



FLASH NEWS

1/23

NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW OF THE MONTHS FROM SEPTEMBER TO DECEMBER 2022



Netherlands – Council of State

Environment - Directive 92/43/EEC (Habitats Directive) - Precautionary principle

The Council of State was asked to rule on three disputes concerning the legality of permits for the construction of new low-emission sheds that reduce nitrogen emissions.

In its judgments in these cases, the Council of State, in the context of a proper assessment under the Habitats Directive, ruled that, by applying the statutory emission factor, the emissions from the sheds in question could not be established with the required certainty.

According to the high court, this conclusion was necessary given that the Court of Justice adopts a strict interpretation of the precautionary principle with regard to the appropriate assessment referred to in the Habitats Directive.

Therefore, the building permits in question could not be granted.

*Raad van State, judgments of 7/9/2022, [202106900/1/R2 \(NL\)](#), [202106908/1/R2 \(NL\)](#) and [202106915/1/R2 \(NL\)](#)
[Press release \(NL\)](#)*



Germany – Federal Labour Court

Registration of working time - Refusal of the Works Council's right of initiative

The Federal Labour Court ruled that employers are obliged to set up a system for recording the daily working time, including overtime, of employees for whom the German legislature has not adopted, on the basis of Article 17(1) of Directive 2003/88/EC, provisions derogating from the requirements of Articles 3, 5 and 6(b) of that directive.

In doing so, the German high court interpreted a national provision on worker protection in accordance with EU law, relying on the Court's judgment of 14 May 2019, CCOO, [C-55/18](#).

However, according to the Federal Labour Court, the Works Council does not have a right of initiative to introduce a working time recording system, since such an obligation already exists under the relevant legislation, which does not, however, require a recording system in electronic form. Nor does it have such a right to define the modalities of this system.

*Bundesarbeitsgericht, order of 13/9/2022, 1 ABR 22/21 (DE)
[Press release \(DE\)](#)*



Netherlands – Council of State

Border control, asylum and immigration - Subsequent application for international protection

In the context of the examination of a subsequent application for international protection, the Council of State interpreted Article 40(4) of Directive 2013/32/EU. According to the high court, it follows from the judgment of 9 September 2021, Bundesamt für Fremdenwesen und Asyl (Demande ultérieure de protection internationale), [C-18/20](#), that a Member State's refusal to examine such an application by virtue of this provision is limited to cases where this provision has been transposed into national law. As this was not the case in this instance, the Secretary of State for Justice and Security could not declare the subsequent application inadmissible on the basis of that article. In addition, by referring to the judgment of 10 June 2021, Staatssecretaris van Justitie en Veiligheid (Éléments ou faits nouveaux), [C-921/19](#), the Council of State clarified the terms according to which the Secretary of State was to examine the subsequent application for international protection concerned.

Raad van State, judgment of 15/9/2022, 202006762/1/V2 (NL)



France – Council of State

Environment - Right to live in a balanced environment respectful of health - Fundamental freedom - Possibility of recourse to the freedom summary procedure

In an interim order dated 20 September 2022, the Council recognised the right of everyone to live in a balanced environment respectful of health as a fundamental freedom within the meaning of Article L.521-2 of the Code of Administrative Justice. Any person who, in view of their personal situation or the interests they intend to defend, justifies that they have been seriously and manifestly unlawfully affected by the action or failure to act of the public authority, may apply to the interim relief judge. It is then up to the person to state the particular circumstances that make it necessary for them to benefit, in a very short time, from a measure of the kind that can be ordered on the basis of this article.

Conseil d'État, [judgment of 22/9/2022, No 451129 \(FR\)](#)

Denmark – Supreme Court

Fundamental rights - Right to property - Confiscation of a car belonging to a third party

The Supreme Court had before it a question concerning the legality of confiscating a car belonging to a leasing company because of speeding. As a result of speeding by the driver, the car was seized for subsequent confiscation. This car belonged to company A, which had leased the car to company B, and the car was then made available to the spouse of the person who committed the offence. The Supreme Court ruled that the seizure could take place in accordance with the Code of Civil Procedure and the Road Traffic Act. In its view, neither the Danish system of third-party confiscation in general nor the seizure in this specific case violated the provisions on property rights in Article 17(1) of the Charter or Article 1 of Additional Protocol No 1 to the European Convention on Human Rights.

Højesteret, [judgment of 12/10/2022, Sag 102/2021 \(DK\)](#)

Cyprus – Supreme Court

State aid - Possibility of bringing an action for damages against the aid recipient - Condition

In its judgment of 12 October 2022, the Supreme Court confirmed that a claimant may bring an action for damages under national tort law directly against the beneficiary of allegedly incompatible State aid, insofar as the latter has contributed to the violation of the Union's rules on State aid.

Ανώτατο Δικαστήριο Κύπρου, [judgment of 12/10/2022, Γενικός Εισαγγελέας της Δημοκρατίας κ.α. και Cypra Limited, civil appeal No E153/2014 \(GR\)](#)

Latvia – Constitutional Court

Environment - Promotion of renewable energy - Obligation to ensure the use of useful heat

The Constitutional Court, hearing a case brought by several producers of electricity produced in cogeneration using biogas, ruled that various provisions of the government decree on the production of electricity from renewable energy sources and on the methods for setting prices were incompatible with Article 105, first sentence, of the Constitution (right of ownership). These were the requirements as to the use of useful heat in the context of the compulsory purchase of renewable electricity, which were, according to the applicants, impossible to meet. The high court considered that the provisions in question were incompatible with the proportionality principle. In its view, there were alternative, less restrictive ways of ensuring public welfare, which includes, on the one hand, protecting the environment and, on the other, reducing costs for consumers.

Latvijas Republikas Satversmes tiesa, [judgment of 27/10/2022, 2021-31-0103 \(LV\)](#)
[Press release \(LV\)](#)

Latvia – Constitutional Court

Fundamental rights - Right to vote and to stand as a candidate in municipal elections - Prohibition on imprisoned persons voting in such elections

The Constitutional Court, ruling on an appeal by a person serving a prison sentence, held that a provision of national law prohibiting imprisoned persons from voting in municipal elections was incompatible with Article 101(2) of the Constitution (right to vote in municipal elections). The high court noted that this absolute limitation of a fundamental right did not pursue a legitimate objective likely to justify such a limitation.

Latvijas Republikas Satversmes tiesa, [judgment of 3/11/2022, 2021-43-01 \(LV\)](#)
[Press release \(LV\)](#) and [\(EN\)](#)



Romania – Constitutional Court

Judicial organisation - Hierarchical control by the superior prosecutor - Review of constitutionality

The Constitutional Court was asked to rule on an exception of unconstitutionality raised against the law on the organisation of the judiciary. It rejected the criticism of the provisions concerning the prerogative of persons appointed to positions of responsibility in the Public Prosecutor's Office of the High Court of Cassation and Justice, the Anti-Corruption Directorate and the Directorate for the Investigation of Organised Crime and Terrorism Offences, to overturn decisions adopted by the public prosecutors placed under their authority.

In this respect, the Constitutional Court pointed out that a measure ordered by a superior prosecutor can be challenged before the Prosecutors' Section of the Higher Judicial Council. Thus, its intervention is likely to be censured by the highest authority exercising competence in matters of judicial independence.

Curtea Constituțională, [judgment of 9/11/2022, No 522 \(RO\)](#)



Lithuania – Supreme Court

Common foreign and security policy - Restrictive measures against Belarus - Regulation (EC) No 765/2006 - Refusal to recognise a decision of a Belarusian court

The Supreme Court of Lithuania held that the restrictive measures provided for in Regulation (EC) No 765/2006 against Belarus could justify the refusal to recognise a judgment given by a court of that third State, this approach being in line with the bilateral agreement between the two States.

It gave a broad interpretation of Regulation (EC) No 765/2006, stating that the mere fact that a person concerned, such as the applicant in this case, is not formally listed on a sanctions list does not mean that he or she is not subject to the sanctions regime, where he or she may, de facto, be controlled by a person listed on it.

Lietuvos Aukščiausiasis Teismas, [judgment of 9/11/2022, 3K-3-255-611/2022 \(LT\)](#)



Finland – Supreme Administrative Court

Data protection - Law firm - Phishing

The names and email addresses of approximately 2 000 to 2 500 people, 250 to 500 private addresses and 100 to 200 national identification numbers were targeted in a cyberattack on a law firm.

The Data Protection Supervisor ordered the firm to notify the victims of the cyberattack of the breach of their personal data as the hacker potentially had access to these data, thus creating a probable and serious risk to the rights and freedoms of the individuals concerned.

The Supreme Administrative Court rejected the action for annulment brought by this law firm against the decision of the Data Protection Supervisor, considering that this notification obligation was justified under Articles 34 and 52 of Regulation (EU) 2016/679.

Korkein hallinto-oikeus, [judgment of 23/11/2022, No 20397/2021, ECLI:FI:KHO:2022:131 \(FI\)](#) and [\(SV\)](#)



Spain – Constitutional Court

Free movement of capital - Obligation to serve - Right to effective judicial protection

The Constitutional Court condemned the tax administration for using only electronic means to notify a company of all the stages of a VAT review procedure that ultimately resulted in the seizure of the company's assets. Thus, the high court annulled the judgments of the first and second instance, and ordered the administration to cancel the liquidations it had made, in addition to returning the money seized with interest. In particular, it considered that the administration had violated the right to effective judicial protection by retaining a system of electronic service and enjoined it to use an alternative channel in case the taxpayer cannot access their digital mailbox.

Tribunal Constitucional, [judgment of 29/11/2022, No 147/2022 \(ES\)](#)



Cyprus – Supreme Court

Taxation - VAT - Amending law subjecting the supply of electricity to a reduced rate of VAT - Breach of the principle of the separation of powers

Following a referral from the President of the Republic, the Supreme Court declared an amending law subjecting the supply of electricity to a reduced rate of VAT to be incompatible with the Cypriot Constitution.

According to that court, the law at issue was contrary to the principle of the separation of powers, since the question of the application of a reduced rate of VAT to that type of supply falls, in particular in the light of Article 102 of Directive 2006/112/EC on the common system of value added tax, within the competence of the executive, which is called upon, in that context, to assess, inter alia, the economic consequences that would ensue not only for the Cypriot State but also for the funds of the Union.

Ανώτατο Δικαστήριο Κύπρου, [Opinion of 30/11/2022, Πρόεδρος της Δημοκρατίας και Βουλή των Αντιπροσώπων, No 1/2022 \(GR\)](#)



Belgium – Constitutional Court

Union law - Primacy - Judgment in cassation contrary to Union law

The Constitutional Court confirmed that a court may not be obliged to comply with a judgment in cassation because of the primacy of Union law. According to the Constitutional Court, Belgian procedural law is unconstitutional insofar as it obliges a court to which the Court of Cassation refers a case after a judgment in cassation to comply with the latter judgment, when that court considers that this judgment is contrary to Union law, as interpreted by the Court of Justice in a judgment subsequent to the judgment of the Court of Cassation.

Pending intervention by the legislator, it is for the court concerned to put an end to the unconstitutionality by departing, if necessary, from the judgment of the Court of Cassation if it considers that it is obliged to do so in order to respect the principles of primacy and effectiveness of Union law.

*Grondwettelijk Hof, [judgment of 1/12/2022, No 159/2022 \(FR\)/\(NL\)](#)
[Press release \(FR\)](#) and [\(NL\)](#)*



France – Council of State

Environment - Conservation of natural habitats - Wild fauna and flora

In an opinion issued on 9 December 2022, the Council of State highlights the conditions for triggering the obligation to submit an application for an exemption from the ban on the destruction of protected species.

On the one hand, it stipulates that the person responsible for the project must consider whether an exemption is necessary if specimens of the species concerned are present in the project area. At this stage of the review, neither the number of such specimens nor the conservation status of the protected species present is taken into account. On the other hand, the Council of State indicates that the project manager must obtain such an exemption if the risk that the project entails for protected species is sufficiently characterised. As such, both risk-avoidance measures and risk-reduction measures must be taken into account.

Conseil d'État, [opinion of 9/12/2022, No 463563 \(FR\)](#)



Slovenia – Supreme Court

Reference for a preliminary ruling - Referral to the Court of Justice - Obligatory reference

The Supreme Court was asked by a user of protected works to rule on the payment of equitable remuneration claimed by an organisation for the collective management of copyright and related rights. This user argued that the dispute raised the question of the application of Article 102 TFEU (abuse of a dominant position) and proposed referring questions on this matter to the Court of Justice for a preliminary ruling.

The high court dismissed the applicant's request as unfounded. Basing itself on the judgment of 6 October 2021, *Management e Catania Multiservizi and Catania Multiservizi (C-561/19)*, it recalled that it is for the national court to examine the relevance of questions relating to the interpretation of Union law raised by parties to national proceedings. With regard to the questions proposed by the user of the protected works, it held that there was no link between Article 102 TFEU and the subject matter of the dispute at issue.

Vrhovno sodišče Republike Slovenije, [order of 13/12/2022, VSRS Sklep III Dor 25/2022 \(SI\)](#)



Sweden – Supreme Court

Judicial cooperation - European arrest warrant - Refusal to execute

The Supreme Court, ruling on an appeal concerning a request for surrender of a person by Sweden to Greece under a European arrest warrant, rejected the request. Noting that the decision underlying the request had been made following a trial at which the person concerned had not appeared in person, the Supreme Court interpreted the national law transposing Framework Decision 2002/584/JHA in the light of the Court's case-law, in particular that relating to Article 4a of the Framework Decision. The Supreme Court concluded that the person had not been informed of the date and place of the trial, so that it could be unequivocally established that they had been aware of the planned trial.

Högsta domstolen, [order of 13/12/2022, No B 4080-22 \(SV\)](#)



Spain – Supreme Court

Fundamental rights - Presumption of innocence and rights of defence - Access to medical data of the offender

The Supreme Court overturned a 9-year prison sentence handed down by Alicante High Court to a man for robberies with violence committed in the Community of Valencia. During one of these robberies, a man was injured as a result of a confrontation. Guardia Civil officers accessed the perpetrator's medical report. Such a procedure was essential to locate and convict him, but this consultation was carried out without the permission of the person concerned and without a court order. For these reasons, this person claimed that the actions of the Guardia Civil were unconstitutional. The Supreme Court upheld his appeal, stressing the need for permission from the data subject or a judge to collect non-anonymous medical data for use in an investigation.

Tribunal Supremo, [judgment of 16/12/2022, No 971/2022 \(ES\)](#)



Bulgaria – Supreme Administrative Court

Asylum policy - Ukrainian nationals fleeing war - Mass influx of displaced persons - Temporary protection

The Supreme Administrative Court annulled the decision of the Ministerski savet (Council of Ministers) of 30 March 2022, which automatically granted Ukrainian nationals fleeing the war in Ukraine temporary protection in Bulgaria until 15 April 2022.

According to the Supreme Court, the time limit envisaged imposed a limitation contrary to EU law, as Member States were not allowed to accept less favourable conditions than those provided for in Directive 2001/55/EC. It stated that the government's decision was contrary to the objectives of this directive and therefore could not meet the need to ensure the safe passage of threatened persons for the purpose of their return to their country of origin. It also pointed out that this decision was contrary to the Bulgarian Asylum and Refugee Act, which did not provide for the possibility of obtaining temporary protection without express registration of persons and which limited such protection to a certain date. Furthermore, it considered it illegal for stateless persons or third-country nationals to be granted temporary protection without their express indication to that effect. Thus, these persons were deprived of the opportunity to apply for immediate protection or international protection, in accordance with Implementing Decision (EU) 2022/382 and Articles 17 and 19 of Directive 2001/55/EC.

Varhoven administrativen sad, n. [judgment of 20/12/2022, No 11853 \(BG\)](#)



Luxembourg – Court of Cassation

International child abduction - Hague Convention - Concept of 'habitual residence' - Primacy of Union law

In the context of a dispute falling within the scope of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the Court of Cassation interpreted the concept of the child's 'habitual residence' in the light of the case-law of the Court of Justice.

It dismissed the appeal before it and thus confirmed the decision of the Court of Appeal to order the immediate return of the child concerned by the appeal to his father in the Republic of Armenia. While it is true that the child's return to Armenia might deprive him of the special relationship he had with his mother, should the latter remain in Luxembourg, as well as of his social environment, it was not to be feared that the child would suffer from readjustment difficulties in his country of origin, where he had been raised for most of his life, where he had received schooling, whose language he spoke and where his father and grandparents resided.

Cour de cassation, [judgment of 22/12/2022, No 157/2022 \(FR\)](#)



Latvia – Constitutional Court

Personal data - Lifetime storage of data of criminally acquitted persons in the national register of convictions - Infringement of the right to privacy

The case concerned a national regulation providing that personal data of, inter alia, persons acquitted in criminal proceedings should be stored for their entire life in the national register of convictions. The Constitutional Court, following a referral from the District Administrative Court, ruled that this regulation was contrary to Article 96 of the Constitution (right to privacy), as far as criminally acquitted persons were concerned. It noted that, although such a regulation was intended to protect public safety and the right of the person concerned in certain cases, the infringement of the right to privacy was not proportionate in this case.

*Latvijas Republikas Satversmes tiesa, [judgment of 22/12/2022, 2022-09-01 \(LV\)](#)
[Press release \(LV\)](#)*



Sweden – Supreme Court

Reference for a preliminary ruling - Referral to the Court of Justice - Obligatory reference

By order of 20 December 2022, the Supreme Court, ruling by way of extraordinary appeal, annulled a decision of a court of appeal ruling at last instance and referred the case back to the latter. The Court of Appeal had interpreted Article 3(c) of Regulation (EC) No 469/2009 without seeking the intervention of the Court of Justice under Article 267 TFEU. The Supreme Court found that, in view of the case-law of the Court of Justice, the interpretative uncertainties in this case were so great that the Court of Appeal was obliged to refer to the Court of Justice for a preliminary ruling. By failing to do so, the procedure before the Court of Appeal was vitiated by a serious formal defect, rendering its decision void.

Högsta domstolen, [order of 22/12/2022, No Ö 5978-21 \(SV\)](#)



Italy – Council of State

Recognition of professional qualifications - Teaching assistants

In its judgments of 28 and 29 December 2022, the Council of State ruled on the procedure for recognising the specialisation certificates of teaching assistants. The Council of State clarified that the absence of the documents necessary for the recognition of professional qualifications in accordance with Article 13 of Directive 2005/36/EC could not automatically be considered an obstacle to such recognition, given that the level of professional competence acquired by the person concerned had to be verified in practice. It was thus necessary to examine whether this level of competence corresponded or was comparable to the qualification required in the country of destination for access to the regulated profession. In the light of the foregoing, the Council of State rejected the appeal of the Ministry of Education.

Consiglio di Stato, [judgment of 28/12/2022, No 18 \(IT\)](#)

Previous decisions



Portugal – Constitutional Court

Restrictions on movement - Lack of valid legal basis - Conformity with the Constitution

The Constitutional Court ruled unconstitutional a government decision in response to the pandemic crisis caused by COVID-19. On the basis of this measure, those responsible for commercial and service establishments in the Lisbon area who did not close their establishments at 8 p.m. were guilty of criminal disobedience. The court of first instance had decided not to apply the measure on the grounds that the government had no competence to adopt such a measure. The Constitutional Court ruled that the measure did not comply with the Constitution, since the adoption of criminal measures, as well as the related penalties, falls within the competence of Parliament.

Tribunal Constitucional, [judgment of 12/5/2022, No 350/2022 \(PT\)](#)



Poland – Supreme Administrative Court

Asylum policy - Granting of refugee status - Full and ex nunc examination of the factual and legal circumstances by an administrative court

An appeal in cassation against the decision of a court of first instance refusing to grant refugee status to a Ukrainian national was pending before the Supreme Administrative Court. This judgment and the administrative decisions that preceded it were issued before the Russian aggression in Ukraine. In its judgment, the Supreme Administrative Court annulled the said judgment, finding that it was necessary to take into account the changed circumstances resulting from the outbreak of the war. Since, according to the provisions of Polish law, an administrative court has no competence to take into consideration circumstances arising after an administrative decision has been issued, the Supreme Administrative Court considered that Article 46(3) of Directive 2013/32/EU had not been correctly transposed into national law and applied it directly.

Naczelny Sąd Administracyjny, judgment of 5/7/2022, II OSK 1753/21 (PL) [the link to the text of the decision is not available]



Portugal – Constitutional Court

Fundamental rights - European arrest warrant - Right to an effective remedy

Following the execution of a European arrest warrant (EAW) issued by the United Kingdom, the Supreme Court ruled that the detainee, who had consented to his surrender, had no right to appeal against the decision validating his consent. The Supreme Court had ruled that by consenting to the surrender, the citizen waived the procedure and, therefore, the remedy. In this regard, the Constitutional Court stated that this decision infringed the guarantees of the accused in criminal proceedings provided for in Article 32 of the Constitution, including the right to a remedy. For this reason, the Constitutional Court ruled that the interpretation of the Supreme Court was unconstitutional in that it deprived the detainee of this right.

Tribunal Constitucional, [judgment of 16/8/2022, No 540/2022 \(PT\)](#)