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FLASH NEWS

4/24

NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW OF THE MONTHS OF OCTOBER AND NOVEMBER 2024

Germany – Federal Constitutional Court

Protection of personal data - Data collection and storage - Federal Criminal Police Office

The Federal Constitutional Court ruled that the provisions of the law granting certain powers to the Bundeskriminalamt (Federal Criminal Police Office) with regard to the collection and storage of data were partly unconstitutional and should be the subject of new regulations.
According to these provisions, the Federal Criminal Police Office had special powers to combat threats of international terrorism, such as the power to collect personal data using particularly intrusive techniques, namely the secret surveillance of persons close to individuals suspected of intending to commit a terrorist offence and, in this context, to process such data in its information system and in the police information network.
The German high court held that these provisions partly infringed the fundamental right to informational self-determination, which is part of the general right to personality under Article 2(1), read in conjunction with Article 1(1), of the Basic Law. The surveillance of non-responsible contact persons does not meet the requirements of proportionality with regard to the threshold for intervention. While the processing of data collected in the Federal Criminal Police Office's information system meets constitutional requirements in terms of data deletion rules, this is not the case for the storage of such data in the police information network, in the absence of sufficient rules on the threshold and duration of storage.

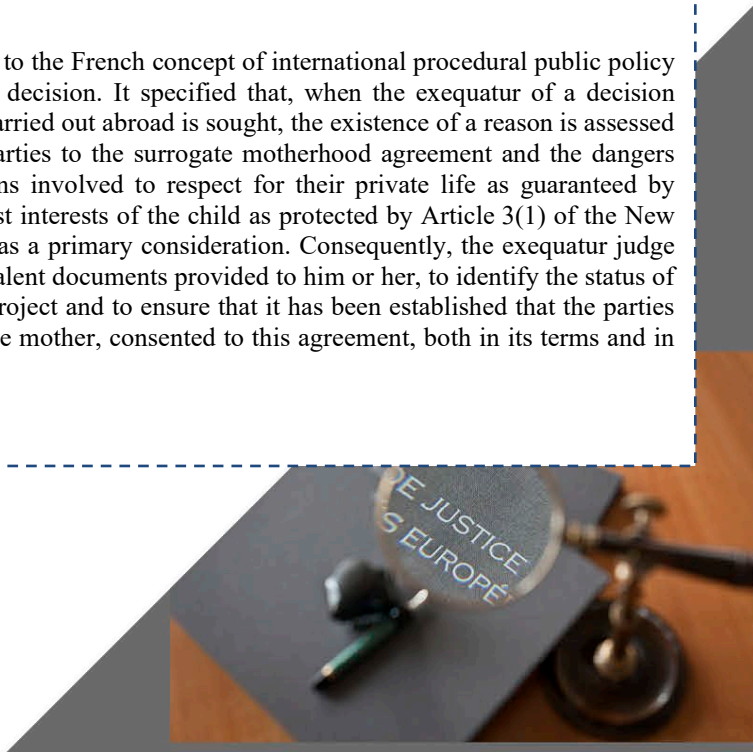
*Bundesverfassungsgericht, judgment of 1/10/2024, 1 BvR 1160/19 (**DE**/**EN**)*
Press release (DE/EN)

France – Court of Cassation

Private international law - Exequatur - Foreign decision establishing the parentage of a child born by surrogate motherhood

In its judgment, the Court of Cassation pointed out that it is contrary to the French concept of international procedural public policy to recognise a foreign decision without stating the reasons for the decision. It specified that, when the exequatur of a decision establishing the parentage of a child born of surrogate motherhood carried out abroad is sought, the existence of a reason is assessed in the light, on the one hand, of the risks of vulnerability of the parties to the surrogate motherhood agreement and the dangers inherent in these practices, the right of the child and of all persons involved to respect for their private life as guaranteed by Article 8 of the European Convention on Human Rights, and the best interests of the child as protected by Article 3(1) of the New York Convention of 20 November 1989 on the Rights of the Child as a primary consideration. Consequently, the exequatur judge must be able, through the reasons given for the decision or the equivalent documents provided to him or her, to identify the status of the persons mentioned who participated in the surrogate parenting project and to ensure that it has been established that the parties to the surrogate parenting agreement, first and foremost the surrogate mother, consented to this agreement, both in its terms and in its effects on their parental rights.

*Cour de cassation, judgment of 2/10/2024, No 22-20.883 (**FR**)*



Netherlands – Supreme Court

Consumer protection - Distance contracts concluded electronically - Disclosure obligations on the trader

Relying on the judgments of the Court of Justice in Cases C-249/21 and C-400/22, the Supreme Court held that an icon on an e-commerce website bearing the words 'bestelling plaatsen' (place order), 'bestellen' (order) or 'bestelling afronden' (complete order), in Dutch, cannot necessarily and systematically be associated with the creation of an obligation to pay, either in everyday language or in the mind of the average consumer who is normally informed and reasonably attentive and circumspect. In addition, the high court ruled that a judge may annul a sales contract in whole or in part if the consumer has not been explicitly informed by the trader that, by placing the order, he or she is committing to payment. However, referring to the judgments handed down by the Court of Justice of the European Union in Cases C-488/11, C-243/08 and C-83/22, it pointed out that a total cancellation of the sales contract is only possible if the consumer does not oppose it.

Hoge Raad, decisions of 4/10/2024, 23/01968 and 23/01972 ***(NL)***
Press release (NL)

Germany – Federal Constitutional Court

Protection of personal data - Strategic surveillance of telecommunications - Federal Intelligence Service

The Federal Constitutional Court ruled that the strategic surveillance of telecommunications on German territory and abroad by the Bundesnachrichtendienst (Federal Intelligence Service) as part of the fight against cyber-threats was partially unconstitutional and should therefore be the subject of new regulations.
The law limits the secrecy of correspondence, post and telecommunications by authorising the Federal Intelligence Service to collect and process personal data by means of secret strategic surveillance of internal and external telecommunications in relation to cyber-threats, such as cyber-attacks in the form of cyber-espionage or cyber-sabotage.
According to the German high court, this power is compatible with the secrecy of telecommunications guaranteed by Article 10(1) of the Basic Law. However, it does not satisfy the principle of proportionality and needs to be adjusted in its limitation and structuring, particularly as regards the sorting of data from purely internal communications, the protection of privacy for foreign nationals residing abroad, the time limit for keeping documentation and independent monitoring by a commission.

*Bundesverfassungsgericht, order of 8/10/2024, 1 BvR 1743/16 and 1 BvR 2539/16 (**DE**/**EN**)*
Press release (DE/EN)

Italy – Constitutional Court

Questions of constitutionality - Reference for a preliminary ruling - Equal treatment for men and women

In its judgment, the Constitutional Court ruled on the conditions for admissibility of questions of constitutionality concerning the incompatibility of a national regulation with EU law.
In this context, the high court specified that a question of constitutionality for violation of the first subparagraph of Article 117 of the Constitution is considered admissible only if it presents a link with interests or principles of constitutional importance and thus demonstrates a certain 'constitutional relevance'.
This requirement was amply met in the present case, since the principle of equality guaranteed by Article 3 of the Constitution had to be considered in conjunction with the principle of equal treatment between men and women, as enshrined in EU law.
As the question of constitutionality raised was therefore admissible, the Constitutional Court examined its merits and observed that the national regulation reserving the majority of prison police inspector posts for men was not justified by reasons linked to the legitimate need to preserve the functionality and effectiveness of the prison police force. As a result, the high court ruled that this national regulation was unconstitutional.

Corte Costituzionale, judgment of 30/10/2024, No 181 ***(IT)***

Poland – Supreme Court

Consumer protection - Unfair terms - Mortgage loan indexed to a foreign currency - Deletion of the provision relating to the banking margin

An appeal in cassation was lodged with the Supreme Court by a bank against a decision of the Gdansk Court of Appeal declaring a mortgage loan agreement indexed to the CHF exchange rate to be null and void. In its decision, the Court of Appeal ruled that the deletion of certain unfair terms, such as those relating to banking margins, altered the substance of the provisions on conversion.
The Supreme Court ruled that the deletion of the provision relating to the banking margin arbitrarily set by the bank in the conversion clause of the loan agreement, and the retention of the mechanism for converting CHF into PLN on the basis of the average exchange rates of the National Bank of Poland referred to in the agreement, did not constitute a substantial amendment to the agreement that would render it invalid.

*Sąd Najwyższy, judgment of 30/10/2024, II CSKP 1939/22 (**PL**)*
Press release (PL)

Finland – Supreme Administrative Court

Protection of personal data - Regulation (EU) 2016/679 - Exclusion of CFSP-related activities - Scope extended by national law

Finnish diplomats were the victims of cyber-espionage via spyware installed on their phones. In this case, the issue was whether the Ministry of Foreign Affairs, the data controller, had informed the supervisory authority and the data subjects of the personal data security breach within the time limits set out in Articles 33 and 34 of Regulation (EU) 2016/679. While the regulation does not apply to the processing of personal data for Member States' activities relating to CFSP, in Finland, the applicability of the regulation has been extended to these activities by the Law on the protection of personal data. As a preliminary point, the Supreme Administrative Court observed that it was indeed a matter of interpreting provisions of EU law, but for situations excluded from its scope, referring to the Court of Justice's Nolan judgment in Case C-583/10. It was therefore appropriate in the present case to consider other provisions of national law, such as the duty of secrecy laid down in the Law on access to information. In this regard, the high court first found that the data controller had not complied with the obligation arising from Article 33 of said regulation to notify the breach in question to the competent supervisory authority within 72 hours or at the latest after becoming aware of it. On the other hand, it considered that the controller had communicated the personal data breach to the data subject 'as soon as possible', within the meaning of Article 34 of the regulation, read in the light of the obligation of secrecy arising from the Law on access to information. The penalty, namely the issue of a reprimand, provided for in Article 58 of said regulation and sent by the supervisory authority to the ministry in question, was therefore confirmed with regard to the first aspect and annulled with regard to the second.

*Korkein hallinto-oikeus, judgment of 1/11/2024, No 179/2024, ECLI:FR:KHO:2024:115 (**FI**/**SV**)*

France – Court of Cassation

European arrest warrant - Surrender of a refugee - Condition - Undertaking of non-expulsion by the issuing Member State

In its judgment, the Court of Cassation ruled that the investigating chamber, which cannot, except in the case of a systemic failure on the part of the issuing State, make the surrender of the refugee pursuant to the European warrant conditional on an undertaking by that State not to return the person concerned to his or her State of origin at a later date, is not obliged to look for the existence of such an undertaking. Reversing its previous case-law, which it considered incompatible with the principle of mutual recognition underpinning the European arrest warrant system, the Court of Cassation thus reinstated the presumption of respect for fundamental rights between Member States.

*Cour de cassation, judgment of 5/11/2024, No 24-85.705 (**FR**)*

Spain – Constitutional Court

Social policy - Parental leave - Single-parent family - Discrimination

The Constitutional Court declared that the Workers' Statute and the General Law on social security were contrary to the Constitution in that they did not allow biological mothers of single-parent families in employment to extend their parental leave beyond the 16 weeks to which all biological mothers are entitled. The fact that national law does not provide for a mother in a single-parent family to be able to extend her leave for the period that the other parent would have been able to take is contrary to the principle of equality, in that it introduces an unjustified difference in treatment based on birth between children born into single-parent families and those born into two-parent families.
Consequently, the Constitutional Court concluded that the national provisions in question had to be interpreted as granting biological mothers of single-parent families in employment 26 weeks' parental leave, as long as they had not been amended by the legislator.

Tribunal Constitucional, judgment of 6/11/2024 No 140/2024 (ES)

Germany – Federal Court of Justice

Protection of personal data - Facebook scraping - Compensation for non-material damage

The Federal Court of Justice ruled that the 'scraping' of data by the social network Facebook can give rise to non-material damage within the meaning of Article 82(1) of the GDPR and result in compensation of approximately EUR 100. In April 2021, the personal data of around 533 million Facebook users from 106 countries were made public on the internet. Unknown third parties had accessed the data in these user accounts using the publicly available 'scraping' function. The high court considered that, in accordance with the relevant case-law of the Court of Justice, non-material damage within the meaning of Article 82(1) of the GDPR may also be constituted by the mere short-term loss of control over one's own personal data following a breach of the GDPR. In this respect, it is not necessary for the data to be misused to the detriment of the data subject or for other significant negative consequences to occur. Furthermore, compensation for this loss of control can be estimated at around EUR 100.

Bundesgerichtshof, judgment of 18/11/2024, VI ZR 10/24 ***(DE)***
Press release *(**DE**)*

Cyprus – Supreme Constitutional Court

Public service - Declaration of assets and liabilities - Attorney General and Deputy Attorney General

At the request of the President of the Republic, the Supreme Constitutional Court ruled that the national law requiring the Attorney General and Deputy Attorney General of the Republic of Cyprus to declare their assets was consistent with the Constitution and the principle of the separation of powers.
According to the Supreme Court, the Attorney General and Deputy Attorney General, as heads of the State's legal service, enjoy the same institutional autonomy as Supreme Court judges with regard to their conditions of service. However, the obligation to declare their assets does not fall within the concept of conditions of service, nor does it entail any change to them. Thus, far from encroaching on the independence and powers of the institution of the Attorney General, this obligation promotes transparency and accountability and reinforces the necessary public confidence in the institution.

Ανώτατο Συνταγματικό Δικαστήριο Κύπρου, opinion of 20/11/2024, Πρόεδρος της Δημοκρατίας και Βουλή των Αντιπροσώπων, No 3/2024 ***(GR)***

Ireland – High Court

Border controls, asylum and immigration - International protection - Access to the labour market in the public sector

The High Court dismissed an appeal against a ban on an applicant for international protection working in the public sector. The claimant, a qualified pharmacist specialising in the public sector, had been granted permission to access the labour market, but national legislation transposing Directive 2013/33/EU had prohibited him from working in that sector. Despite obtaining employment in a private pharmacy, the applicant argued, in essence, that he would have been better paid in a public pharmacy given his experience.
The High Court held that the claimant's complaint did not relate to access to the labour market as such, but to the fact that he could not access employment in the public sector. It recalled that Article 15(2) of Directive 2013/33/EU provides that it is for the Member States to decide the conditions under which access to the labour market is granted to a claimant, in accordance with their national law, while guaranteeing effective access to that market.
The high court concluded that restricting access to jobs in the public sector did not prevent effective access to the labour market. The applicant's allegations that the restrictions were disproportionate and infringed his rights under EU law were rejected.

The High Court, judgment of 20/11/2024, [2024] IEHC 660 ***(EN)***

Germany – Federal Administrative Court

Border controls, asylum and immigration - Absence of inhuman or degrading reception conditions

The Federal Administrative Court ruled that the asylum applications in question, submitted by single people who were able to work and were not vulnerable, and who had refugee status in Italy, had to be rejected as inadmissible, in accordance with EU law.
The high court found that this category of persons is not currently at risk of being subjected to degrading or inhumane living conditions if returned to Italy, and that this procedure therefore does not violate Article 4 of the Charter of Fundamental Rights.
Accordingly, it should not be expected that refugees returning to Italy would find themselves in a situation of extreme material distress that would not allow them to meet their most basic needs in terms of housing, food and hygiene. Basic medical care would also be guaranteed.

Bundesverwaltungsgericht, judgments of 21/11/2024, 1 C 23.23 and 1 C 24.23 (not yet published)
Press release *(**DE**)*

Previous decisions

Poland – Supreme Court

Independence of judges - Test of independence and impartiality - Irregular composition of the court

In the context of criminal proceedings, the Supreme Court found that the annulment of decisions of the courts of first and second instance by the same court ruling in cassation, solely on the basis of the resolution of the three united chambers of the Supreme Court of 23 January 2020 (BSA-I-4110-1/20), constituted a blatant violation of the Constitution.
The judgments in question had been annulled because of the irregular composition of the courts that handed them down, due to the participation in those compositions of judges appointed on the proposal of the National Council of the Judiciary, as constituted after the 2017 reform. According to the high court, said resolution was no longer valid given, on the one hand, that the ruling of the Constitutional Court of 20 April 2020 annulled it, and on the other hand, the entry into force, on 15 July 2024, of the regulations ensuring the implementation of the judgments of the Court of Justice of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 et C-625/18) and of 2 March 2021, A.B. and Others (Nomination des juges à la Cour suprême – Recours) (C-824/18). In addition, the high court considered that the annulment of said national judgments on the basis of the aforementioned resolution would have had the effect of depriving the judges concerned of the right to an effective remedy.

*Sad Najwyższy, order of 7/8/2024, I KZ 34/24 (**PL**)*

Denmark – Supreme Court

Fundamental rights - Respect for private life - Legal gender reassignment

In this case, a man, X, had been convicted on numerous occasions, including for assault and rape committed against women. In 2015, at his request, X was given a new social security number with a change of gender, although he did not undergo surgery.
X took legal action before the Supreme Court, claiming that he should not serve his sentence in the men's section of the prison. According to the Supreme Court, the term 'gender' within the meaning of Article 60(6) of the National Law on the enforcement of sentences is to be understood as the biological sex of a person. Thus, it considered that X had rightly been placed in the men's section on the basis of a specific and individual assessment. The Supreme Court declared that the placement of X and the strip searches or urine samples requiring the presence of male staff constituted neither degrading treatment of X in violation of Article 3 of the ECHR nor a violation of his privacy contrary to Article 8 of that legal instrument.

*Højesteret, judgment of 10/9/2024, BS-60551/2023-HJR (**DA**)*

Sweden – Migration Court of Appeal

Border controls, asylum and immigration - Third-country nationals - Expulsion to another Member State

The Migration Court of Appeal upheld the decision of the Migration Office to deport a person to Germany without first asking him to go there on his own initiative.
The person concerned had a residence permit for Germany, where he also had refugee status. He had also applied for asylum in Sweden.
The high court ruled that the expulsion decision complied with national legislation transposing Directive 2008/115/EC. Although this directive cannot be applied when a citizen of a third country has obtained refugee status in another Member State, this fact did not prevent the application of national legislation allowing the expulsion in question. In this regard, the high court specified that national legislation made no distinction between expulsion to a Member State or to a third country.

Migrationsöverdomstolen, judgment of 27/9/2024, No UM707-24 (SV)