



FLASH NEWS

2/21

NATIONAL DECISIONS OF INTEREST TO THE EU OVERVIEW OF THE MONTHS OF MARCH TO JUNE 2021



Germany – Federal Constitutional Court

International agreements - Canada-EU Comprehensive Economic and Trade Agreement (CETA) - Member States' competences

The Federal Constitutional Court declared inadmissible an application by a parliamentary group in the German Federal Parliament aimed at compelling the latter to impose on the Federal Government the position to be adopted in the Council for the negotiation of the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA). According to the court, the applicant had not clearly explained how Parliament had failed to fulfil its constitutional obligation to contribute to the affairs of the Union.

Furthermore, while not ruling on the question of whether it would, if necessary, classify the adoption of the CETA by the Union as an ultra vires act, the Court recalled that a national measure, such as that sought by the present action, could not, in any event, be capable of remedying the possible ultra vires nature of an act of the Union.

*Bundesverfassungsgericht, [judgment of 2/3/2021, 2 BvE 4/16 \(DE\)](#)
[Press release \(DE\)](#)*



Italy – Constitutional Court

Medically assisted procreation - Transcription of a foreign legal measure - Public policy

The Constitutional Court ruled on the conformity with the Constitution of the provisions opposing, on the grounds of incompatibility with public policy, the recognition of a foreign legal measure relating to the transcription into the civil status register of a child born of surrogate motherhood by the non-biological intended parent.

In this case, a court decision in Canada recognised the status of 'parent' for both the biological parent (the one who provided the gametes) and the intended parent (the one who shared the parental project without providing genetic input).

The Constitutional Court first declared inadmissible questions relating to compliance with Article 24 of the Charter of Fundamental Rights of the European Union. In this respect, it stated that, although the Charter could not be taken into account in this case because of the lack of implementation of Union law, its provisions could be considered as interpretative criteria in relation to the other elements invoked by the judge who raised the question of constitutionality. Stressing that it was up to the legislator to adapt 'living law' to the requirements of protecting the interests of children born of surrogate motherhood, it also ruled that the current adoption system did not constitute an appropriate mechanism for guaranteeing that the best interests of the child were respected.

Corte costituzionale, [judgment of 9/3/2021, No 33 \(IT\)](#)



Romania – High Court of Cassation and Justice

European arrest warrant - Deprivation of liberty - Continued detention on remand

In an appeal against the replacement of pre-trial detention by house arrest, the High Court found that surrender to the issuing judicial authority, as a direct consequence of the acceptance of a request for the execution of a European arrest warrant, implicitly presupposes the deprivation of liberty of the person sought. Thus, although another non-custodial preventive measure may be adopted during the examination of such an application, this possibility no longer exists after the final surrender decision has been adopted. Therefore, continued pre-trial detention is appropriate to ensure the completion of the surrender procedure. Moreover, personal circumstances, such as the state of health of the person sought, cannot in themselves justify a contrary decision.

Înalta Curte de Justiție și Casație, [decision of 9/3/2021, No 200 \(RO\)](#)



Slovenia – Supreme Court

Enforcement of a foreign court decision - Public policy - Right of a child to be heard

The Supreme Court had before it an appeal against an order of Ljubljana Regional Court declaring enforceable an Italian judgment concerning the father's custody of his 6-year-old child and denying the mother parental responsibility.

In this case, the high court emphasised that the refusal of the competent Italian courts to hear the child concerned did not manifestly violate Slovenian public policy. First of all, under Italian law, a child can be heard from the age of 12 only. Secondly, a hearing of a child is provided for under Article 41(2)(c) of Regulation No 2201/2003, unless it is considered inappropriate having regard to the age or degree of maturity of the child. Finally, under Slovenian law, a court will hear a child when the child is capable of understanding the importance of the proceedings and the consequences of its decisions. In these circumstances, the Supreme Court rejected the appeal on the merits.

Vrhovno sodišče Republike Slovenije, [order of 8//7/2020, No VSR/Sodba I U 6/2021 \(SI\)](#)



Romania – High Court of Cassation and Justice

European arrest warrant - Impossibility of execution - Continued detention

The High Court dismissed the appeal of a wanted person, the subject of a European arrest warrant, against the extension of his detention for the purpose of executing the warrant. In particular, the high court noted that, due to the international epidemiological situation caused by the COVID-19 virus, there was, among other things, a reduction in the number of flights between Romania and the State issuing the European arrest warrant concerned. It considered that this circumstance constituted an objective reason, well known and beyond the control of the authorities of those two States, making it impossible to execute the European arrest warrant issued for the wanted person within the time limit initially set.

Înalta Curte de Justiție și Casație, [decision of 19/3/2021, No 250 \(RO\)](#)



Poland – Supreme Court

Independence of judges - Judicial reform - Procedure for appointing judges

The Supreme Court had before it a preliminary question concerning the resolution of the joint chambers of the Supreme Court of 23 January 2020 on the composition of the ordinary courts, military courts and the Supreme Court, issued in connection with the judgment in A. K. and others (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18), in the context of the Polish judicial reform. The question was whether such a resolution could be used to challenge a decision of a court in which a judge appointed to that position by a new National Council of the Judiciary was sitting.

The high court, in dismissing the preliminary question, recalled that the Constitutional Court, in particular in its judgment of 20 April 2020 (U 2/20), had ruled that the resolution in question was incompatible with the Constitution and with the acts of international law ratified by Poland, insofar as it sought to call into question the prerogatives of the President of the Republic and of the National Judicial Council. As the rulings of the Constitutional Court are universally binding and final, the Supreme Court considered itself bound by this decision. However, it made it clear that the unconstitutionality of the resolution could in no way be regarded as calling into question the judgment in A. K. and others, cited above). Thus, this ruling was to be implemented in full and in accordance with the principles of the Constitution, which was achieved, inter alia, by the resolution of 8 January 2020 of the Supreme Court (I NOZP 3/19).

Sąd Najwyższy, *Chambre du contrôle extraordinaire et des affaires publiques*, [order of 12/4/2021, I NZP 1/21 \(PL\)](#)



Germany – Federal Constitutional Court

Decision on the system of the Union's own resources - Recovery plan to deal with the socio-economic consequences of the COVID-19 pandemic - Rejection of the application for interim measures

The Federal Constitutional Court rejected the application for interim measures by a group of individuals before it and consequently allowed the entry into force of the Council Decision on the system of the European Union's own resources, adopted in 2020, containing the rules for financing the recovery plan to deal with the socio-economic consequences of the COVID-19 pandemic.

In a summary examination, this court found that the decision on the system of the European Union's own resources and the national law ratifying this decision did not affect, with a high degree of certainty, the general budgetary responsibility of the Bundestag (Federal Parliament), subject to the decision on the merits of the dispute.

Furthermore, the same court stated that the disadvantages that might arise in connection with a favourable decision in summary proceedings followed by a decision rejecting the constitutional appeal far outweighed the disadvantages that might arise in the opposite situation.

Bundesverfassungsgericht, [order of 15/4/2021, 2 BvR 547/21 \(DE\)](#)
[Press release \(DE\)](#)



Estonia – Supreme Court (Constitutional Review Chamber)

Free movement of persons - Procedure guaranteeing judicial review of early withdrawal of a right of residence - Obligation under the Constitution

The Supreme Court had before it a case concerning seasonal workers who violated the health quarantine requirements of COVID-19. It declared a national regulation contrary to the Constitution insofar as it did not allow the exercise of a remedy before a court to challenge the early withdrawal of the right of these workers to stay in Estonia without a visa. The Supreme Court referred to the judgment of the Court of Justice in Case C-403/16, *El Hassani*, noting that foreigners staying in Estonia without a visa are in a substantially similar legal situation to those staying there on the basis of a visa. Both the former and the latter exercise a subjective right deriving from Regulations 2018/1806 and 810/2009 respectively.

According to the Supreme Court, there was no reason not to examine the constitutionality of this regulation on the sole basis that it might also be in conflict with EU law.

Riigikohtu põhiseaduslikkuse järelevalve kolleegium, [judgment of 20/4/2021, No 5-20-10 \(ET\)](#)
[Press release \(ET\)](#)



Spain – Constitutional Court

Fundamental rights - Right to privacy and confidentiality of communications - Listening to and recording conversations inside a vehicle

The Constitutional Court upheld a court decision that found it lawful to listen to and record conversations held inside a vehicle for a period of 3 months, following a bank robbery. In view of the evidence of the commission of offences and the seriousness of the offences, it considered this duration to be in accordance with the principles of proportionality and necessity. In particular, it stressed that the contested decision had correctly balanced not only the constitutional rights and values at stake, but also the minimum guarantees established by law for the protection of other similar communications. The high court concluded that there had been no particularly serious interference with the private lives of the people concerned by the investigation.

Tribunal Constitucional, [judgment of 10/5/2021, No 99/2021 \(ES\)](#)
[Press release \(ES\)](#)



Slovenia – Supreme Court

Co-financing of a local project by the European Regional Development Fund (ERDF) - Checks carried out by the Member States - Infringement of the rules on public contracts

On appeal, the Supreme Court ruled that the Republic of Slovenia, having concluded a contract with a municipality for the co-financing of a project for the construction of an open broadband network, was obliged to review its compliance with EU law. The high court found an irregularity insofar as, after the conclusion of the contract, the value of the public contract had increased beyond the values provided for in the relevant provision of the law on public contracts. It clarified that, according to Regulation No 1083/2006, it is irrelevant in which phase of the implementation of a project partly financed by the European Regional Development Fund the Member State finds an irregularity. According to the high court, any other interpretation of this regulation would mean that the Member State does not guarantee effective enforcement of the regulation.

Vrhovno sodišče Republike Slovenije, [order of 18/5/2021, VS_RS Sklep II Ips 1/2021 \(SI\)](#)



France – Constitutional Council

Processing of personal data - Law for global security preserving liberties - Regulation 2016/679

The Constitutional Council had before it an appeal concerning the conformity of the law for global security preserving liberties with the Constitution. It ruled that the provisions on the processing of images captured by on-board cameras of internal security or emergency vehicles and by aircraft travelling without people on board were not in conformity with the latter, in the absence of a balanced reconciliation between the constitutional objectives of preventing breaches of public order and the right to privacy.

While referring to Regulation 2016/679, the Constitutional Council nevertheless found that Article 61 of this law concerning the experimental installation of on-board front cameras on the rolling stock of public passenger transport operators in order to prevent rail accidents was in conformity with the Constitution. With regard to the use of individual cameras by the police, the Council also dismissed the complaint alleging infringement of the right to privacy, taking into account, in particular, the fact that the reasons for the use of these cameras precluded their widespread and discretionary use.

Conseil constitutionnel, [decision of 20/5/2021, No 2021-817 DC \(FR\)](#)

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



Netherlands – Court of First Instance of The Hague

Environment - CO₂ emissions - Obligation to reduce emissions

The Rechtbank Den Haag (Court of First Instance in The Hague) ruled that the oil company Royal Dutch Shell Plc (hereinafter referred to as 'RDS'), the parent company of the Shell Group with its headquarters in The Hague, was obliged to reduce the CO₂ emissions of the Shell Group, as well as those of the Group's customers and suppliers. This obligation derives from an unwritten principle of due diligence, applicable to RDS, based on facts, a broad consensus and recognised international standards. Although the court points out that no violation has yet been established, it considers that there is now a risk of the obligation being violated. As a result, the court ordered RDS to reduce its CO₂ emissions by 45% compared with the CO₂ emissions in 2019 by the end of 2030 at the latest.

Rechtbank Den Haag, [judgment of 26/5/2021, C/09/571932 / HA ZA 19-379 \(NL\) \(EN\)](#)

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