



FLASH NEWS

1/2022

NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW OF THE MONTHS FROM OCTOBER 2021 TO JANUARY 2022



Austria – Administrative Court

Freedom to provide services - Audiovisual media services - Videos on political events uploaded and commented on by a blogger

An Austrian blogger exploited YouTube and Facebook channels for entertainment purposes. Specifically, he uploaded and commented on videos concerning current political events. This operation was classified by the Federal Administrative Court as a provision of services within the meaning of Articles 56 and 57 TFEU.

However, in its judgment, the Administrative Court specified that a provision of services presupposes the participation of the service provider in economic life. The service provider must provide the service in the course of their economic activity, generally for a fee. Consequently, the activity in question, which is carried out for entertainment purposes, does not constitute a provision of services.

Verwaltungsgerichtshof, [judgment of 5/10/2021, Ra 2021/03/0061 \(DE\)](#)



Bulgaria – Constitutional Court

Constitution - Concept of 'sex' - Scope - Right to self-determination of the person

The Bulgarian Constitutional Court was asked by the General Assembly of the Civil Division of the Supreme Court of Cassation to decide whether the concept of 'sex' enshrined in the Constitution has a meaning other than biological sex.

The Constitutional Court indicated that it is for the legislator alone to establish an express procedure by which the State will recognise the sexual conversion of a transgender person and for the judiciary to determine the manner in which the applications of such persons are to be assessed in order to respect the legal consequences of self-determination.

According to the Constitutional Court, the concept of 'sex' under the Constitution is to be understood only in its biological sense and the State has no obligation to respect the self-determination of persons of non-biological sex.

Konstitutsionen sad, [decision of 26/10/2021, No 15 \(BG\)](#)



Belgium – Constitutional Court

Fundamental rights - Freedom of expression - Contempt and serious offences against the King - European Arrest Warrant - Dual criminality

Following a preliminary question from an appeal court that was required to rule on the execution of a European Arrest Warrant issued by the Spanish judiciary against a Spanish national convicted in Spain for contempt and serious offences against the Crown, the Constitutional Court ruled that the article in Belgian criminal law punishing contempt and serious offences against the King violates the freedom of expression.

Based on this judgment, the appellate court refused to execute the arrest warrant, since the offence for which the person concerned had been convicted in Spain no longer exists in Belgium. However, this decision was partially overturned by the Court of Cassation, as the appellate court had not verified whether this offence is punishable under other provisions of criminal law.

These decisions are part of the case that gave rise to the judgment of 3 March 2020, X (European arrest warrant - Double criminality), [C-717/18](#).

Grondwettelijk Hof, [judgment of 28/10/2021, No 157/2021 \(FR\)/\(NL\)](#)

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

Hof van Cassatie, [judgment of 18/1/2022, No P.21.1692.N \(NL\)](#)



Poland – Supreme Administrative Court

Independence of judges - Judicial reform - Procedure for appointing judges - Iudex inhabilis v. Iudex suspectus

The Supreme Administrative Court, hearing two appeals in cassation concerning VAT and property tax respectively, adopted a position on the status of judges sitting in first instance.

It held that an administrative judge appointed to carry out their duties by the President of the Republic at the request of the National Council of the Judiciary, composed following the recent judicial reform, remains a judge of the Republic of Poland and a European judge within the meaning of Articles 2 and 19(1) TEU, as well as Article 6(1) to (3) TEU, read in the light of Article 47 of the Charter of Fundamental Rights and Article 6(1) ECHR. This is the case even if the procedure preceding the appointment may have been flawed.

Naczelny Sąd Administracyjny, judgments of 4/11/2021, III FSK 3626/21 and III FSK 4104/21 (PL)



Ireland – High Court

Asylum policy - Regulation (EE) No 604/2013 - Automatic suspensive effect

An action for the annulment of a decision by the Minister for Justice refusing to exercise his discretion under Article 17(1) of Regulation (EU) No 604/2013 was brought before the High Court for judicial review. It stated that the applicant was not entitled to an automatic injunction preventing her removal from the State pending a final decision in these proceedings. Referring in particular to the judgments of the Court of Justice in C.K. and Others, [C-578/16 PPU](#), and M.A. and Others, [C-661/17](#), the High Court held that an appeal against a refusal decision adopted under Article 17(1) of said regulation does not constitute a review or appeal against a ‘transfer decision’ for the purposes of Article 27(1) and that, therefore, the automatic suspensive effect provided for in Article 27(3) for transfer decisions does not apply.

The High Court, judgment of 18/11/2021, [IEHC] 717 (EN)



Belgium – Constitutional Court

Personal data - Removing anonymity from prepaid mobile phone cards - End-user identification

The Constitutional Court, relying in particular on the judgement in La Quadrature du Net and Others, [C-511/18](#), [C-512/18](#) and [C-520/18](#), ruled that the law introducing the suppression of the anonymity of prepaid GSM cards and the obligation for banks and financial institutions to contribute to the identification of the end user is in conformity with the Constitution, except insofar as it does not determine with sufficient precision the identification data that are collected and processed and the identification documents that are taken into consideration.

According to the Constitutional Court, a measure providing for an obligation to identify all end users of a prepaid mobile phone card is permissible in view of the need to ensure the proper functioning of the emergency services, the detection, prosecution and punishment of offences, and the collection of information by the intelligence and security services. The high court also considered that this measure is proportionate in light of these objectives, subject to compliance with the material and procedural guarantees established by the said law.

Grondwettelijk Hof, judgment of 18/11/2021, No 158/2021 (FR)/(NL) Press release (FR)/(NL)



Poland – Constitutional Court

Powers of the Constitutional Court - Examination of the conformity of Article 6 of the ECHR with the Constitution - Judicial reform

In the context of judicial reform in Poland, the Constitutional Court was asked by the Prosecutor-General whether Article 6, first sentence, of the European Convention on Human Rights (ECHR) was in conformity with the Constitution. The appeal concerned the extent to which the Constitutional Court falls within the concept of ‘court’ as referred to in this provision, as well as the relationship between the powers of the Constitutional Court and the powers of the Court of Human Rights to judge the conformity of the process of electing the judges of the Constitutional Court with the principles of independence and impartiality, within the meaning of the said provision.

In this regard, in ruling that Article 6 ECHR is partially not consistent with the Constitution, the high court noted that the fact that it could itself fall under the concept of ‘court’ as referred to in this provision is likely to infringe, in particular, the principles of separation of powers and independence of the judiciary stemming from the Constitution.

Furthermore, the Constitutional Court stressed that Article 6 ECHR, insofar as it confers on the ECtHR the competence to assess the legality of the election of the judges of the Polish high court, calls into question the constitutional structure of the latter, read in the light of the principle of primacy of the Constitution.

Trybunał Konstytucyjny, judgment of 24/11/2021, K 6/21 (PL)



Spain – Supreme Court

Social policy - Protection of workers against dismissal - Pregnant worker dismissed during the trial period

The Supreme Court upheld the invalidity of the dismissal of a woman who became pregnant during the trial period of her contract. In January 2018 the worker signed an open-ended contract to provide telephone support services, which included a trial period that could be interrupted in case of temporary incapacity. In April 2021 the worker informed the company that she was pregnant, and 4 days later the company informed her that the contract was terminated because the trial period had not ended. The Supreme Court held that it is not sufficient for the trial period to be agreed in writing. Its duration must also be indicated since, as established in Article 14 of the Workers' Statute, this period has certain limits that must be respected, and which are those established in wage agreements. It stated that, in this case, the trial period agreed in the contract signed between the parties was null and void as it did not meet these requirements.

Tribunal Supremo, [judgment of 9/12/2021, STS 4760/2021 \(ES\)](#)



Latvia – Senate (Supreme Court), Administrative Section

Fundamental rights - Human dignity - Protection of families - Obligation of the State to recognise same-sex relationships

The Senate, ruling in cassation and referring to a judgment of the Constitutional Court, held that Article 110 of the Constitution, having regard to the principle of human dignity, imposes an obligation on the State to ensure that same-sex couples have the right to be recognised as a family. As the legislator failed to fulfil this obligation without valid justification, the solution to guarantee this right to the said couples must be found by the court within the framework of the existing legal system, respecting international obligations and using analogy if necessary. Thus, the appellate court must itself assess whether the relationship between the applicants can be likened to that of a family within the meaning of Article 110 of the Constitution.

*Latvijas Republikas Senāta Administratīvo lietu departaments, [judgment of 10/12/2021, SKA-\[B1\]/2021 \(LV\)](#)
[Press release \(LV\)](#)*



Italy – Court of Cassation

European Arrest Warrant - European Public Prosecutor's Office - Possibility of refusing execution - Conditions

The Court of Cassation gave an unprecedented ruling on a European Arrest Warrant in the context of the execution of such a warrant issued by the European Public Prosecutor's Office at Germany's request. In this respect, in holding that the absence of an indication in the arrest warrant of the minimum sentence does not affect the completeness of the information for the purpose of surrender, the Court dismissed the appeal of an Italian national subject to that warrant for investigations into tax fraud offences. According to the Court of Cassation, the only relevant indication for the purposes of the decision on surrender is the maximum sentence of imprisonment, even though the relevant Italian legislation provides, inter alia, for the obligation to indicate the minimum sentence. Moreover, no particular consequences follow from the fact that part of the conduct took place in Italy insofar as the offences concern the damage to the financial interests of the Union and fall within the competence of the European Public Prosecutor's Office, so that a refusal to surrender can only be justified if there is a concrete interest for the State.

Corte di Cassazione, [judgment of 15/12/2021, No 46140/2021 \(IT\)](#)



Lithuania – Supreme Administrative Court

Protection of personal data - Right to erasure - Concept of 'personal data'

The Supreme Administrative Court ruled that a request for erasure does not have to be express but can be inferred from the content and the legal framework set out by the data subject, while pointing out that Regulation (EU) No 2016/679 does not provide a form for such a request.

In addition, the court clarified that the concept of 'personal data' includes information about a child with a disability and certain family issues relating to that child. It also clarified the criteria for determining the retention period of personal data.

Lietuvos vyriausiosios administracinės teismas, [judgment of 15/12/2021, eA-2108-822/2021 \(LT\)](#)



France – Council of State

Protection of the safety and health of workers - Directive 2003/88/EC - Maximum weekly working time - Departmental Gendarmerie

The Council of State, sitting in its highest court, ruled, after recalling that the French Constitution remains the supreme standard of national law, that the organisation of the Departmental Gendarmerie ensures that the working time, within the meaning of Directive 2003/88/EC, of the military personnel who serve there is effectively less than 48 hours a week. It was therefore no longer necessary to verify whether the constitutional requirements of the free use of armed force might be compromised by the application of Directive 2003/88/EC.

Conseil d'État, decision of 17/12/2021, No 437125 (FR)
[Press release \(FR\)](#)



United States – Supreme Court

Economic activity - Public health - COVID-19 - Requirement for companies with 100 or more employees to ensure that they are vaccinated

In its ruling, the US Supreme Court has upheld the joint appeals filed by certain US states, business groups and non-governmental organisations seeking to suspend the emergency rule adopted on 5 November 2021 by the Occupational Safety and Health Administration: OSHA. This imposed an obligation on companies with 100 or more employees to ensure that their workers were vaccinated against COVID-19 or able to produce a negative test result at least once a week. The high court ruled in favour of the claimants and suspended the application of the disputed regulation.

Supreme Court of the United States, judgment of 13/1/2022, NFIB v. OSHA (21A244) (EN)

DECISIONS PRIOR TO 1 OCTOBER 2021



Germany – Federal Fiscal Court

Freedom to provide services - Equality before the law - Taxes on sports betting

The Federal Fiscal Court rejected two appeals by which sports betting organisers, established in another Member State and also offering their services in Germany, challenged their taxation under the German sports betting tax. According to this court, the taxation at issue is not contrary, inter alia, to Article 56 TFEU, Article 20 of the Charter of Fundamental Rights or Directive 2006/112/EC. Furthermore, the tax in question did not have to be notified to the European Commission under Directive 98/34/EC.

Furthermore, the German high court considered that there was no need to make a reference to the Court of Justice for a preliminary ruling in this respect, since it had no doubts as to the interpretation adopted.

Bundesfinanzhof, judgments of 17/5/2021, IX R 20/18 and IX R 21/18 (DE)
[Press release \(DE\)](#)



Netherlands – Council of State

Environment - Directive 2001/42/EC - Concept of 'plans and programmes'

The Council of State, taking into account the judgment in A and Others, [C-24/19](#), held that certain national provisions concerning the operation of a wind turbine, including general rules that do not materially contribute to the implementation of a project or to the manner in which it is to be carried out, constitute "plans and programmes" within the meaning of Article 2(a) of Directive 2001/42/EC. In other words, in this case, these provisions should have been subject to an environmental assessment.

This decision differs from that handed down by the Council of State of 3 April 2019, [ECLI:NL:RVS:2019:1064](#) (Battenoord), in which it rightly held that the national provisions in question are not 'plans and programmes' within the meaning of the said provision of Directive 2001/42/EC.

Raad van State, decision of 30/6/2021, 202003882/1/R3 (NL)
[Press releases \(NL\)](#)