



FLASH NEWS

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NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW OF THE MONTHS OF JUNE TO OCTOBER 2021



Greece – Council of State

Liability of a Member State for breach of EU law - Breaches attributable to a national court - Division of jurisdiction between civil and administrative courts

The Council of State ruled that, in the absence of a special provision on violations of EU law attributable to national courts, judicial protection may be offered to individuals on the basis of the existing national provision on legal proceedings involving the civil liability of the State. However, in view of the division of competences between civil and administrative courts, as provided for by the Greek Constitution, the Council of State considered that, when the infringement was allegedly committed by a civil court, it is the civil courts that are competent to judge the case and not the administrative courts.

Symvoulío tis Epikrateias, Ass., [decision of 4/6/2021, 799-803/2021 \(EL\)](#)



Belgium – Court of Cassation

Air transport - Obligation to pay compensation in the event of delay or cancellation of a flight - Non-payment of compensation - Infringement of Regulation (EC) No 261/2004 - Absence

The Court of Cassation clarified that the non-payment by an air carrier of the compensation provided for in Article 7 of Regulation (EC) No 261/2004 does not in itself constitute a breach of that Regulation and therefore a criminal offence under the Belgian legislation implementing Article 16(3) of that Regulation. According to the Court of Cassation, such an infringement can only occur if the air carrier, in the event of cancellation or delay of the flight, unduly refuses to comply with a request for compensation submitted in good time by the passenger. Consequently, it dismissed the appeal in cassation of the applicants, who, having brought their claim for compensation beyond the 1-year limitation period provided for by national law (in accordance with the Cuadrench Moré judgment, [C-139/11](#)), had argued that non-payment still constitutes a criminal offence, subject to a longer limitation period.

Hof van Cassatie, [judgment of 11/6/2021, No C.20.0185.N \(NL\)](#)



Austria – Constitutional Court

Asylum policy - Right of asylum for nationals of EU Member States

A Lithuanian national had applied for international protection in Austria, claiming that he was at risk of persecution in Lithuania, as a Jew and human rights activist, for destroying a World War II commemorative plaque.

In its judgment, the Constitutional Court confirmed the assessment of the administrative authorities and courts based on the Protocol (No 24) on the Right of Asylum for Nationals of Member States of the European Union refusing the said application. The Lithuanian national in question failed to show why he could not benefit, in his Member State of origin, from protection, in particular judicial protection, against such persecution, so as to rebut the presumption of a manifestly unfounded claim provided for by the Protocol.

Verfassungsgerichtshof, [judgment of 22/6/2021, E 2546/2020 \(DE\)](#)
[Press release \(DE\)](#)



Germany – Federal Labour Court

Posting of workers - Working and employment conditions - Minimum wage provided for by the provisions of the host Member State

The Federal Labour Court ruled that employees posted from another Member State and working in Germany as carers in a private household are entitled to the German statutory minimum wage. According to the high court, the German provisions on minimum wages apply, by virtue of Regulation (EC) No 593/2008 (Rome I) and Directive 96/71/EC, regardless of which national law is intended to apply to the employment contract of the employee concerned.

In addition, this court specified that the said salary is also due for on-call periods and referred the case back to the court dealing with the substance of the case to determine the employee's actual working time.

Bundesarbeitsgericht, [judgment of 24/6/2021, 5 AZR 505/20 \(DE\)](#)
[Press release \(DE\)](#)



Spain – Supreme Court

Social policy - Directive 1999/70/EC - Fixed-term employment contracts in the public sector - Temporary workers

In the light of the Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario judgment, [C-726/19](#), the Supreme Court supplemented and amended its case law on fixed-term employment contracts in the public sector in response to an appeal in cassation. The high court ruled that an interpretation in keeping with the framework agreement on fixed-term work set out in the annex to Directive 1999/70/EC implies that procedures to fill vacancies in the public sector should not last more than 3 years from the date of the *interinidad* contract.

Thus, exceeding this period constitutes, with very limited exceptions (notably not related to budgetary reasons), an unjustified duration that leads to the transformation of temporary workers' contracts into non-permanent open-ended contracts.

Tribunal Supremo. Sala de lo Social [judgment of 28/6/2021, No STS 2454/2021 \(ES\)](#)



Slovakia – Constitutional Court

National electoral law - Referendum - Shortening of the term of office of the Slovak Parliament (National Council)

The Constitutional Court ruled that the subject matter of a referendum, concerning the possibility of shortening the term of office of the National Council (Slovak Parliament) so that elections to the Council can be held within 180 days from the date of the announcement of the results of the referendum, is not in keeping with the Constitution.

The high court stressed the importance of the principles of the rule of law and considered that the purpose of the referendum would circumvent the Constitution, according to which the Council's electoral term is 4 years. It ruled that such a shortening of the election period would violate the Constitution by removing the barriers protecting citizens from abuses of State power.

Ústavný súd, [judgment of 7/7/2021, PL. ÚS 7/2021-150 \(SK\)](#)



Italy – Court of Cassation

European Arrest Warrant - Possibility of refusing execution - Double criminality test

The Criminal Division of the Court of Cassation refused to execute a European Arrest Warrant concerning a decision to sentence a Romanian national to 1 year's imprisonment for driving without a licence, on the grounds that the offence that had led to the judgment in the requesting State did not constitute a criminal offence under Italian law.

In this respect, the national court recalled that, in the absence of a repeat offence, the offence in question had been decriminalised under Italian law and transformed into an administrative offence.

More specifically, the Court of Cassation considered that the criterion of dual criminality in the two legal systems concerned, provided for by the national regulations implementing Council Framework Decision 2008/909/JHA, was lacking in this case.

Corte di Cassazione, [judgment of 22/7/2021, Sent. No 28701/2021 \(IT\)](#)



France – Council of State

Environment - Ambient air quality - Exceedance of limit values - Obligation to draw up a plan to remedy the situation

In order to comply with the requirements of Directive 2008/50/EC, in July 2017, the Council of State had ordered the French government to draw up plans to reduce concentrations of nitrogen dioxide and fine particles in 13 areas in France. In July 2020, having found that the limit values were still being exceeded in eight areas, the Council of State ordered it to take the necessary measures within 6 months, failing which it would be fined EUR 10 million per 6-month delay. In this decision, considering the measures taken to be insufficient, the Council of State ordered the State to pay the applicant association, as well as several public and private bodies, a penalty payment of EUR 10 million for the first half of 2021.

Conseil d'État, [decision of 4/8/2021, No 428409 \(FR\)](#)
[Press release \(FR\)](#)



Italy – Court of Cassation

European Arrest Warrant - Possibility of refusing execution - National rules making this possibility conditional on a minimum period of stay

The Criminal Division of the Court of Cassation ruled that the national legislation reserving the possibility of refusing the execution of a European Arrest Warrant issued for the purpose of enforcing a custodial sentence or security measure to EU citizens who have legally and effectively resided in Italian territory for 5 years does not raise any question of constitutionality. According to the Court of Cassation, it is not contrary to the principle of equality, nor to the principle of reasonableness, nor to the objective of social reintegration of the person concerned.

More specifically, the Court of Cassation ruled that the appeal challenging the constitutionality of the national regulations implementing Council Framework Decision 2002/584/JHA was unfounded, ruling out the possibility that the person concerned, who had only been in Italian territory for 6 months, might be integrated into it.

Corte di Cassazione, [judgment of 5/8/2021, Sent. No 31207/2021 \(IT\)](#)



France – Court of Cassation

European Arrest Warrant - Challenge to surrender - Psychological disorder of the person sought

The Court of Cassation rejected the appeal lodged by a wanted person against the judgment authorising his surrender in execution of the European Arrest Warrant for him. In this case, the person concerned had been sentenced by a German court to a custodial sentence involving being placed in a psychiatric institution, for offences involving insults, threats and damage to property. The high court ruled that it follows from Article 695-23 of the Code of Criminal Procedure that judges only have to ensure that the facts giving rise to the arrest warrant constitute an offence under French criminal law. Consequently, the applicant cannot rely on the fact that these judges did not investigate whether he was suffering from a psychological or neuropsychological disorder that had impaired his discernment or control over his actions, and whether he was not therefore criminally irresponsible under French law.

Cour de cassation, [judgment of 11/8/2021, No 21-84.361 \(FR\)](#)



Finland – Supreme Administrative Court

Protection of personal data - Independence of supervisory authorities

The Supreme Administrative Court annulled the decision of the Provincial Government of Åland not to appoint A. to the post of head of the personal data supervisory authority after a 1-year trial period.

The position of A. as head of the personal data supervisory authority was regulated not only by national provisions, but also by the provisions of Regulation (EU) No 679/2016. Although this Regulation does not contain explicit provisions on the trial period, the minimum term of office set out in Article 54(1)(d) of the Regulation limits the application of national rules with regard to trial periods.

Högsta förvaltningsdomstolen, [decision of 10/9/2021, No KHO:2021:125 \(SV\)](#)
[Press release \(FI\)](#)



France – Court of Cassation

Fundamental rights - Freedom of expression - Freedom that can never justify the commission of a criminal offence - Exclusion

A group of environmental activists broke into various town halls to steal the official portrait of the President of the Republic. According to this group, the removal of this portrait was a matter of individual freedom of expression of its members, in relation to a subject of general interest. The appeal court had ruled that freedom of expression can never justify the commission of an offence, thus refusing to examine the argument put forward in a concrete way. In overturning this appeal decision, the Court of Cassation ruled that, when a plea based on freedom of expression (Article 10 ECHR) is raised before the courts dealing with the substance of the case, it is up to the latter to determine whether the criminal prosecution of the conduct in question does not constitute, in the case in point, a disproportionate infringement of this freedom.

Cour de cassation, [judgment of 22/9/2021, No 20-85.434 \(FR\)](#) [Press release \(FR\)](#)

Poland – Constitutional Court

Judicial reform - Powers of the Constitutional Court - Examination of the conformity of EU law with the Constitution

In the context of judicial reform, the Constitutional Court was approached by the Prime Minister regarding the conformity of Articles 1(1) and (2), 4(3) and 19(1) TEU with the Constitution, insofar as these provisions allow the national judicial authorities to apply national provisions in a manner that is not in keeping with the Constitution, with a view to guaranteeing judicial protection and monitoring both the impartiality of the magistrates appointed by the President and the resolutions of the National Council of the Magistracy concerning the appointment of these magistrates.

Firstly, in ruling that the provisions of EU law in question were contrary to the Constitution, the high court emphasised that the European Union must exercise its competences while respecting the national and constitutional identity of the Member States, insofar as EU law, and in particular the norms arising from the case law of the Court of Justice, must be applied in Poland only within the framework of exercising the competences delegated to the Union.

In this respect, the Constitutional Court ruled that the creation by the European Union and its bodies of legal norms directed at the Republic of Poland, beyond the competences attributed by the Member States to the European Union, and the fact that these rules take direct precedence over national laws and the Polish Constitution, implies a loss of sovereignty by the Republic of Poland.

Furthermore, the Constitutional Court stressed that it does not exclude using its competence to assess directly the constitutionality of the judgments of the Court of Justice, including their non-application in the Polish legal system.

Trybunał Konstytucyjny, [judgment of 7.10.2021, K 3/21 \(PL\)](#)

France – Constitutional Council

Schengen Agreement - Re-routing obligation on air carriers - Review of constitutionality

The Constitutional Council ruled on the obligation for air carriers to re-routing foreigners who have been refused entry to the national territory – an obligation arising from Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement. The Constitutional Council held that the transposition of a directive or the adaptation of domestic law to a regulation cannot run counter to a rule or principle inherent in France's constitutional identity. The Constitutional Council also noted that the prohibition on delegating the exercise of public force to private persons is a principle inherent in France's constitutional identity. However, it ruled that the obligation in question does not disregard this principle and is therefore consistent with the Constitution.

*Conseil constitutionnel, [decision of 15/10/2021, No 2021-940 QPC \(FR\)](#)
[Press release \(FR\)](#)*

Norway – Vestfold District Court

European Arrest Warrant - Refusal to surrender the accused - Independence of judges

Vestfold District Court had before it a European Arrest Warrant issued by a Polish court for a Polish national residing in Norway for the purpose of criminal prosecution. Vestfold District Court refused to execute the warrant on the grounds that, if handed over to the Polish judicial authorities, the accused would run the risk of his fundamental right to a fair trial being infringed. In reaching this conclusion, it referred to recent developments concerning the independence of the Polish judiciary, including the disciplinary regime for judges, as well as to recent decisions of the Court in this area [judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, and order of 14 July 2021, *Commission v Poland*, C-204/21 R] and of the ECHR (judgments of 1 December 2020, *Guðmundur Andri Ástráðsson v Iceland*, of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v Poland*, and of 22 July 2021, *Reczkowicz v Poland*). According to the Norwegian court, it follows from these decisions that there is now a 'significantly higher risk and probability' that a Polish court will include a judge who cannot be considered a judge within the meaning of Article 6 ECHR.

Vestfold tingrett, [decision of 27/10/2021, TVES-2021-144871 \[NO\]](#)

DECISIONS PRIOR TO 1 JUNE 2021



Czech Republic – Supreme Administrative Court

Fundamental rights - Discrimination on grounds of sex - Human dignity

In its judgment, the Supreme Administrative Court rejected the appeal in cassation lodged by the applicant, a pawnbroker, which had been fined by a regional authority for an infringement of the Advertising Regulation Act, on the grounds that it had used an advertisement showing a nearly naked female body, unrelated to the company's activities.

The Supreme Administrative Court ruled that an advertisement that uses photographs of naked women for the sole purpose of drawing attention to products or services not related to the human body places women in the position of sexual objects and discriminates against them on the basis of sex, which violates human dignity and is contrary to public decency.

Nejvyšší správní soud, [judgment of 31/3/2021, 8 As 202/2019-43 \(CS\)](#)