



FLASH NEWS

4/17

FOLLOW-UP OF PRELIMINARY RULINGS

OVERVIEW FROM 1st to 31st DECEMBER 2017



Portugal – Supreme Court

[Judgment of *Securitas*, [C-200/16](#)]

Transfer of undertakings- Directive 2001/23/EC- Scope

This judgment follows from the judgment of the Court of justice in the C-200/16 case concerning the interpretation of the concept of transfer of undertaking or establishment in view of directive 2001/23. The Supreme Court recalled that this concept covers a situation in which an instructing party has terminated the contract for the provision of surveillance and guard services of its facilities signed with a company, and then signed, for the provision of this service, a new contract with another company, which refuses to take the employees of the first company, when the equipment necessary for the provision of the said service has been taken by the second company.

Supremo Tribunal de Justiça, ruling of 06.12.2017, not published, available upon request



Netherlands – Supreme Court

[Judgment of *X BV*, [C-661/15](#)]

Customs Union- Community Customs Code- Repayment of import duties

The Supreme Court allowed the appeal in cassation lodged by a Dutch company against the decision of the court of first instance that had dismissed the appeal filed against the decision of the tax authorities refusing payment of custom duties.

Based on judgment C-661/15, it ruled that the court of first instance was wrong to consider that in order to apply article 145, paragraph 2, of regulation no. 2464/93, it is not enough to establish the only risk or the only possibility that the goods in question may be defective in order to obtain repayment of custom duties.

Hoge Raad, ruling of 08.12.2017 (NL)



Austria – Supreme Court

[*Verein für Konsumenteninformation*, [C-191/15](#)]

Consumer protection - Online sales contract

The Supreme Court allowed the appeal filed against the order of the Higher Regional Court of Vienna, having annulled the judgment delivered by the court of first instance, by which the latter had decided that the great majority of the general conditions appearing in the Amazon EU Sàrl contracts, established in Luxembourg, and concluded with Austrian consumers, were invalid.

Based on judgment C-191/15, the Supreme Court ruled that the selection of the law of Luxembourg is invalid and thus examined the clauses in the light of the Austrian law. It annulled the order of the court of second instance and ordered Amazon to stop using the disputed clauses in their entirety.

Oberster Gerichtshof, ruling of 14.12.2017 (DE)



Austria – Administrative court


[Judgment of *Shiri*, [C-201/16](#)]

Asylum Policy- Dublin III Regulation- Failure to meet the deadline for the transfer of an applicant for international protection

The Administrative Court annulled the judgment of the Federal Administrative Court, in which the latter considered that the responsibility for the examination of the application for international protection submitted by M. S. still rested with Bulgaria and had not been transferred to Austria, although the transfer was not executed within the deadline of six months as defined in article 29 of the Dublin III Regulation.

Supporting judgment C-201/16, it ruled that M. S. could invoke the expiry of the said period in the context of his appeal against the decision of transfer taken concerning him. Consequently, the Administrative Court decided that in the absence of execution of the transfer within the prescribed period, the responsibility was automatically transferred to Austria, without the need for Bulgaria to refuse to take charge of the person concerned.

Verwaltungsgerichtshof, ruling of 14.12.2017 (DE)


 **Hungary** – Administrative and Labour Court of Szeged

[Judgment of Lombard Ingtatlan Lízing, [C-404/16](#)]

Taxation- VAT- Directive 2006/112- Direct effect of article 90, paragraph 1- Taxable amount

Following the judgment of the Court of Justice in the C-404/16 case, the tax authorities considered that in the event that a leasing contract had been definitively terminated owing to non-payment of payments due by the lessee, the lessor can invoke article 90, paragraph 1, of directive 2006/112 against a Member State to obtain the reduction in the taxable amount of VAT, although the applicable national law does not allow reduction in the taxable amount in case of non-payment. The tax authority changed its decision that was the subject of the dispute in the main proceedings. Thus, the administrative and labour court of Szeged ended the dispute.

Szegedi Közigazgatási és Munkügyi Bíróság, order of 14.12.2017, not published, available upon request

 **Austria** – Supreme Court

[Judgment of Raimund, [C-425/16](#)]

European Union trademark- Action for infringement for an absolute ground for invalidity - Counterclaim based on the same ground for invalidity.

The Supreme Court maintained the discontinuance of the proceedings on the appeal concerning an action of infringement of a European Union trademark. The defendant in the main proceedings, claiming that Mr Raimund had obtained the said trademark in bad faith, had filed a counterclaim for a declaration of invalidity of the same trademark. The Commercial Court of Vienna had delayed delivering a judgment on this counterclaim until there was final ruling on the action for infringement.

Based on judgment C-425/16, the Supreme Court had considered that it was necessary to wait until the decision relating to the counterclaim for a declaration of invalidity of the trademark became final in order to avoid undermining the unitary character of the European Union trademarks by contradictory decisions..

Oberster Gerichtshof, [order of 21.12.2017 \(DE\)](#)

 **Portugal** – Court of Appeal of Porto

[Judgment of Neto de Sousa, [C-506/16](#)]

Third party motor insurance – National regulation excluding the compensation for the material damage suffered by the driver responsible for the accident

Supporting the reasoning of the Court of Justice in the C-506/16 case, the Court of Appeal of Porto recalled that directives 72/166, 84/5 and 90/232 did not object to a national legislation excluding the right of the driver of a motor vehicle, responsible, through his fault, for a traffic accident following which his spouse, a passenger in that vehicle, has died, to be compensated for the material damage that he has suffered as a result of this death.

Thus, the said Court of Appeal dismissed the applicant's claim for damages against the Portuguese State, which was based on a misinterpretation of directives 84/5 and 90/232 by the Supreme Court.

Tribunal da Relação do Porto, [ruling of 14.12.2017, no. 11275012 \(PT\)](#)

 **United Kingdom** – High Court

[Judgment of Shield & Sons Partnership, [C-262/16](#)]

Taxation - Value added tax - Flat-rate scheme applicable to agricultural producers

Following the judgment of the Court of Justice on the interpretation of article 296, paragraph 2, of directive 2006/112, the High Court allowed the appeal filed against the decision of the tax administration to cancel the membership certificate of the applicant for the common flat-rate system for agricultural producers.

In this regard, the court stated that, on the one hand, the membership certificate is restored in a retroactive manner from the date of its withdrawal by the tax administration, and, on the other hand, that the applicant can issue invoices later to its registered customers at a rate of 4% VAT.

Upper Tribunal (Tax and Chancery Chamber), [ruling of 21.12.2017 \(EN\)](#)



France – Court of Cassation

[Judgment of A-Rosa Flussschiff, [C-620/15](#)]

Social Security- Migrant workers- E 101 Certificate - Probative force

Supporting the interpretation used by the Court of Justice in judgment C- 620/15, the Court of Cassation annulled the judgment under appeal. In this regard, it considered that the Court of Appeal could not itself question the validity of the E 101 certificates by establishing that the persons employed by the company do not exercise a salaried activity on the territory of two or more Member States, under article 14, paragraph 2, under a), of regulation no. 1408/71. Moreover, the Court of Cassation considered that it was incumbent upon the l'Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (URSSAF) [Union for recovery of social security and family allowance contributions], which had doubts as to the accuracy of the facts mentioned in the certificates and invoked in support of the exception stated by this provision, to challenge the validity of the same at the Swiss institution that issued them, and, in the absence of an agreement on the assessment of the disputed facts, to refer the matter to the administrative commission on social security for migrant workers.

Court of cassation, [ruling of 22.12.2017 \(FR\)](#)

The Intranet site of the Search and Documentation Directorate lists all analysis of the follow-up decisions received and processed by the Directorate since 1st January 2000, arranged by year according to the date of filing of the case in the court. All the analyses established in the context of the follow-up of preliminary ruling are also available via the internal portal, under each preliminary ruling, under the 'litigation at national level' section.