



FLASH NEWS

5/22

NATIONAL DECISIONS OF INTEREST TO THE EU OVERVIEW OF THE MONTHS OF MAY TO AUGUST 2022



Germany – Federal Constitutional Court

Fundamental rights - Principle of ne bis in idem

The Constitutional Court was called upon to rule on the lawfulness of decisions by national judicial authorities concerning the surrender of a person sought under a European arrest warrant issued by another Member State. In particular, it had to examine whether such decisions were likely to infringe that person's right to respect for the principle of ne bis in idem recognised in Article 50 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 54 of the Convention implementing the Schengen Agreement.

The high court ruled that it was necessary to examine the application, by the national authorities, of legal provisions fully harmonised by Union law in the light of fundamental rights. It stated that such an examination should be made when the interpretation of the Charter can be clearly deduced from the case-law of the Court or if the interpretation leaves no room for reasonable doubt by reason of the hypotheses described in Article 52(2) and (3) of the Charter, while at the same time respecting the mechanism of the preliminary ruling under Article 267(3) TFEU.

As such, after examining the application of the relevant legal provisions by the national authorities in this case in the light of fundamental rights, the Constitutional Court found an infringement of Article 50 of the Charter.

Bundesverfassungsgericht, [order of 19/5/2022, 2 BvR 1110/21 \(DE\)](#)



Netherlands – Supreme Court

Social policy - Temporary work - Non-competition clause

The Supreme Court heard an appeal in cassation concerning the validity of a contractual non-competition clause. This stipulated that a temporary worker is, in principle, not allowed to perform the same tasks during the 6 months following the end of his or her contract of employment as he or she did during the 6 months before that date.

The Court of Appeal had annulled said non-competition clause on the grounds that it infringed the national provision transposing Article 6(2) of Directive 2008/104/EC.

In holding that the Court of Appeal had wrongly considered that this provision was applicable to the case, the Supreme Court referred to the interpretation of the concepts of 'worker' and 'employment relationship' provided in the *Betriebsrat der Ruhrländklinik* judgment (Case C-216/15).

It concluded that it was for the Court of Appeal to reconsider the case in the light of this judgment.

Hoge Raad, [decision of 2/5/2022, 20/03958 \(NL\)](#)



Latvia – Constitutional Court

Fundamental rights - Equal treatment - Right to property - Confiscation by the State of funds linked to crimes

The Constitutional Court, ruling on the appeals of a credit institution in liquidation and one of its creditors, found Latvian legislation providing in certain cases for confiscation (ex gratia seizure) by the State of funds (property) in connection with crimes to be compatible with Article 91 of the Constitution (right to equal treatment). The Constitutional Court noted that the creditor did not have an absolute right to recover his deposit from the insolvent credit institution on the basis that the funds deposited with such an institution had been qualified as crime-related property and, therefore, had been removed from the civil circulation of goods.

*Latvijas Republikas Satversmes tiesa, [judgment of 23/5/2022, 2021-18-01 \(LV\)](#) and [\(EN\)](#)
[Press release \(LV\)](#)*



Romania – Constitutional Court

Disciplinary sanctions applicable to judges and prosecutors - Exclusion from the judiciary - Review of constitutionality

In response to an objection of unconstitutionality raised against the law on the status of judges and prosecutors, the Constitutional Court considered that the provisions concerning disciplinary sanctions that may be imposed on the latter are constitutional only insofar as the disciplinary sanction of exclusion from the judiciary is not permanent. In this regard, the high court considered, first of all, that the perpetuity of this sanction meets a legitimate objective, namely the preservation of the lasting reputation of the profession and the image of justice. However, it found that the perpetuity of the consequences of the disciplinary sanction was not proportionate to the objective pursued by the legislator, as this objective could also be achieved by less restrictive means.

Curtea Constituțională, [decision of 8/6/2022 No 363 \(RO\)](#)



Belgium – Constitutional Court

Schengen Borders Code - External border control - Illegal passengers on board a ship

The Constitutional Court annulled a provision of the Belgian Shipping Code that requires all stowaways to remain on board the ship, only to disembark if they are removed from the territory. According to this supreme court, such a retention measure is relevant to achieving the objectives of the Schengen Borders Code. However, it has disproportionate effects for specific categories of stowaways, such as those seeking international protection, unaccompanied foreign minors and seriously ill passengers.

Furthermore, the Constitutional Court ruled that this deprivation of liberty is not accompanied by the required guarantees, such as the possibility for the stowaway kept on board to appeal on the legality of his or her detention or a maximum duration of detention.

Cour constitutionnelle, [judgment of 9/6/2022, No 75/2022 \(FR\)/\(NL\)](#)
[Press release \(FR\)/\(NL\)](#)



Slovenia – Constitutional Court

Fundamental rights - Concept of marriage - Prohibition of discrimination on grounds of sexual orientation

In an unprecedented move, the Constitutional Court ruled that the articles of the Family Code concerning marriage were unconstitutional, as they only provided for the possibility of people of different sexes to cohabit. The high court noted that the Constitution provides for the right to marriage between two persons, without explicitly mentioning the sex of the latter, while pointing out that persons of the same sex can only register their partnership with the authorities, while persons of different sexes can marry. Since this differentiation is based on sexual orientation, it infringes the right to non-discriminatory treatment under the Constitution. The high court therefore rejected the arguments put forward regarding the traditional and majority approach to the concept of family, considering that these could not justify discrimination on the basis of sexual orientation. Furthermore, the lack of possibility for same-sex couples to marry was not an adequate measure to achieve the aim of protecting the family.

Ustavno sodišče Republike Slovenije, [decision of 23/6/2022, joined Cases U-I-486/20-20, Up-572/18-42, U-I-91/21-26 and Up-675/19-39 \(SI\)](#)



Greece – Council of State

Asylum policy - Directive 2013/32/EU - Implied withdrawal of an application for international protection - Conditions for enforcement of a return decision

In a pilot judgment of 27 June, the Council of State stated that, in the event of an implied withdrawal of an application for international protection due to the failure of the foreign national-applicant to comply with his or her obligations, as provided for in Article 28 of Directive 2013/32/EU, the execution of a decision requiring him or her to return to his or her country is only authorised if, within 9 months of the suspension of the examination of his or her initial application, the applicant does not exercise his or her right to a review or does not make an application based on new evidence. According to the interpretation of the national law, which would be in line with the provisions of Directives 2013/32/EU and 2008/115/EC as well as the principle of non-refoulement, the enforcement of the return order is only allowed at the end of the new proceedings initiated.

Symvoulío tis Epikrateias, Ass., [judgment of 27/6/2022, No 1398/2022, Summary of judgments \(EL\)](#)



Austria – Constitutional Court

Fundamental rights - Respect for private and family life - Right to parenthood of a child of a mother's registered partner

The case concerned a national regulation providing, in essence, that any form of procreation entails the parenthood of the father or registered partner for an opposite-sex couple. In contrast, the parenthood of a partner or wife is only provided for after medically assisted procreation.

The Constitutional Court, having initiated ex officio proceedings on the compatibility of said regulation with the Constitution, annulled it as of 31 December 2023, holding that the differentiation between an opposite-sex couple and a same-sex couple constitutes sex discrimination without any identifiable justification.

*Verfassungsgerichtshof, [judgment of 30/6/2022, G 230/2021 \(DE\)](#)
[Press release \(DE\)](#)*



Spain – Supreme Court

Failure of a Member State to fulfil its obligations - Freedom of movement of capital - Obligation to provide information

The Supreme Court recognises the nullity of fines imposed by the tax authorities on individuals for infringing the obligation to fill in a declaration on form 720. This form concerns shares, assets, securities, rights, insurance and income deposited, managed or obtained abroad. In this case, the property and rights were located in Switzerland.

In this regard, the High Court recalled that the system of sanctions established violated the obligations incumbent on the Kingdom of Spain and infringed on the free movement of capital, considering that such sanctions were 'disproportionate' compared with the sanctions provided for in a purely national framework.

Cour suprême, [judgment of 4/7/2022 No 2854/2022 \(ES\)](#)



Lithuania – Supreme Court

Public procurement - Evaluation of tenders - Selection criteria

The Supreme Court of Lithuania ruled that the rejection of a tender in a procurement procedure was unlawful, since its evaluation was based on the value of the contract, which was not published and thus unknown to the tenderer.

In reaching this conclusion in a civil dispute, the supreme court applied by analogy the rules on public procurement and relied, inter alia, on the case-law of the Court of Justice on the selection criteria applicable in a public procurement procedure and on its clarification of the qualitative selection criteria.

Lietuvos Aukščiausiasis Teismas, [judgment of 8/7/2022, e3K-3-189-701/2022 \(LT\)](#)



Ireland – High Court

Environment - Applications to limit recoverable costs - Requirement that proceedings not involve prohibitive costs

The Aarhus Convention requires that environmental proceedings should not involve prohibitive costs. In this light, the High Court held, in the context of an environmental appeal, that a costs protection determination, which in essence seeks to limit the claimant's liability for recoverable costs in the event that the appeal is dismissed, need not be brought before the decision on the merits is taken. Such an application must be examined by the competent court, even when it is submitted after the decision on the merits has been taken.

The High Court, [judgment of 19/7/2022 \[2022\] IEHC 427 \(EN\)](#)



France – Council of State

Schengen Borders Code - Abolition of internal border controls - Temporary reintroduction of controls in the event of a serious threat to public order or internal security

In its decision of 27 July, the Council of State ruled, in order to justify the renewal of internal border controls by the French State, that a threat can be considered as new, within the meaning of the Schengen Borders Code, either when it is of a different nature from previously identified threats, or when new circumstances and events change the characteristics of the threat in such a way as to modify its topicality, scope or consistency. It specifies that such circumstances and events may relate, inter alia, to the purpose of the threat, its scale or intensity, its location and its origin.

Conseil d'État, [decision of 27/7/2022, No 463850 \(FR\)](#)



France – Constitutional Court

Protection of the environment - Fundamental interests of the Nation - Ability of future generations to meet their own needs

The Constitutional Council ruled, in unprecedented terms, that it follows from the preamble of the Charter of the Environment of the French Republic, which has constitutional value, that the preservation of the environment must be sought in the same way as the other fundamental interests of the Nation and that the choices intended to meet the needs of the present must not compromise the ability of future generations to meet their own needs. The high court, which had been asked to examine the law on emergency measures for the protection of purchasing power, thus supervised the implementation of provisions concerning the deployment of a floating methane terminal on the port site of Le Havre and certain installations for the production of electricity from fossil fuels. It concluded that, unless Article 1 of the Charter of the Environment is disregarded, these provisions can only be applied in the event of a serious threat to the security of gas supply.

*Conseil constitutionnel, [decision of 12/8/2022, No 2022-843](#)
[DC \(FR\)](#)
[Press release \(FR\)](#)*



Poland – Supreme Administrative Court

Independence of judges - Judicial reform - Principles of independence and impartiality of judges - Mechanism for verification of the status of judge

In force since 15 July 2022, the mechanism for verifying the independence and impartiality of judges allows any litigant before the administrative and ordinary courts as well as before the Supreme Court to submit a request for verification of the independence and impartiality of the judge handling his or her case. Where the competent court grants this request, the judge concerned shall be discharged from the case in question without, however, losing his or her status as a judge and without being discharged from other cases.

An application is admissible where it contains an express and reasoned request for a declaration of lack of independence or impartiality and where the lack of independence or impartiality affects the level of assurance of independence or impartiality to such an extent that it has an impact on the outcome of the case.

In this case, applying this new mechanism for the first time, the Supreme Administrative Court rejected an application concerning a judge of an administrative court of first instance, who had in the meantime become a judge of the Supreme Administrative Court, for lack of indication of the circumstances justifying the application.

Naczelny Sąd administracyjny, [order of 22/8/2022, II GSK 1396/22 \(PL\)](#)