



## FLASH NEWS

2/24

# NATIONAL DECISIONS OF INTEREST TO THE EU

## OVERVIEW OF THE MONTHS OF JANUARY TO JUNE 2024



### Sweden – Supreme Administrative Court

#### ***Freedom of establishment - Taxation - Right to deduct interest***

The Supreme Administrative Court ruled that national tax legislation providing for certain restrictions on the right to deduct interest paid to another company belonging to the same group was not compatible with the freedom of establishment provided for in Articles 49 and 54 TFEU. It considered that the restriction provided for therein implied a difference in treatment between national and cross-border situations and that there were no overriding reasons in the general interest capable of justifying such a restriction

*Högsta förvaltningsdomstolen, judgment of 22/1/2024, No HFD 2024 Ref 6 (SV)*  
[Press release \(SV\)](#)



### Cyprus – Supreme Constitutional Court

#### ***Civil service - Seniority of civil servants - Indirect discrimination***

The Supreme Constitutional Court found that the provisions of the law on the civil service governing the seniority of civil servants created indirect discrimination insofar as they did not envisage taking into account previous years of employment in a comparable civil service post in another Member State.

On the basis of the case-law of the Court of Justice, the high court emphasised the need for effective judicial protection of the freedom of movement of workers within the Union, without discrimination.

*Ανώτατο Συνταγματικό Δικαστήριο Κύπρου, judgment of 6/3/2024, Κυπριακή Δημοκρατία v. Δημήτρη Μιχαήλ κ.α., administrative appeal No 38/17 (GR)*



### Sweden – Supreme Court

#### ***Free movement of citizens of the Union - Expulsion of an EU citizen on grounds of public policy - Threat to a fundamental interest of society***

As part of criminal proceedings, the Supreme Court decided to expel a Polish citizen and ban him from re-entering Swedish territory for a period of 8 years. The citizen in question had been sentenced to a prison term for committing a serious violation against the integrity of a woman. According to the Supreme Court, the crime in question is of such a nature that it implies a threat to a fundamental interest of society, within the meaning of Article 27 of Directive 2004/38/EC, thereby justifying an expulsion order on grounds of public order. The Supreme Court ruled that the expulsion decision complied with the principle of proportionality, despite the fact that the citizen in question has two minor children in Sweden.

*Högsta domstolen, judgment of 6/3/2024, No B 6145-23 (SV)*  
[Press release \(SV\)](#)





### **Germany – Federal Finance Court**

#### ***Protection of personal data - Taxpayer's right of access***

The Federal Finance Court ruled for the first time on the conditions and scope of the right of access to a taxpayer's personal data under Article 15(1) of the General Data Protection Regulation (GDPR).

In principle, in accordance with the Court's recent case-law, the taxpayer's right of access is limited to knowing what personal data concerning him or her is processed by the tax authorities. Only in exceptional cases, where this is essential for the effective exercise of the rights conferred by the GDPR, is the taxpayer entitled to obtain a copy of extracts from documents, or even entire documents, in accordance with Article 15(3) GDPR.

In addition, the finance court pointed out that the tax authority can reject a request for access where it is manifestly unfounded or excessive, in accordance with Article 12(5) GDPR, which it must, however, demonstrate.

In this case, the high court annulled the judgment of the finance court regarding a taxpayer's request for (electronic) copies of administrative files, on the grounds that the court had not made the necessary findings with regard to Article 15(3) and Article 12(5) GDPR, and referred the case back to this court.

*Bundesfinanzhof, [judgment of 12/3/2024, IX R 35/21 \(DE\)](#)  
[Press release \(DE\)](#)*



### **Greece – Council of State**

#### ***Protection of personal data - Electronic communications - Directive 2002/58/EC - Inviolability of communications***

The Council of State partially annulled an act of the 'Authority for the Safeguarding of the Secrecy of Communications', the latter having rejected the request of a Member of the European Parliament to be informed of the complete file relating to the lifting of the secrecy of his communications. The legislative provision, which formed the legal basis for the Authority's contested measure, provided for a prohibition on notifying the person concerned of the lifting of secrecy in cases where such a measure was required for reasons of national security.

The high court found that the absolute prohibition on informing the person concerned constituted a disproportionate restriction of the right to inviolability of communications and was therefore not justified in the context of the functioning of a state governed by the rule of law. It therefore ruled that the legislative provision in question was contrary to the Constitution, Directive 2002/58/EC, the Charter and the ECHR.

*Supreme Council of the Judiciary, [judgment of 25/1/2024, No. 165/2024](#)*



### **Germany – Federal Social Court**

#### ***Social security - Statutory pension insurance - Child-rearing periods***

The Federal Social Court ruled that Article 56(2) of Book 6 of the German Social Code (SGB VI), according to which periods spent bringing up children were, in cases of doubt, credited to the mother in the context of statutory pension insurance, did not discriminate against men in a manner contrary to the Basic Law. According to sentences 8 and 9 of Article 56(2) of SGB VI, time devoted to bringing up children is attributed to the mother in the absence of a concordant declaration by the parents on the subject and in the absence of predominant upbringing by one of the parents.

The high court found that, although the latter provision entailed direct discrimination against the father, it was justified by the principle of equality between men and women laid down in the Basic Law. It compensates for the de facto disadvantages associated with bringing up children in terms of acquiring pension rights, disadvantages that affect women much more often than men.

In addition, the attribution rules in Article 6(2) of SGB VI leave considerable scope for recognising periods of child-rearing for a male parent.

*Bundessozialgericht, [judgment of 18/4/2024, B 5 R 10/23 R \(DE\)](#)  
[Press release \(DE\)](#)*



## Germany – Federal Court of Justice

### **Competition - Cartels - Undertakings of primary importance for competition - Amazon**

The Kartellsenat of the Federal Court of Justice (panel responsible for cartel matters) upheld the decision of the Bundeskartellamt (Federal Cartel Office) of 5 July 2022 recognising that Amazon.com, Inc, including its associated companies, has significant activities in multilateral markets and is of primary importance for competition in all markets.

This is the first decision relating to an appeal concerning a finding of primary importance for competition pursuant to Article 19a of the German law against restraints of competition (GWB), which allows the company concerned to be prohibited from certain conduct. Such a finding, limited to 5 years, does not presuppose a concrete threat or harm to competition, but the mere existence of certain strategic and competitive opportunities presenting an abstract potential for risk.

In addition, the German high court found that the national decision at issue could co-exist with the Commission's decision designating Amazon as a gatekeeper under Article 3 of Regulation No 2022/1925 (Digital Markets Act), that it was not contrary to Directive 2001/31/EC and did not need to be notified to the Commission in accordance with Directive (EU) 2015/1535.

*Bundesgerichtshof, order of 23/4/2024, KVB 56/22 (not yet published),*

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



## Czech Republic – Constitutional Court

### **Fundamental rights - Right to personal integrity - Official gender reassignment surgery**

The Constitutional Court annulled national regulations requiring surgery, including sterilisation and genital transformation, to recognise officially a transgender person's change of sex. The high court, meeting in plenary session, considered that such regulations ran counter to the fundamental right of transgender people to the protection of their physical integrity and human dignity.

Although it accepted that the State could have a legitimate interest in defining the conditions for a sex change, it indicated that it was manifestly disproportionate to require, without exception, an invasive and irreversible operation that threatens the health of the persons concerned.

*Ústavní soud, judgment of 24/4/2024, PL. ÚS 52/23 (CS)*  
[Press release \(CS\)](#), [Summary \(EN\)](#)



## Denmark – High Court of Eastern Denmark

### **Free movement of capital - Controls on cash entering or leaving the European Union - Reporting obligation**

T was charged with taking cash totalling DKK 1 577 837 (EUR 211 540) from Copenhagen airport to the United Arab Emirates, without first declaring the amount on a customs and tax form.

The municipal court imposed a fine on him. The High Court of Eastern Denmark upheld this judgment, recognising gross negligence given that T had already attempted on two previous occasions to take the same amount of cash out of the country to a non-EU country without declaring it to the customs and tax authorities in accordance with Regulation (EU) 2018/1672 on controls on cash entering or leaving the Union, constituting a breach of Article 3(1) and (2) of the regulation. The high court imposed a fine on him of DKK 375 000 (EUR 50 275).

*Østre Landsret, judgment of 8/5/2024, Sag S-1256-23 (DA)*



## Finland – Supreme Administrative Court

### **Personal data - Regulation 2016/679 - Lawfulness of processing - Balancing of interests**

A company engaged in debt collection had asked the tax authorities for public information relating to income tax for 2017, on the basis of personal identification numbers, of persons concerned by the collection carried out by this company.

The Supreme Administrative Court held that, in the context of Article 6(1), first subparagraph, points (a) to (f), of Regulation 2016/679, the processing of personal data would be carried out by the company within the limits of what is strictly necessary to achieve the company's legitimate interest. It then examined whether a balancing of the competing interests, in the light of all the relevant circumstances, showed that the interests or the fundamental rights and freedoms of those persons prevailed over the legitimate interest of the controller or of a third party (judgment of 4 July 2023, Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social), C-252/21). In the end, a majority of the Supreme Administrative Court's members rejected the company's application.

*Korkein hallinto-oikeus, judgment of 14/5/2024,*  
[ECLI:FI:KHO:2024:73 \(SV\)](#)

 **France – Court of Cassation**

**European arrest warrant - Request for extension of the effects of surrender - Verification of double criminality by the executing authority**

In its judgment, the Court of Cassation held, firstly, that the consent of the executing judicial authority to the extension of the effects of a European arrest warrant, by virtue of which it had previously ordered the surrender of the requested person, had to be deemed to have been given when the offence for which the extension was requested itself gave rise to the obligation to surrender. Secondly, it held that in the absence of a plea based on the optional ground for refusal to surrender, the judges were not required to verify dual criminality. They did not therefore have to determine of their own motion whether the facts on which the request for extension was based constituted an offence under French law.

*Cour de cassation, [judgment of 29/5/2024, 24-82.747 \(FR\)](#)*

 **Italy – Court of Cassation**

**Consumer protection - Lawyers - Court with jurisdiction**

The Court of Cassation ruled on the identification of the competent court in the case of services provided by lawyers. It ruled in favour of a German citizen who claimed that the Italian court did not have jurisdiction in favour of the German court, specifying that, in the relationship between a lawyer and his client, the latter should be recognised as a consumer. Consequently, the high court ruled that Article 17 of Regulation (EU) No 1215/2012 (Brussels I bis Regulation), which establishes jurisdiction at the place of the consumer's domicile, should be applied. However, the Court of Cassation, reiterating the case-law of the Court, specified that it was necessary to demonstrate, in the light of the evidence in the file, that the trader had demonstrated his intention to establish relations with consumers in one or more Member States, including the territory in which the consumer was domiciled.

*Corte Suprema di Cassazione, judgment of 3/6/2024, No 15364 (IT) (not yet published)*

 **Germany – Federal Administrative Court**

**Free movement of persons - Coexistence with another right of residence under secondary EU law**

The Federal Administrative Court ruled on the secondary right to freedom of movement of a third-country national who is the parent of a child who is a citizen of the Union, based on Article 21(1) TFEU.

The high court confirmed that, in this case, the Turkish national concerned, who contested the loss of his right to free movement, still had a right of residence pursuant to Article 21(1) TFEU, by assuming custody of and responsibility for his minor son of Bulgarian nationality. That right had not disappeared because he had also acquired a right of residence under secondary Union law, namely as a Turkish worker under Article 6(1) of Decision No 1/80 of the EEC-Turkey Association Council.

*Bundesverwaltungsgericht, judgment of 3/6/2024, 1 C 5.23 (not yet published), [Press release \(DE\)](#)*

 **Finland – Supreme Administrative Court**

**Working Time Directive - Direct vertical effect - Statutory home service for disabled people**

The competent authority (an intermunicipal association governed by public law) had, on the basis of a legal obligation, recognised the employment relationship between a severely disabled person and their personal assistant. The authority was thus obliged to compensate the severely disabled person, as employer, for the costs incurred in paying for an assistant. However, certain elements of the employment relationship were excluded from reimbursement by national law, contrary to the provisions of the Working Time Directive 2003/88/EC.

The Supreme Administrative Court, in an enlarged composition, found that the fact that the severely disabled person themselves paid the personal assistant the additional salary that every employer must pay, did not mean, in the light of the directive, that this was a legal relationship between two subjects of private law.

It found that national law could not be interpreted in accordance with the directive. However, it ruled that, as an employer, a severely disabled person could invoke the provisions of the Working Time Directive relating to derogations applicable to employees within the family against a body governed by public law, as these provisions were sufficiently clear, precise and unconditional.

*Korkein hallinto-oikeus, [judgment of 7/6/2024, ECLI:FI:KHO:2024:83 \(SV\)](#)*



## Belgium – Court of Cassation

### ***Protection of animal welfare - Access to justice***

The Court of Cassation ruled on the admissibility of a civil action brought by a legal entity working for the protection of animals in criminal proceedings relating to animal welfare offences. Under Belgian law, an action is admissible if the legal person aims to protect human rights or fundamental freedoms recognised in the Constitution and in international instruments binding on Belgium.

Referring to EU law and the case-law of the Court, the high court noted that the protection of animal welfare constitutes an objective of general interest of the Union recognised in international instruments binding on Belgium.

However, in its view, these instruments do not require Belgium to ensure access to justice for associations seeking to protect this well-being.

*Hof van Cassatie, [judgment of 11/6/2024, P.23.1538.N \(NL\)](#)*



## Poland – Supreme Court

### ***Consumer protection - Unfair terms - Mortgage loan indexed to a foreign currency - Right of retention***

The Supreme Court was asked to rule on whether a party to a contract can invoke the right of retention if the payments made by both parties to the contract, which must be returned, are of a pecuniary nature. This question was asked in the context of a dispute concerning the cancellation of a mortgage loan contract indexed to a foreign currency due to unfair clauses contained in the contract. Since the cancellation of the contract obliged the parties to return the payments, the question arose as to whether the bank that had granted the loan could invoke a right of retention enabling it to make the return of the payments it had received from the consumer conditional on the consumer's making an offer to return the payments that he himself had received from the bank.

The high court ruled that the right of retention cannot be invoked by a party who can set off its own claim against that of the other party.

*Sąd Najwyższy, [resolution of 19/6/2024, III CZP 31/23 \(PL\)](#)*