



FLASH NEWS

4/22

NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW OF THE MONTHS FROM FEBRUARY TO APRIL 2022



Germany – Federal Constitutional Court

EU-Canada Comprehensive Economic and Trade Agreement (CETA) - Provisional application - Constitutionality

The Federal Constitutional Court ruled that the participation of the German representative in the adoption of the Council decision of 28 October 2016 cannot be challenged from a constitutional point of view. According to the high court, this decision does not constitute an ‘ultra vires’ act or an act affecting the constitutional identity of the fundamental law. The decision taken by the Council concerns only matters falling within the competence of the Union.

Furthermore, that court observes that the CETA agreement is a mixed agreement, comparable to the agreement between the Union and the Republic of Singapore that gave rise to the Court's Opinion 2/15 of 16 May 2017, in which it held that certain provisions of that agreement are subject to shared competence.

Bundesverfassungsgericht, [order of 9/2/2022, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16 \(DE, EN\)](#)

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



Slovenia – Supreme Court

Consumer protection - Package holidays - Compensation for non-material damage

In its judgment of 2 March 2022, the Supreme Court ruled, in an unprecedented manner, that, in the context of claims for compensation for damage arising from package holidays, national courts must take into account different types of non-material damage, including that relating to the loss of holiday enjoyment. Referring to the Leitner judgment (C-168/00), the high court observed that, although the question of compensation for such damage is not expressly provided for by Directive 90/314/EEC and the national law on consumer protection, Slovenian courts faced with a case of compensation for such damage in the context of package holidays must judge such compensation on the basis of the general rules of the Code of Contractual Liability Obligations, as well as the provision of the said Code that refers to an application, by analogy, of compensation for non-contractual damage.

Vrhovno sodišče Republike Slovenije, [judgment of 2/3/2022, II Ips 69/2022 \(SI\)](#)



Romania – Constitutional Court

Judicial reform - Abolition of the section of the Public Prosecutor's Office responsible for investigating offences committed within the judicial system (SIJ) - Review of constitutionality - Rule of reference

Having received a request to review the unconstitutionality of the law abolishing the SIJ, the Constitutional Court considered that the content of this law is different from the one at issue in the judgment *Asociația ‘Forumul Judecătorilor din România’ and others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19), insofar as the law submitted for a review of constitutionality does not create a specialised section within the Public Prosecutor's Office with exclusive competence to investigate offences committed by magistrates. In this respect, according to the Constitutional Court, the provisions of Union law, as interpreted by the Court in this judgment, cannot be applied for the purposes of the review of the constitutionality of the said law, since this interpretation does not concern the contested law. Therefore, the Constitutional Court reiterated that the only rule of reference is the Romanian Constitution.

Curtea Constituțională, [decision No 88 of 9/3/2022 \(RO\)](#)





Poland – Constitutional Court

Judicial reform - Powers of the Constitutional Court - Examination of the conformity of Article 6 of the ECHR with the Constitution

In the context of the judicial reform in Poland, the Constitutional Court was asked several questions by the Prosecutor-General concerning the conformity with the Constitution of Article 6, paragraph 1, first sentence of the ECHR. The appeal concerned, inter alia, the possibility offered by this provision to national and international courts to assess the conformity with the Constitution and the ECHR of laws concerning the Polish judicial system.

In this respect, the high court ruled that Article 6 of the ECHR does not comply with the Constitution insofar as, on the one hand, the ECtHR deduced from the concept of ‘rights and obligations in a suit at law’ contained in this provision the subjective right of the judge to occupy an administrative function in the organisational structure of the courts of general jurisdiction in Poland and, on the other hand, this provision allows the ECtHR or national courts, firstly, to disregard the provisions of the Constitution, laws and judgments of the Constitutional Court, secondly, to create norms concerning the procedure for the appointment of judges of national courts and, finally, to assess the conformity of laws concerning the organisation of the judiciary and the jurisdiction of courts with the Constitution and the ECtHR.

Trybunał Konstytucyjny, judgment of 10/3/2022, K 7/21 ([PL/EN](#))
[Press release \(PL\)/\(EN\)](#)



Greece – Council of State

Environment - Directive 2001/42/EC - Concept of ‘plan’ - Failure to draw up a strategic environmental assessment before the approval of a major port project

The Council of State annulled the administrative acts concerning the approval of the investments and the new design of the port of Piraeus, which constitute a ‘plan’ within the meaning of Directive 2001/42/EC.

The high court considered that these acts are illegal, insofar as they were adopted in violation of the obligation to draw up a strategic environmental assessment provided for in this directive, the objective of which is to study, at an early stage, the environmental impact of this port expansion and enlargement project in multiple areas of activity.

In this context, the Council of State rejected the defendants’ argument that national legislation allows the omission of such an assessment, in accordance with Directive 2001/42/EC, if the approval of the master plan is followed by the authorisation of all port projects.

Symvoulío tis Epikrateias, Ass., judgments of 11/3/2022, No 547-549/2022 (EL), [Summary of judgments \[EL\]](#)



France – Constitutional Court

Asylum policy - Determination of the Member State responsible for examining an application for international protection - Holding an alien in a waiting zone

In its decision of 17 March 2022, the Constitutional Council ruled that the provisions of Article L.221-1 of the Code on the Entry and Stay of Foreigners and the Right to Asylum allowing the administration to keep a foreigner in a waiting zone for a period of 4 days without the intervention of a judge do not infringe on individual freedom. Detention in the waiting zone is ordered for the time strictly necessary for the administration to take the necessary steps to organise the departure of the foreigner concerned or to check that the examination of his or her asylum application falls within the competence of another Member State or is not inadmissible or manifestly unfounded. It was also observed that the time limit for initial placement by the administration could not be extended.

Conseil constitutionnel, [decision of 17/3/2022, No 2021-983 OPC \(FR\)](#)



Spain – Constitutional Court

Fundamental rights - Principle of legality of offences and penalties - Effective judicial protection

The Constitutional Court rejected the appeal for protection lodged by the former vice president of the Generalitat de Catalunya, Oriol Junqueras, and the former Minister of Foreign Affairs, Raul Romeva, against the decision of the Supreme Court sentencing them respectively to 13 and 12 years in prison for sedition and embezzlement. In this regard, the High Court states that the sentences actually imposed on the applicants are not disproportionate to the seriousness of the acts committed that gave rise to the referendum on self-determination in Catalonia, held on 1 October 2017. Furthermore, the said court rejects the argument that the Supreme Court should have recognised the prerogative of immunity of Mr Junqueras as an elected MEP, concluding that immunity protects parliamentarians from prosecution, but that it should not be granted in the present case, since at the time he was elected MEP, he had already been prosecuted and was on trial.

Cour constitutionnelle, [judgment of 23/3/2022, No 45/2022 \(ES\)](#)

 **Netherlands – Supreme Court**

European Union law - Value added tax (VAT) - Breach of the principle of respect for the rights of the defence

The Supreme Court held that the principle of respect for the rights of the defence was violated in this case because the tax inspector had imposed a payment of an additional amount on a tax without having given the person concerned the opportunity to comment on the proposed taxation.

The high court also ruled that, as an exception to this principle, the inspector may put forward a justification for not giving the interested party the opportunity to present his observations. However, the fact that the interested party had been granted a suspension of payment does not constitute such a justification.

Hoge Raad, [decision of 25/3/2022, 20/01470 \(NL\)](#)

 **Latvia – Supreme Court**

Social policy - Successive employment contracts - Abusive extension of the trial period

The Supreme Court annulled the judgment of the Court of Appeal in which the latter had dismissed an employee's appeal against his former employer concerning the allegedly illegal nature of the dismissal. The first employment contract was terminated by agreement between the parties a few days before the end of the trial period, but another contract for the same work was concluded in the following days, establishing a new trial period of 3 months, during which the worker was dismissed. The high court, applying by analogy the ETUC, UNICE and CEEP framework agreement on fixed-term work, annexed to Directive 1999/70/EC, obliged the Court of Appeal to assess whether the employer had not used its right to establish a trial period in an abusive manner by undermining the legal position of the worker, the weaker party in the employment relationship.

Latvijas Republikas Senāta Civillietu departaments, [judgment of 31/3/2022, SKA-58/2022 \(LV\)](#)

 **France – Council of State**

European Union law - Rights conferred on individuals - Breach by a Member State - Obligation to make good the damage caused to individuals

In its decision of 1 April 2022, the Council of State held, firstly, that it is up to the members of the court that adopted the decision that is alleged to be vitiated by a clear violation of Union law to abstain from sitting in the proceedings required to rule on the existence of this violation.

Secondly, the Council of State considers that, although the failure of a national court ruling at last instance to comply with the obligation to make a reference for a preliminary ruling, which does not create a right to a reference for a preliminary ruling for individuals, is one of the factors that the national court must take into consideration when ruling on a claim for compensation based on the manifest infringement of Union law by a court decision, it does not constitute an independent ground for the liability of a Member State.

Conseil d'État, [decision of 1/4/2022, No 443882 \(FR\)](#)

 **Netherlands – Council of State**

International protection - Principle of mutual trust - Refoulements in Croatia

An appeal was lodged with the Council of State concerning the application of the principle of mutual trust to refoulements carried out in another Member State. The high court considered that, in general, refoulements constitute a negation of Article 6 of Directive 2013/32/EU. However, it follows from the relevant reports that refoulements in Croatia have been taking place for a long time and on a large scale, such that they constitute systemic failures of the asylum procedure that reach the particularly high threshold of seriousness. Given that these failures may affect applicants for international protection under Regulation 604/2013, the Secretary of State should have better analysed the risks to which these applicants are exposed as a result of their refoulement in Croatia in order to ensure that their applications for international protection are dealt with in an appropriate manner.

*Raad van State, [decision of 13/4/2022, 202102939/1/V3 \(NL\)](#)
[Press release \(NL\)](#)*



Germany – Federal Constitutional Court

Fundamental rights - Powers of the services responsible for the protection of the Constitution

The Federal Constitutional Court ruled that the provisions of a *Land* law authorising certain activities of the services responsible for protecting the Constitution (surveillance of homes or persons; online searches; location of mobile terminals; consultation of data; use of undercover agents or informers; transmission of information to other authorities) were disproportionate. These provisions thus violate the fundamental rights to informational self-determination, to the confidentiality and integrity of computer systems, to the secrecy of telecommunications and to the inviolability of the home. However, with the exception of the provisions on data consultation, which it declared null and void - the high court admitted their application, with certain reservations, until 31 July 2023, to allow for legislative reform in line with fundamental rights.

*Bundesverfassungsgericht, [judgment of 26/4/2022, 1 BvR 1619/17 \(DE\)](#)
[Press release \(DE\)/\(EN\)](#)*