



FLASH NEWS

4/20

NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW OF THE MONTHS OF JUNE TO SEPTEMBER 2020



Belgium – Court of Cassation

European arrest warrant – Request for provisional release – Penalty for failure to comply with processing deadlines

The Court of Cassation recalled that, when the judge remedies a gap in the law resulting from a finding of unconstitutionality, he or she cannot violate another constitutional, conventional or legal provision. Thus, the Constitutional Court had, admittedly, noted a loophole in Belgian regulations in that persons detained under a European arrest warrant were unable to apply for release on conditions or bail (see Flash interest No 5/19). However, according to the Court of Cassation, an appellate court faced with such a request may not order release purely and simply on the grounds that the first judge had not ruled within the time limit set by general legislation for processing a request for provisional release. Framework Decision 2002/584/JHA requires that provisional release be accompanied by all necessary measures to prevent the arrested person from absconding.

Cour de cassation, [judgment of 10/06/2020, No P.20.0543.F \(FR\)](#)



France – Council of State

Protection of personal data - Android operating system - Personalisation of advertisements

The Council of State confirmed the €50 million penalty imposed by the Commission Nationale de l'Informatique et des Libertés (CNIL) on Google for processing the personal data of users of the Android operating system in France. First of all, the Council of State recognised the jurisdiction of the CNIL in this case, as no “lead supervisory authority”, within the meaning of the GDPR, could be designated at the time, in the absence of a principal place of business of Google in the Union. Secondly, it confirmed that Google had not provided sufficiently clear and transparent information to Android users and had not allowed them to give free and informed consent to the processing of their data for the purposes of personalising advertisements. Finally, it considered that the amount of the penalty was not disproportionate.

*Conseil d'État, [decision of 19/06/2020, No 430810 \(FR\)](#)
[Press release \(FR\)](#)*



Spain – Supreme Court

Family reunification – Dependent relationship – Balancing the economic and personal circumstances of both spouses

In a cassation appeal, the Supreme Court supplemented its case law on the granting of the right of residence. Recalling the recent case law of the Court of Justice on the impact of the lack of sufficient resources of the Union citizen in this matter (judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real*, [C-836/18](#)), the Supreme Court annulled the decision to automatically withdraw the residence permit of a third-country national following the cessation of affiliation of his spouse, a Union citizen, to the national social security system, which was the subject of the action before it. It based itself on the failure to balance all the economic and personal circumstances of both spouses, in the light of respect for the right to private and family life and the principle of proportionality.

Tribunal Supremo, [judgment of 1 July 2020, STS 2488/2020 \(ES\)](#)



Austria – Supreme Court

Copyright and related rights - Publication of a photograph in a Facebook group without the authorisation of the owner concerned

The Supreme Court heard a dispute concerning the publication in a Facebook group of a photograph showing the press officer of a politician without the authorisation of the holder of the right to use the photograph. The high court ruled that this publication infringed the right to exploit the work in question, given that the photograph was made available to the public. However, it clarified that the photograph would not be viewed as having been made available to the public if it were posted in a private group where there was a personal link between its members, such as a particular interest or purpose. In this case, the Supreme Court overturned the decisions of the lower courts because of the lack of verification of the existence of such a personal link.

*Oberster Gerichtshof, [judgment of 02/07/2020, 4 Ob 89/20x \(DE\)](#)
[Press release \(DE\)](#)*



Slovenia – Supreme Court

Immigration policy – Expulsion of a third-country national staying illegally in another Member State

In an application for review, the Supreme Court ruled that, according to Directive 2008/115, Slovenia is not obliged to expel a third-country national staying illegally in another Member State. Recalling the case law of the Court of Justice on nationals subject to return proceedings ([Affum, C-47/15](#)), the Slovenian High Court held that the State was not obliged to adopt an expulsion order, since the case in question concerned the return of a national residing illegally in another Member State. Stressing that the present case concerned the expulsion of such a national to his State of origin, the Supreme Court stated that it was for that other Member State to adopt the expulsion decision.

Vrhovno sodišče Republike Slovenije, [judgment of 08/07/2020, No UPRS Sodba IU 1412/2019 \(SI\)](#)



Italy – Court of Cassation

Principle of respect for the right to a defence - Dependent proceedings - Proportionality

The Court of Cassation clarified its case law on the adversarial principle in proceedings relating to harmonised taxes, such as VAT. The Italian court recalled the judgments of the Court of Justice ([C-129/13](#), [C-130/13](#) and [C-418/11](#)) according to which the adversarial principle must not be interpreted in an absolute and purely formal way and may therefore be subject to restrictions on the basis of the principles of effectiveness and proportionality. The Italian high court concluded that, in the dependent area, even though the adversarial principle may not apply to the investigation and enquiry activity carried out by the tax authorities, the latter must allow the taxpayer to provide explanations before taking its decision.

Corte di Cassazione, sesta sezione civile, [order of 09/07/2020, No 14628 \(IT\)](#)



France – Council of State

Environment - Air pollution - Ambient air quality

The Council of State ruled that the Government had not put in place the necessary measures to enable the concentrations of nitrogen dioxide and fine particles to be brought below the limit values set by Directive 2008/50/EC in eight zones in France. In this respect, the Council of State noted that the Government's "road maps" for these zones did not include any estimate of the expected improvement in air quality, nor any indication of the deadlines for achieving these objectives. Finally, the Council of State decided to impose a penalty payment on the Government, if it did not demonstrate that it had taken the requested measures within the next six months, in the order of €10 million for each six-month period of delay.

Conseil d'État, Assemblée, [decision of 10/07/2020, No 428409 \(FR\)](#)
[Press release \(FR\)](#)



Poland – Supreme Court

Independence of the judiciary - Procedure for appointing judges - Judicial reform in Poland

An appeal was lodged with the Supreme Court against a decision of an appellate court, issued following the annulment by the Supreme Court of a first decision of the appellate court. The annulment judgment was contested because of the status of the Supreme Court judges who adopted it, who were appointed by the President of the Republic following a proposal of the National Council of the Judiciary, a body deemed not impartial and not independent by the resolution of 23 January 2020 (BSA I-4110-1/20) of the Supreme Court.

In dismissing the appeal, the Supreme Court held that the adoption of decisions by judges appointed by the President of the Republic following the said proposal did not constitute a ground for cassation in the light of the Constitutional Court's ruling of 20 April 2020, by which the aforementioned resolution had been found to be unconstitutional and contrary to Union law and the European Convention on Human Rights.

Sąd Najwyższy, [order of 13/07/2020, II CSK 581/19 \(PL\)](#)

 **Poland – Voivodship administrative courts**

Non-discrimination - Free movement of LGBT persons

Following appeals lodged by the Rzecznik Praw Obywatelskich (Polish ombudsman), three Voivodship administrative courts issued decisions declaring null and void regional charters adopted by municipal councils creating “LGBT-free zones”, which were found to discriminate against LGBT persons. According to these administrative courts, the said regional charters constituted a violation of Union law, and in particular of Article 21 TFEU and of Articles 7, 11(1), 21(1) and 45 of the Charter of Fundamental Rights. In this respect, they infringed the freedoms and rights of the persons concerned in violation of the principle of the free movement of such persons and their dignity and the right to privacy in accordance with their sexual orientation.

Wojewódzki sąd administracyjny w Gliwicach, [judgment of 14/07/2020, III SA/GI 15/20 \(PL\)](#)

Wojewódzki sąd administracyjny w Warszawie, [judgment of 15/07/2020, VIII SA/Wa 42/20 \(PL\)](#)

Wojewódzki sąd administracyjny w Lublinie, [judgment of 06/08/2020, III SA/Lu 7/20 \(PL\)](#)

 **Czech Republic – Supreme Court**

Social policy - Remuneration of workers - Principle of equal treatment

The Supreme Court held that external circumstances, such as socio-economic differences between different regions and the costs necessary to provide for the vital needs of employees in the locality where they work, do not fall within the notion of “difficult working conditions” justifying unequal remuneration of employees in accordance with the Labour Code.

It therefore considered that the remuneration of workers performing the same work for the same employer cannot vary according to the region where they perform their work.

Nejvyšší soud, [judgment of 20/07/2020, 21 Cdo 3955/2018 \(CS\)](#)


 **Germany – Federal Court of Justice**

Trade mark - Sign consisting exclusively of the shape that gives substantial value to the product - Shape of a square for chocolate

The Federal Court of Justice dismissed appeals against decisions dismissing applications for a declaration of invalidity concerning a three-dimensional trade mark for chocolate representing the shape of the “Ritter SPORT” packaging, i.e. a square.

Relying on the judgments of the Court of Justice Hauck (C-205/13) and Gömböc (C-237/19), the national court decided that the square shape of the packaging did not give substantial value to the product, in this case chocolate, since the perception of that shape and the recognition of the sign were not decisive factors in this context.

Bundesgerichtshof, [order of 23/07/2020, I ZB 42/19 et I ZB 43/19 \(DE\)](#)
[Press release \(DE\)](#)

 **Spain – Supreme Court**

Asylum policy - Right of an asylum seeker to move freely within the national territory

The Supreme Court ruled that asylum seekers from the cities of Ceuta and Melilla whose application for asylum has been declared admissible have the right to move freely throughout the national territory and are not restricted to moving only within these two cities. It specified in particular that the judgment of the Court of Justice of 14 June 2012, ANAFE (C-606/10) was not applicable in this case, as it concerned the crossing of borders by holders of a temporary residence permit or a receipt of an application for a residence permit who had left the Schengen area and wished to return.

Tribunal Supremo, [judgment of 29/07/2020, No STS 2497/2020 \(ES\)](#)
[Press release \(ES\)](#)



Germany – Federal Administrative Court

Citizenship of the Union - Derived right of residence of a third-country national who is the parent of a child who is a citizen of a Member State

The Federal Administrative Court ruled that a third-country national who is the parent of a child who is a national of a Member State of the Union has, pursuant to Article 21 TFEU, a right of residence derived from that child only if that child has an autonomous right of residence and not only a right of residence derived from the other parent. To this end, it is necessary to meet the requirements of Directive 2004/38/EC, in particular as regards the existence of sufficient resources. The German high court specified that the existence of such a right of residence derived from a third-country national is without prejudice to any right of residence under national law alone.

Bundesverwaltungsgericht, judgment of 23/09/2020, 1 C 27.19 (not yet available)

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



Cyprus – Supreme Court

Consumer protection - Unfair terms in commercial contracts concluded by micro-enterprises

The Supreme Court declared unconstitutional several provisions of a national law on unfair terms in commercial contracts concluded by micro-enterprises, following a referral by the President of the Republic. On the one hand, these provisions infringed freedom of contract and the right of access to justice, insofar as they did not allow the legality of clauses defining the main subject matter of the contract or relating to the adequacy between the price or consideration and the goods or services provided to be contested, provided that such clauses were drafted in a clear and comprehensible manner. On the other hand, they violated the principle of the separation of powers by laying down the criteria for assessing the unfairness of a clause and the good faith of the contracting parties, which falls within the exclusive competence of the judiciary. The fact that these provisions literally reproduced the law transposing Directive 93/13/EEC was considered irrelevant, since the Directive is limited to the protection of natural persons.

Ανώτατο Δικαστήριο Κύπρου, [opinion of 3/06/2020, Πρόεδρος της Δημοκρατίας και Βουλή των Αντιπροσώπων, Νο 3/2019 \(GR\)](#)