



FLASH NEWS

2/22

NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW OF THE MONTH OF JANUARY 2022



Spain – Supreme Court

Electronic commerce - Directive 2000/31/EC - Provision of information society services

The Supreme Court overturned a decision by the Generalitat de Catalunya that obliged Airbnb to refrain from including apartments on its website that do not have a registration number in the Catalan Trade and Companies Register, which serves as proof of their legal status as tourist accommodation. The Supreme Court pointed out that the Generalitat had already ordered Airbnb in 2015 to block, remove or permanently suspend from its site content relating to the advertising of companies or tourist accommodation without a registration number. It also stated that the provider of information society services, i.e. Airbnb, must have its residence or registered office on Spanish territory in order to be considered established in Spain, and that this must correspond to the place where the administrative management and direction of its business are based.

Tribunal Supremo, [judgment of 7/1/2022, No 6/2022 \(ES\)](#)



Poland – Supreme Court

Freedom of movement - State of emergency at the Polish-Belarusian border

In a case involving three journalists arrested for violating a ban on being in one of the territories covered by the state of emergency on the Polish-Belarusian border, the Supreme Court acquitted the journalists. In particular, it stressed that the provisions on the state of emergency at the Polish-Belarusian border resulted in a disproportionate interference with the exercise of the fundamental right of free movement and residence, leading to a violation of the Constitution. The State has an obligation to protect the rights and freedoms of the individual as far as possible, taking into account the particular circumstances of the state of emergency. In this specific context, the Constitution ensures that human rights are not completely sacrificed and that any limitation of these rights must respect the principles of proportionality and limitation of purpose.

Sąd Najwyższy, [judgment of 18/1/2022, I KK 171/21 \(PL\)](#)



Netherlands – Council of State

Questions referred - Obligation to make a referral - No reasonable doubt

On the basis of the judgment of the Court of Justice in [Conorzio Italian Management and Catania Multiservizi, C-561/19](#), the Council of State did not consider it necessary to refer to the Court for a preliminary ruling the questions raised by the applicant concerning a measure having equivalent effect to quantitative import restrictions within the meaning of Article 34 TFEU. According to the Council of State, the correct interpretation of EU law in this case was so obvious that it left no room for reasonable doubt. The Council of State also pointed out that the applicant had not, with reference to the Court's case-law, explained why it was not a clear act, nor had the applicant indicated in concrete terms what questions should have been put to the Court.

Raad van State, [decision of 19/1/2022, 202003880/1/A2 \(NL\)](#)



Poland – Supreme Court

Independence of judges - Judicial reform - Procedure for appointing judges

The President of the Civil Division of the Supreme Court issued an order concerning the formation of the Court in the more general context of a case in which the Court gave a preliminary ruling [W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) ([C-487/19](#))]. The case concerned by this order relates to a decision declaring inadmissible an appeal against a decision of the National Council of the Judiciary by a judge appointed on the basis of a decision of that Council, which was challenged before the Supreme Administrative Court. The President stated that the new formation of the Court had been chosen in such a way as to maintain, as far as possible, continuity with the previous formation in this case, ensuring an equitable sharing of the workload.

Prezes Izby Cywilnej Sądu Najwyższego, order of 25/1/2022 [[link to decision not available](#)]

[Press release concerning Case III CZP 1/22 \(PL\)](#)



France – Court of Cassation

Judicial cooperation in civil matters - Jurisdiction in divorce matters - Choice of law by the parties

The Court of Cassation deduced from Article 5 of the Rome III Regulation that when spouses whose situation has a foreign element designate, in an agreement on the choice of law applicable to divorce, the law of a given State, which is not one of those listed in points a) to c), namely the law of the State of the spouses' habitual residence, the law of the State of the spouses' last habitual residence or the law of the State of the nationality of one of the spouses, this choice is valid, under point d), when it is that of the court that subsequently receives an application for divorce.

Cour de cassation, [judgment of 26/1/2022, No 20-21.542 \(FR\)](#)



Netherlands – Supreme Court

Taxation - Taxation of motor vehicles

The Supreme Court was called upon to rule in a case concerning the tax on passenger cars and motorbikes on the consequences to be drawn from the judgments of the Court of Justice in *Nidera*, [C-387/16](#), and *Sole-Mizo and Dalmandi Mezőgazdasági*, [C-13/18 and C-126/18](#), concerning the amount of interest on the refund of the excess VAT. It held that EU law does not preclude national legislation under which the remuneration of interest for the repayment of taxes levied in breach of EU law is determined on the basis of simple interest and a fixed rate of interest, provided that this rate of interest is at least close to that which a taxable person would have to pay to borrow the amount of taxes paid in breach of EU law from a bank.

Hoge Raad, [decision of 28/1/2022, 21/00331 \(NL\)](#)



Romania – High Court of Cassation and Justice

Referral for a preliminary ruling - Optional suspension of national proceedings - Resumption ex officio following the judgment of the Court of Justice

The High Court of Cassation and Justice, ruling on an appeal in the interest of the law, held that where a Romanian court decides to order the suspension of proceedings until the Court of Justice has given a preliminary ruling, following a request from another Romanian court or a court of another Member State, it is obliged, following the pronouncement of the Court of Justice's decision, to resume the proceedings ex officio. Thus, in the absence of a request for resumption of the case by the party concerned within 6 months of the judgment, the request cannot be considered as having lapsed.

Înalta Curte de Justiție și Casație, [decision No 2 of 31/1/2022 \(RO\)](#)

DECISIONS PRIOR TO 1 JANUARY 2022



Luxembourg – Administrative Court

Corporate law - Panama papers

The so-called 'Panama Papers' cases concerned, in particular, the right of the direct tax administration to investigate third parties, who were lawyers, in order to obtain information on the economic beneficiaries of Panamanian corporate structures for which these Luxembourg-based lawyers had acted as intermediaries. The Administrative Court recognised the right of this administration to initiate investigations on the basis of the general tax supervision regime ('Steueraufsicht') as well as to request information from these lawyers. In addition, it concluded, in certain specific cases governed by the Tax Code, that the professional confidentiality of the lawyers concerned could not be invoked.

*Cour administrative, [judgments of 13/7/2021 \(FR\)](#)
[Press release \(FR\)](#)*



Portugal – Constitutional Court

Fundamental rights - Inviolability of correspondence - Cybercrime - Seizure of emails

A bill transposing Directive (EU) 2019/713 was submitted to the Constitutional Court for an a priori constitutionality review. The bill aimed, inter alia, to amend the regime for the seizure of emails under the law on cybercrime, extending the scope of seizures and the circle of judicial authorities empowered to authorise them. The Constitutional Court ruled that these amendments were not consistent with the Constitution, considering that the extension of the scope of seizures did not respect the proportionality of the limitation of fundamental rights required by the Constitution. In particular, it stressed that the investigating judge has exclusive competence to adopt acts limiting fundamental rights in the investigation phase.

*Tribunal Constitucional, [judgment of 30/8/2021, No 687/2021 \(PT\)](#)
[Press release \(EN\)](#)*



Cyprus – Supreme Court

Protection of personal data - General and undifferentiated retention of traffic and location data

The Supreme Court declared the incompatibility of certain provisions of the law on the retention of telecommunications data for the purpose of investigating serious criminal offences with Directive 2002/58/EC (Directive on privacy and electronic communications), as well as with the principles derived from the case-law of the Court of Justice. In the context of the investigation of serious criminal offences, these provisions provided for the general and undifferentiated retention of all traffic and location data of all subscribers and users registered with electronic communications services.

Ανώτατο Δικαστήριο Κύπρου, [judgment of 27/10/2021, joined cases on telecommunications, Nos 97/18, 127/18, 140/19-143/19, 154/19, 169/19, 36/20 και 46/20 \(GR\)](#)



Portugal – Constitutional Court

Fundamental rights - Mistreatment of pets

The Constitutional Court ruled that Article 387 of the Criminal Code, which criminalises the mistreatment of pets, was not consistent with the Constitution. The court noted that the rights of these animals and their protection are not in themselves protected by the Constitution and therefore cannot justify a restriction of an individual's freedom. Both the Constitution and EU law, in particular Article 13 TFEU, provide for the general protection of animals, but do not require the criminalisation of their mistreatment.

*Tribunal Constitucional, [judgment of 10/11/2021, No 867/2021 \(PT\)](#)
[Press release \(EN\)](#)*



Germany – Federal Administrative Court

Asylum policy - Recognition of refugee status on the basis of family protection - Conditions

The Federal Administrative Court granted refugee status on the basis of family protection to the parents and minor siblings of a single minor refugee. It held that neither the fact that the family members of the minor refugee already benefit from subsidiary protection, nor the fact that the siblings do not fall within the notion of 'family members' within the meaning of Directive 2011/95/EU, preclude such recognition, on the grounds, inter alia, that this Directive allows Member States to adopt or maintain more favourable standards.

If the refugee comes of age during proceedings, recognition of refugee status under family protection requires that all concerned have applied for asylum before the refugee comes of age. The point in time used to determine whether or not the refugee is a minor and single is when the application for asylum is filed.

*Bundesverwaltungsgericht, [judgment of 25/11/2021, 1 C4.21 \(DE\)](#)
[Press release \(DE\)](#)*



Slovenia – Supreme Court

Health - Medically assisted procreation with a third-party donor

On appeal, the Supreme Court held that prior authorisation by the competent national commission is not a condition for medically assisted procreation to be validly carried out in a Member State other than Slovenia. However, this authorisation is necessary when such assistance is provided in Slovenia. Nevertheless, the high court noted that since the right to reimbursement of costs relating to such acts was not recognised for those performed on national territory, those incurred in another Member State could not be subject to such reimbursement either. It therefore rejected the claim for reimbursement in this case.

Vrhovno sodišče Republike Slovenije, [judgment of 21/12/2021, VSRS Sodba VIII Ips 21/2021 \(SL\)](#)



Germany – Federal Administrative Court

Asylum policy - Recognition of refugee status on the basis of family protection - Exclusion of 'chains of derivation'

The Federal Administrative Court ruled that a person cannot benefit from international protection derived from a member of his or her nuclear family when he or she has been granted refugee status on a derivative basis.

The High Court recalled that German asylum law clearly states that members of a nuclear family can only obtain international protection on a derivative basis from another member who has been directly granted such protection. Such an exclusion of 'chains of derivation' (*Ableitungsketten*) is consistent with EU law as Directive 2011/95/EU allows but does not oblige Member States to accept 'chains of derivation' in their national asylum law under more favourable legislation.

Bundesverwaltungsgericht, [judgment of 21/12/2021, 1 B35.21 \(DE\)](#)