



## FLASH NEWS

2/21

# MONITORING OF PRELIMINARY RULINGS

## OVERVIEW OF THE MONTHS OF MARCH TO JUNE 2021



### Italy – Court of Cassation

[Berlusconi and Fininvest, [C-219/17](#)]

**Economic policy – Acquisition of a qualifying holding in a credit institution – Decision of the European Central Bank – Jurisdiction of the national court to review the legality of the national proposal**

The Court of Cassation rejected the appeal lodged by Finanziaria d'investimento Fininvest S.p.A. and by Mr Silvio Berlusconi requesting the annulment of a decision of the Council of State due to an 'arbitrary refusal to exercise jurisdiction'. In this decision, the Council of State, adopting the interpretation given by the Court of Justice, dismissed the action brought by the same parties in proceedings concerning the Bank of Italy's compliance with the obligation to comply with a judicial decision in a case having the force of *res judicata*. The Court of Cassation, asked to rule on this decision of the Council of State, recalled that, according to the judgment of the Court of Justice, acts adopted by the Bank of Italy are considered to be stages in a procedure in which the European Central Bank exercises the final decision-making power with regard to bank acquisitions. In this context, the decisions of this body must be subject to review of legality by the Court of Justice of the European Union.

*Corte di cassazione, [decision of 9/3/2021, No 10355/2021 \(IT\)](#)*



### Slovenia – Supreme Court

[Radiotelevizija Slovenija, [C-344/19](#)]

**Social policy - Protection of the safety and health of workers - Concept of 'working time' - Period of on-call duty**

On appeal, the Supreme Court emphasised, on the basis of *Radiotelevizija Slovenija* (C-344/19), that only the constraints imposed on the worker, whether by the rules of the Member State concerned, by a collective agreement or by his or her employer, may be taken into account in assessing whether a period of on-call time constitutes 'working time' within the meaning of Directive 2003/88.

In the present case, it is a relevant circumstance that the applicant was subject, during the periods of on-call duty, to constraints that affected the time during which his professional services could not be sought, since that time was devoted to his own interests. However, the high court annulled part of the contested judgment and that of the first instance. In doing so, it held that it is essential also to take into account other relevant circumstances, such as the frequency and duration of interventions, the need to return immediately to work (or the possibility of postponing an intervention) and the ability to devote time to private interests.

*Vrhovno sodišče Republike Slovenije, [order of 30/3/2021, VSRS Sklep VII Ips 147/2018 \(SI\)](#)*



### France – Court of Cassation

[CRPNPAC and Vueling Airlines, [C-370/17](#) and [C-37/18](#)]

**Social Policy - Migrant Workers - E101 certificate**

The Court of Cassation partially upheld the appeal lodged by the Spanish company Vueling Airlines, which had been convicted of undeclared work and failure to pay social security contributions in France, despite the secondment form – known as the E101 certificate – that covered the worker concerned. Adopting the interpretation given by the Court of Justice in *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18), the Court of Cassation considered that, while it was considering the question of the validity of an E101 certificate produced by Vueling Airlines and this company was arguing that the competent Spanish authority had confirmed the validity of the disputed E101 certificates, so that the criminal conviction based on a finding of fraud made in disregard of Union law could not be imposed on the civil court before which the case was brought, the Court of Appeal was not entitled to pronounce this double conviction. Consequently, the Court of Cassation partially annulled the contested judgment.

*Cour de cassation, [judgment of 31/3/2021, No 16-16.713 \(FR\)](#)*



## Spain – Supreme Court

[Orange España, [C-764/18](#)]

### **Telecommunications sector - Authorisation of electronic communications networks and services - Municipal tax for the occupation or exploitation of the public domain**

The Supreme Court upheld the appeal in cassation lodged by Pamplona City Council against a judgment concerning the interpretation of Article 13 of Directive 2002/20. According to the latter, this provision would not allow the imposition of a tax for the installation of equipment in the public domain on operators who, without owning the network, use it to provide fixed telephony and Internet services. Recalling the interpretation given by the Court of Justice in Orange España (C-764/18), the Supreme Court held, first, that that directive applies to undertakings providing fixed telephony and Internet services and, second, that Articles 12 and 13 of that directive do not preclude municipal legislation, such as that at issue, which imposes a charge for private use or special use of the public domain by undertakings operating fixed telephony and Internet services. Consequently, the Supreme Court annulled the contested judgment.

*Tribunal Supremo, [judgment of 26/4/2021, No 555/2021 \(ES\)](#)*



## Italy – Constitutional Court

[Commissione Nazionale per le Società e la Borsa (Consob), [C-481/19](#)]

### **Approximation of laws - Insider dealing and market manipulation (market abuse) - Failure to cooperate with the competent authorities - Right to remain silent and not to contribute to self-incrimination**

The Constitutional Court declared Article 187 quinquiesdecies of Legislative Decree No 28 of 24 February 1998, establishing provisions on financial intermediation, unconstitutional. This provision allows for the conviction of any person who does not comply with the requests of the Commissione nazionale per le società e la Borsa (National Commission for Companies and the Stock Exchange, hereinafter ‘Consob’) or does not cooperate with it in the exercise of its supervisory functions. In this case, a person, sanctioned by Consob for, among other things, refusing to answer during an administrative procedure, objected to a sanction by invoking the violation of his right to remain silent and not to contribute to his own incrimination. The Constitutional Court recalled Consob (C-481/19), in which the Court of Justice found that Member States may not penalise a natural person who refuses to provide the competent authority with answers likely to reveal his responsibility for an offence punishable by administrative penalties of a criminal nature or his criminal liability.

*Corte costituzionale, [decision of 30/4/2021, No 84/2021 \(IT\)](#)*



## Poland – Supreme Administrative Court

[A.B. and Others (Nomination des juges à la Cour suprême – Recours), [C-824/18](#)]

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

The Supreme Administrative Court was asked to rule on disputes between certain candidates for the post of Supreme Court judge and the National Council of the Judiciary, concerning resolutions by which the latter decided not to propose to the President of the Republic the appointment of the persons concerned but that of other candidates.

The high court noted that the judgment of 2 March 2021, A.B. and Others (Nomination des juges à la Cour suprême – Recours) (C-824/18) is binding on all Polish courts and does not constitute a risk for the sovereignty of the Polish State, either for the legislation it has created or for its national interest, present or future.

In considering itself competent in this case, the Supreme Administrative Court ruled that the National Council of the Judiciary does not offer sufficient guarantees of independence from the legislature and the executive in the process of appointing judges. Since the power of the President of the Republic to declare vacancies in the Supreme Court is not a prerogative derived from the power to appoint judges and requires the countersignature of the President of the Council of Ministers, the judgments in the present case do not concern the validity and systemic effectiveness of the presidential acts appointing Supreme Court judges adopted on the basis of the recommendations submitted by the National Council of the Judiciary in the resolutions under appeal.

*Naczelny Sąd Administracyjny, [judgments of 6/5/2021, II GOK 2/18, II GOK 3/18, II GOK 4/18, II GOK 5/18, II GOK 6/18, II GOK 7/18 \(PL\)](#)*



## Sweden – Supreme Administrative Court

[Sölgård Fastigheter AB, [C-787/18](#)]

### **Value added tax – Sale of rented property - Adjustment of deductions**

The Supreme Administrative Court rejected the Swedish tax administration's appeal to force the taxable person to regularise previous deductions. Agreeing with the Court of Justice's interpretation of Article 188(2) of Directive 2006/112, the high court found that the Swedish legislation in question was not in compliance with EU law and could not therefore be the basis for an obligation to regularise the tax deducted. Secondly, the Supreme Administrative Court examined whether such an obligation to regularise could arise from the assumption of a transfer of goods within the meaning of Article 19 of the directive. However, it found that neither Union law nor the evidence presented supported such a conclusion.

*Högsta förvaltningsdomstolen, [judgment of 24/6/2021, Case No 4302-17 \(SV\)](#)*



## Sweden – Supreme Administrative Court

[Skatteverket, [C-812/19](#)]

### **Value added tax - VAT grouping - Main establishment and its branch**

The Supreme Administrative Court upheld the disputed act of the Skatterättsnämnden (Tax Law Commission) by holding that the principal place of business in question, which was located in Denmark and was part of a VAT group, and the branch of that company, which was located in Sweden, were to be regarded as separate taxable persons in cases where the principal place of business provided services to the branch and charged the costs to the branch. According to national case law, a foreign VAT group is a 'foreign taxable person' under the Swedish VAT Act. Thus, under the terms of the said law, the branch, as the customer of the said services, is to be considered as a taxable person provided that all the additional conditions provided for therein are met.

*Högsta förvaltningsdomstolen, [judgment of 24/6/2021, Case No 6695-18 \(SV\)](#)*

The Research and Documentation Directorate's intranet site lists all the analyses of follow-up decisions received and processed by the Directorate since 1 January 2000, classified by year according to the date on which the case was brought before the Court. All the analyses drawn up in the context of the follow-up to preliminary rulings are also available, in particular via the internal portal, under each preliminary ruling, under the heading 'Litigation at national level', and on Eureka, under the source 'Analyses', under the heading 'National decision'.