



FLASH NEWS

3/20

NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW OF THE MONTHS OF APRIL AND JUNE 2020



Italy – Constitutional Court

Combating late payment in commercial transactions - Member States' obligation to ensure effective compliance by their public authorities with payment periods

The Constitutional Court established the compliance of a national regulation concerning the fight against late payment of the national health service. It held that the obligation of suppliers to include in the contracts of their directors, on the one hand, an objective aimed at meeting deadlines and, on the other hand, a part of the compensation not less than 30% of that provided for contractually, must contribute to meeting deadlines.

These measures aim to avoid late payments, as provided for in Article 4(3) and (4) of Directive 2011/7, as interpreted by the judgment of 28 January 2020, *Commission v Italy (Late Payments Directive)* ([C-122/18](#)).

Corte costituzionale, [judgment of 09/03/2020 no. 78 \(IT\)](#)
[Press release \(IT\)](#) [et \(EN\)](#)



Lithuania – Supreme Administrative Court of Lithuania

Protection of personal data - Processing of biometric data

The Supreme Administrative Court of Lithuania ruled that the processing of biometric data, by means of a system involving the use of employees' fingerprints to record their working hours and ensure labour discipline, introduced by several companies, had no legal basis and constituted a disproportionate and unjustified measure.

The high court emphasised that the employer is always required to choose the least restrictive measures and, if possible, to introduce those that do not involve the processing of biometric data. It also noted that Regulation 2016/679, which in this case was not applicable *ratione temporis*, prohibits the processing of such data.

Lietuvos vyriausiosios administracinės teismas, [judgment of 02/04/2020, A-3345-822/2020 \(LT\)](#)
[Press release \(LT\)](#)



Germany – Federal Constitutional Court

Asylum application - Religious persecution - Evidence

The Federal Constitutional Court, referring in particular to the judgments of 5 September 2012, *Y and Z* ([C-71/11 et C-99/11](#)), and of 4 October 2018, *Fathi* ([C-56/17](#)), ruled that, although the courts examining an asylum application based on a fear of religious persecution are not authorised to question the fact of the applicant's religious conversion, nor the beliefs of the religious community concerned, they must nevertheless ensure that the religious practice that may give rise to a risk of persecution constitutes an essential element of the religious beliefs of the person concerned. On the basis of these considerations, the High Court rejected a constitutional appeal against the rejection of an asylum application motivated by a religious conversion.

Bundesverfassungsgericht, [order of 03/04/2020, 2 BvR 1838/15 \(DE\)](#)
[Press release \(DE\)](#)



France – Constitutional Council

Right of access to documents - "Parcoursup" - Publication of the criteria for examining applications

A matter was brought before the Constitutional Council calling into question the impossibility of access, for candidates and third parties alike, to the algorithms likely to be used by higher education institutions to process applications for admission to courses on the "Parcoursup" digital platform. For the first time, the Constitutional Council established the existence of a constitutional right of access to administrative documents and ruled that each higher education institution must report on the criteria for examining applications. Thus, institutions are not exempt from publishing, at the end of the registration procedures, the criteria for the examination of applications, specifying the extent to which algorithmic treatments were used to carry out this examination.

Conseil constitutionnel, [decision of 03/04/2020, no. 2020-834 OPC \(FR\)](#)
[Press release \(FR\)](#)



Cyprus – Supreme Court

Civil service - Reduction of salaries and pensions during the 2009 financial crisis - Violation of right to property - Absence

The Plenary Assembly of the Supreme Court annulled several decisions of the Administrative Court, according to which the laws adopted during the financial crisis of 2009 concerning, on the one hand, the reduction of salaries and pensions of the staff of the civil service and the wider public sector and, on the other hand, the non-granting of an increase and the lack of indexation thereof, infringed the right to property enshrined in Article 23 of the Cypriot Constitution.

Taking into account the risks of economic collapse, the Supreme Court concluded that the reduction of salaries and pensions does not constitute a violation of the right to property, as long as it does not affect the substance of the right to salaries and pensions or the right to a dignified existence of the beneficiaries. In addition, increase and indexation are only covered by the constitutional right to property if certain conditions are met, which was not the case here.

Ανώτατο Δικαστήριο Κύπρου, [*judgment of 10/04/2020, Κυπριακή Δημοκρατία και Ανγονστή κ.α., no. 177/2018, 75/2019, 76/2019, 77/2019, 79/2019, 80/2019, 84/2019 and 85/2019*](#)(GR)



Austria – Administrative Court

Asylum policy - Reception of asylum seekers - Access to the labour market

An appeal was lodged with the Administrative Court against the rejection by the Labour and Employment Office of a work permit applied for by an Austrian company for an asylum seeker. This authorisation had been requested during the appeal procedure relating to the rejection of the applicant's asylum application.

The Administrative Court found that the asylum seeker must obtain real and effective access to the labour market, but only until the decision at the first instance of the competent authority in the asylum procedure. Therefore, since the application for the said work permit was lodged after the decision of the first-instance authority rejecting the asylum application, the conditions required to obtain the work permit were not met in this case.

Verwaltungsgerichtshof, [*judgment of 28/04/2020, Ro 2019/09/0011*](#) (DE)



Germany – Federal Constitutional Court

Jurisdiction - Exclusion in case of manifestation of public power of a foreign State - Restructuring of sovereign debt

The Federal Constitutional Court ruled that the restructuring of Greek sovereign bonds, carried out by the Greek legislator, as a manifestation of the public authority of a foreign State, does not fall within the competence of the German courts. Consequently, it upheld a judgment of the Federal Court of Justice dismissing the applicants' action against the Hellenic Republic for the full repayment of the initial nominal value of the Greek sovereign bonds held by them. In this respect, the Federal Constitutional Court referred, inter alia, to the ruling of 15 November 2018, Kuhn ([C-308/17](#)).

Bundesverfassungsgericht, [*order of 06/05/2020, 2 BvR 331/18*](#) (DE)
[Press release](#) (DE)



Spain – Supreme Court

Environment - Directive 2000/60 - Notion of “overriding public interest”

The Supreme Court dismissed an appeal against a judgment that partially annulled decisions approving the environmental impact statement and the preliminary project for a dam in Biscarrés (Huesca), on the river Gállego. The Supreme Court interpreted the notion of “overriding public interest”, used in Directive 2000/60, by specifying that the adjective “overriding” introduces an element of comparison that requires a specific assessment of the conflicting interests, explaining why the public interest in the creation of the reservoir outweighs the interests affected. The Supreme Court recalled, on the basis of the judgment of 4 May 2016, Commission v Austria ([C-346/14](#)), that a detailed scientific analysis of the project must be carried out in order to derogate from the ban on altering or worsening the status of a body of surface water. Finally, it ruled that the “overriding public interest” had to be explained and justified in the preliminary project for the reservoir and that the administration could not be exempted from this obligation by invoking the fact that the file was voluminous.

Tribunal Supremo, Sala de lo Contencioso-Administrativo, [*judgment of 18/05/2020, no. STS 884/2020*](#) (ES).
[Press release](#) (ES)



Spain – Supreme Court

Taxation - Right to deduct VAT - Limitation of this right by reason of the actual use of the vehicle for business purposes

Recalling the case law of the Court concerning limitations on the deduction of VAT (judgment of 11 July 1991, Lennartz, [C-97/90](#) and the judgment of 15 September 2016, Landkreis Potsdam-Mittelmark, [C-400/15](#)), the Supreme Court ruled that, where a private car is used for business purposes, the national rule allowing taxpayers to apply the percentage of VAT deduction corresponding to the actual use of such a good for business activities, without limits, does not infringe the principle of fiscal neutrality. The national rules do not establish a priori any percentage of deduction, but only condition the quantum of the deduction on the degree to which the vehicle is actually used for the professional activity concerned, thus creating a *iuris tantum* presumption of a 50% deduction that does not violate the principle of tax neutrality.

Tribunal Supremo, [judgment of 19/05/2020, no. STS 1149/2020 \(ES\)](#)



Germany – Higher Regional Court of Frankfurt am Main

Ne bis in idem principle - Extradition of a citizen of the Union to a third State

The Higher Regional Court of Frankfurt am Main ruled that the principle of *ne bis in idem* precludes a Member State from extraditing a citizen of the Union to a third country to stand trial where the citizen concerned has already been convicted or acquitted in another Member State on the same charges.

Thus, the German court declared inadmissible the extradition to the United States of an Italian national, for acts of counterfeiting and fraud relating to works of art committed by an organised gang, who had already been convicted in Italy for the same acts.

Oberlandesgericht Frankfurt am Main, [order of 19/05/2020, 2 AusLA 3/20 \(DE\)](#)
[Press release \(DE\)](#)



Estonia – Supreme Court

Environment - Directive 92/43 - Conservation of natural habitats - Requirement for appropriate assessment

The Administrative Division of the Supreme Court partially annulled the regional development plan for the Baltic Rail route. It considered that the impact of this project on the bird protection area in the vicinity of this infrastructure had not been properly assessed. The Administrative Division stressed, with reference to the Court's settled case law, that an assessment within the framework of the Natura 2000 network must be carried out whenever it cannot be excluded, on the basis of a preliminary assessment, that the activity or infrastructure envisaged will have a significant effect on the site's conservation objectives.

Riigikohtu halduskolleegium, [judgment of 19/05/2020, no. 3-18-529 \(ET\)](#)
[Press release \(ET\)](#)



France – Constitutional Council

Protection of copyright and related rights - Protection of privacy - Fighting counterfeiting practices on the internet

The Constitutional Council ruled that, by authorising the communication to agents of HADOPI (the High Authority for the Dissemination of Works and the Protection of Rights on the Internet) of the identity, postal address, e-mail address and telephone details of the subscriber whose access to online public communication services has been used illegally, the legislator intended to strengthen the fight against counterfeiting practices on the Internet, which meets the objective of safeguarding intellectual property. However, the Constitutional Council censured the provisions organising HADOPI's access to all documents, including Internet users' connection data. In fact, given their nature and the processing to which they may be subjected, such data provide a great deal of precise information on the persons concerned, which is particularly prejudicial to their privacy.

Conseil constitutionnel, [decision of 20/05/2020, no. 2020-841 OPC \(FR\)](#)
[Press release \(FR\)](#)



Germany – Federal Court of Justice

Civil liability law - Diesel vehicles fitted with an unlawful disabling device - Conduct contrary to public morals

In an action against Volkswagen, the Federal Court of Justice ruled that the purchaser of a diesel vehicle fitted with an unlawful disabling device that distorts the results of tests on pollutant gas emissions may seek termination of the contract of sale on the basis of tort law, with the refunded purchase price being reduced according to the purchaser's use of the vehicle. In view of Volkswagen's fraudulent behaviour towards the competent administrative authorities, the significant environmental impact and the traffic restrictions to which a vehicle fitted with an illegal device may be subject, the sale of such a vehicle to a bona fide purchaser must be regarded as particularly reprehensible and incompatible with the fundamental values of the German legal and moral order.

Bundesgerichtshof, judgment of 25/05/2020, VI ZR 252/19 (DE)
[Press release \(DE\)](#)

Poland – Supreme Court

Independence of judges - Judicial reform in Poland - Applications for disqualification of judges

The Extraordinary Control and Public Affairs Division of the Supreme Court issued several decisions dismissing on the merits or dismissing applications for disqualification of judges appointed in proceedings challenging their independence.

On the one hand, the Supreme Court condemned the fact that the applications for disqualification were based solely on the joint resolution of its Civil, Criminal, and Labour and Social Security Divisions of [23 January 2020](#), which was found to be unconstitutional by the Constitutional Court, without making an assessment of the personal characteristics of the judge with regard to his or her impartiality. On the other hand, the High Court based its assessment, inter alia, on the criteria established by the judgment of 19 November 2020, A.K. ([C-585/18, C-624/18 and C-625/18](#)).

Sąd Najwyższy, order of 08/05/2020, I NWW 7/20 (PL), order of 13/05/2020, I NWW 22/20 (PL), order of 02/06/2020, I NWW 28/20 (PL)
[Press release \(PL\)](#)



Poland – Constitutional Court

Independence of judges - Judicial reform in Poland - Applications for disqualification of judges - Constitutionality

The Constitutional Court ruled that applications for disqualification of judges on the grounds of their appointment at the initiative of the National Judicial Council, a body deemed not to be impartial and not independent of the legislative and executive authorities by the Supreme Court, are not in accordance with the Polish Constitution.

The Constitutional Court considered, as it had already ruled in its judgment of [4 March 2020](#), that the provisions of the Polish Code of Civil Procedure, insofar as they allow the examination of an application for the disqualification of a judge due to the existence of defects in his or her appointment by the President of the Republic on the initiative of the National Council of the Judiciary, do not comply with the constitutional norms relating to the appointment of judges.

Trybunał Konstytucyjny, judgment of 02/06/2020, P 13/19 (PL)
[Press release \(PL\)](#)



Poland – Supreme Court

Independence of judges - Judicial reform in Poland - Procedure for the appointment of judges

The Extraordinary Control and Public Affairs Division of the Supreme Court dismissed the appeal against the resolution of the National Judicial Council. This resolution had given a favourable opinion on the appointment of a judge to the Labour and Social Security Division of the Supreme Court.

The Supreme Court ruled that the President of the Republic was entitled to appoint the judge concerned and that the latter's legal position was therefore subject to the Constitution and the principle of irremovability. The high court argued that, in light of Article 47 of the Charter of Fundamental Rights of the European Union and the judgment of 19 November 2020, A.K. ([C-585/18, C-624/18 and C-625/18](#)), the admissibility of the assessment of the independence of the National Judicial Council requires, inter alia, that the applicant demonstrate, in the case in point, the existence of a direct or indirect influence on the way in which this Council adopts its decisions. The Supreme Court recalled, in this respect, that the constitutionality of the provisions concerning the composition of the National Judicial Council was confirmed by the Constitutional Court's decision of [25 March 2019](#).

Sąd Najwyższy, judgment of 25/06/2020, I NO 37/20 (PL)
[Press release \(PL\)](#)

OTHER DECISIONS

International organisations – Inter-American Court of Human Rights

Right to a healthy environment - Right of property - Lhaka Honhat indigenous groups (Argentine Republic) - Violation of these rights

The Inter-American Court of Human Rights ruled that the Argentine Republic violated the rights of the Lhaka Honhat indigenous groups to a healthy environment, property, cultural identity, food and water in Article 26 of the American Convention on Human Rights.

In this regard, after emphasising that the Argentine Republic has failed to establish mechanisms to guarantee the full enjoyment of the right to property of the indigenous groups concerned or to provide them with a real and effective title guaranteeing access to all their property, this international court ordered the Argentine Republic to adopt reparation measures, such as activities concerning adequate access to water and food. It also ordered the Argentine Republic to produce a prior study concerning, inter alia, the lack of access to drinking water and food, which will serve as a basis for the adoption of these measures.

Inter-American Court of Human Rights, [decision of 06/02/2020, Comunidades Indígenas Miembros de la Asociación Lhaka Honhat \(Nuestra Tierra\) v Argentina](#)