courts, Supreme court and the Administrative Supreme court, is not compliant with the constitutional system of the Administrative Supreme court.

Trybunał Konstytucyjny, [ruling of 25.03.2019, K 12/18 \(PL\)](#)



France – Constitutional Council

Immigration - Best interests of the child

Seized by the Court of cassation on 21 December 2018 of a priority issue of constitutionality bearing on article 388 of the civil code, which authorises the use of a bone X-ray for the purpose of helping to determine the age of a person, the Constitutional Council concluded, from the 10th and 11th paragraphs of the Preamble of the Constitution of 1946, a requirement of protection of the best interests of the child, requiring that the minors present on the national territory receive the legal protection associated to their age. It stated that the rules relating to the determination of the age of an individual should be backed up by the necessary guarantees so that the minors are not unduly considered to be adults.

Constitutional Council, [decision of 21.03.2019, no. 2018-768 \(QPC\)\(FR\)](#)
[Press release \(FR\)](#)



Spain – Constitutional Court

Reference for a preliminary ruling - Obligation of referral of the Court - Acte éclairé

By this ruling, the Constitutional Court annulled a ruling of the Supreme court by which the latter had established that a national regulation relating to the financing of electricity was incompatible with the 2009/72 directive. In the annulled ruling, based on the rulings of the Court of Justice relating to physically identical provisions of the 2003/55 and 2009/73 directives, the Supreme court had ruled that the provision in question constituted an acte éclairé and that it was therefore not under obligation to seize the Court.

The Constitutional Court noted that the rulings of the Court of Justice invoked by the Supreme court pertained to, on the one hand, the other directives and, on the other hand, pertained to a problem different from the one in this case. The Constitutional Court concluded that, by leaving the national regulation unapplied without having seized the Court, the Supreme court had violated the right to a fair hearing within the meaning of the Constitution. It thus annulled the ruling of the Supreme court and asked it to seize the court of a reference for a preliminary ruling.

Tribunal Constitucional, [ruling of 26.03.2019, no. 37/2019 \(ES\)](#)



Greece – Council of State

Competition - Imposition of penalties - Deadline

The Council of State ruled that in the absence of a national provision establishing a specific deadline within which the national competition authority is required to exercise its competence to identify anti-competitive practices, it must exercise them, within a reasonable period of time, depending on the nature and gravity of the violation in question. This solution is based on the conciliation between the principle of legal certainty, the rights of defence and the principle of legality.

In this instance, regulation no. 1/2003 bringing about a harmonisation of the substantive rules and not a harmonisation of the procedural rules, was not applicable. Based on the principles of effectiveness and proportionality, the Council of State nevertheless held that the reasonable period in question could not be less than or more than those set out by art. 25 of the said regulation.

Symvoulío tis Epikrateias, apofasi tis 27.03.2019, no. 582/2019, not published, available on request (EL)



Germany – Federal Administrative Court

Citizenship of the Union - Right to move and reside freely within the territory of the Member States - Spouse's right of residence in case of divorce

The Federal Administrative Court ruled that a national from a third State can obtain a derived right of residence under the 2004/38/EC directive despite the dissolution of the marriage with a citizen of the Union. To this effect, it mainly referred to the Singh ruling, [C-218/14](#), according to which the nationals of a third country, members of the family of a citizen of the Union, can claim the right of residence provided for by the 2004/38 directive only in the host Member state where this citizen resides and not in another Member State. The Federal Administrative Court held that, even if the national of a Third state no longer satisfies the conditions of a right of residence when the citizen of the Union leaves the territory of the host Member State, he can again claim this right when the citizen of the Union starts staying in this State again, notwithstanding the dissolution of the marital relationship.

*Bundesverwaltungsgericht, [ruling of 28.03.2019, 1 C 9.18 \(DE\)](#)
[Press release \(DE\)](#)*