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FLASH NEWS

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NATIONAL DECISIONS OF INTEREST TO THE EU

OVERVIEW FOR DECEMBER 2024 - END OF JANUARY 2025

Spain – Constitutional Court

Judicial proceedings – Arbitral award – Judicial review – Concept of substantive public policy – Article 101 TFEU – Inclusion

The Constitutional Court clarified its case-law on judicial review in actions for the annulment of arbitral awards, with regard to the concept of violation of substantive public policy.
It ruled that this concept includes not only the rules of the Constitution, recognised as an integral part of economic public policy, but also the substantive rules of public policy established by the Court of Justice in the field of European Union law, in accordance with common constitutional traditions, in this case Article 101 TFEU. In the Eco Swiss judgment (C-126/97), the Court of Justice ruled that this article constitutes a fundamental provision essential to the functioning of the internal market. Consequently, it ruled that a national court hearing an application for the annulment of an arbitral award must grant such an application if it considers that the award is indeed contrary to that article, since it must, under its internal rules of procedure, grant an application for annulment based on a breach of national rules of public policy.
The Spanish high court clarified that the review of the alleged failure to apply Article 101 TFEU falls within the jurisdiction of the court of first instance.

*Tribunal Constitucional, judgment of 2/12/2024, No 146/2024 (**ES**)*

Czech Republic – Supreme Administrative Court

Breach of EU law – Non-renewal of a term of office – Concepts of ‘report’ and ‘retaliation’

The Supreme Administrative Court upheld the ruling that the withdrawal of the proposal to appoint the applicant as president of the Office for Access to Transport Infrastructure was unlawful. In this case, during his first term of office, the applicant had sent a letter to the Commission alleging potential breaches of EU law. Although he successfully completed the selection process for a new term, his application was rejected. The high court held that the letter reporting breaches of EU law constituted a ‘report’ within the meaning of Directive 2019/1937 on the protection of persons, and that the rejection of his application therefore fell within the concept of ‘retaliation’ within the meaning of that directive.

*Nejvyšší správní soud, judgment of 5/12/2024, 3 As 309/2023 (**CS**)*, **Press release (CS)**

Sweden – Administrative Court of Appeal, Stockholm

Immigration policy – Permanent residence permits – Ability to support oneself

In proceedings concerning an application for a permanent residence permit in Sweden, the higher court ruling on immigration matters held that income from employment abroad must be taken into account when assessing whether a foreign national meets the requirement of being able to support himself or herself, even if the income in question is not taxed in Sweden. In this case, the applicant was resident in Sweden and liable for tax in that State, but, as she worked in Denmark, her income was taxed in Denmark under the Nordic tax treaty. Her net income after tax enabled her to support herself.
The higher court further clarified that although the preparatory legislative work on this matter states that the income must not be so low that the foreign national needs financial assistance to meet his or her needs, and thus constitutes a burden on Swedish society, the applicable legislation does not stipulate that the requirement to be able to support oneself can only be met by income from Sweden or income taxed in Sweden.

*Migrationsöverdomstolen, judgment of 9/12/2024, No UM3195-24 (**SV**)*

Slovakia – Constitutional Court

Referral to the Court of Justice – Obligation to refer – Right to a lawful judge

The Constitutional Court overturned a ruling by the Supreme Court on the grounds that the latter had failed to refer a question to the Court of Justice of the European Union for a preliminary ruling on the interpretation of a provision of a directive that did not fall within the concept of either an *'acte clair'* or an *'acte éclairé'*.
The high court found that there had been a violation of the constitutional right to a lawful judge in this case. It considered that the Supreme Court, as a court against whose decisions there is no appeal, had taken the place of the Court of Justice in interpreting EU law.

*Ústavný súd Slovenskej republiky, judgment of 11/12/2024, II. ÚS 481/2024 (**SK**)*

Sweden – Supreme Administrative Court

Taxation – Value added tax – Exemption for the management of mutual funds

In this case, a company providing advice and assistance on compliance and risk management to fund management companies had asked the Skatträttsnämnden (Council for Advance Tax Rulings) for an opinion on whether its activity constituted management of mutual funds exempt from value added tax (VAT) under national VAT legislation. In its judgment, the Supreme Administrative Court upheld the tax ruling issued by the Council for Advance Tax Rulings, referring to the K judgment (C-58/20). It thus ruled that the activity in question did not form a distinct whole, assessed overall, and was therefore not exempt from VAT.

*Högsta förvaltningsdomstolen, judgment of 30/12/2024, No 3825-24 (**SV**)*

Poland – Supreme Court

Consumer protection – Unfair terms – Mortgage loan indexed to a foreign currency – Ex officio review by the national court of the unfairness of contractual terms

Following an extraordinary appeal lodged by the Attorney General, the Supreme Court overturned the ruling of the Gdańsk Court of Appeal, which had refused to examine of its own motion the potentially unfair nature of the terms of a mortgage loan agreement indexed to the Swiss franc exchange rate. More specifically, in the context of the proceedings concerning this loan agreement, the bank had brought an action for payment against the consumer on account of unpaid loan instalments. Referring to the Lintner judgment (C-511/17), the high court found that the consumer was not required to make a detailed claim regarding the unfairness of specific contractual terms, since the obligation to examine of its own motion whether the terms relating to the subject matter of the dispute, as defined by the consumer, were unfair lay with the court of appeal. According to the Supreme Court, this obligation stems from both national law and EU law, which require judges to ensure effective protection of consumer rights. Failure to comply with this obligation results in a violation of the right to a tribunal, which encompasses the right to a fair trial and the right to have the case examined in accordance with the provisions of the law.

*Sąd Najwyższy, judgment of 15/1/2025, II NSNc 364/23 (**PL**)*, **Press release of 28/1/2025 (PL)**

Italy – Court of Cassation

Immigration policy – Transfer of asylum seekers – Third-country national – Principle of non-refoulement – Systemic deficiencies

The Court of Cassation ruled on the conditions for transferring a Pakistani national to Austria, given the risk of him being returned to Pakistan, where he would be exposed to inhumane treatment. The high court, hearing an appeal brought by the Ministero dell'Interno (Ministry of the Interior, Italy), clarified that, in proceedings challenging decisions to transfer asylum seekers, under Article 27 of Regulation (EU) No 604/2013, the court hearing the case cannot examine whether there is a risk, in the requested Member State, of a breach of the principle of non-refoulement to which the applicant for international protection would be exposed as a result of his or her transfer to that Member State or as a consequence of that transfer. However, it noted that there is an exception to this rule, namely where the court hearing the case finds systemic deficiencies in the asylum procedure and in the reception conditions for applicants for international protection in the requested Member State. As this exception did not apply in this case, the Supreme Court upheld the appeal lodged by the Ministry of the Interior.

*Corte di cassazione, judgment of 15/1/2025, No 935 (**IT**)*

Cyprus – Supreme Constitutional Court

Free movement of persons – Restrictions in the event of a criminal conviction – Conditions

The Supreme Constitutional Court considered that the existence of a criminal conviction may justify the removal of a Union citizen from Cypriot territory if, in view of the circumstances giving rise to the conviction, his or her conduct represents a genuine, present and sufficiently serious threat to a fundamental interest of society. In order to assess whether such a threat exists, the competent authority must take into account all relevant factors, including the nature and seriousness of the offence and the circumstances in which it was committed.
Consequently, the Supreme Constitutional Court ruled that the court of appeal had erred in finding, in this case, that the seriousness of the offence could not be taken into account as a separate factor from the conviction itself and could not therefore justify a removal decision.

*Ανώτατο Συνταγματικό Δικαστήριο Κύπρου, judgment of 15/1/2025, No 28/23 and others, No 3/2024 (**GR**)*

Finland – District Court

Processing of personal data – Access by police authorities to data contained in a telephone – Primacy of EU law

Relying on the judgment in Case C-548/21, the court of first instance confirmed that a police judicial commissioner did not have jurisdiction to decide on the search of computer equipment (including four mobile phones) used by a person suspected of defamation and sexual harassment. According to the court, in the case in question, the search should have been subject to prior review and a balancing of the various interests, either by a court or by an independent administrative authority. The ex post facto judicial review provided for by national law could not be regarded as a sufficiently effective remedy. Based on the principle of the primacy of EU law, the court left the national law unapplied and ordered the destruction of copies of the content of the devices held by the police.
This decision has not yet become final. Nevertheless, following the judgment, the Ministry of Justice began preparations for a legislative proposal to bring national legislation into line with EU law, in accordance with the judgment in Case C-548/21.

Varsinais-Suomen käräjäoikeus, *decision of 20/1/2025,(**FI)***
Press release (FI)

Germany – Federal Court of Justice

Criminal law – Drug trafficking – Cannabis-based products – Admissibility of EncroChat data

The Federal Court of Justice overturned the decision acquitting the defendant of the charge of trafficking significant quantities of narcotics using an encrypted mobile phone from the provider ‘EncroChat’, insofar as the offence was committed in 2020 in connection with cannabis products.
Since the Cannabis Act came into force on 1 April 2024, the acts in question are no longer considered crimes, but only offences punishable by lighter penalties.
The court of first instance had justified the acquittal by observing that an investigative measure as serious as an online search was no longer authorised for such offences and that ‘EncroChat’ data was now inadmissible in cannabis trafficking cases.
The high court confirmed that the new law has no impact on the usability of EncroChat data, which can still be used as evidence. It considered that, in light of the M.N. (EncroChat) judgment in Case C-670/22, the legality of the transfer of data at the time of the request is decisive for the admissibility of such evidence. In this regard, it found that, at the time, in 2020, the acts alleged were still punishable as crimes and the data had therefore been obtained lawfully.

Bundesgerichtshof, judgment of 30 January 2025, 5 StR 528/24 (not yet available)
Press release (DE)

Previous decisions

Greece – Council of State

Consumer protection – Agricultural products – Plant variety name – Protected designation of origin – Phonetic identity – Risks

The Council of State, sitting in an extended formation, dismissed the appeal for annulment against the ministerial decision relating to the recording in the register of plant varieties of the name 'Kalamata' as a synonym for the name of the olive variety 'Kalamon'.
The applicant associations argued, in particular, that the new name for this plant variety infringed the protected designation of origin (PDO) for 'Kalamata Olives' because of the phonetic similarity between the two names.
After interpreting Articles 13 and 42 of Regulation (EU) No 1151/2012, the high administrative court ruled that only Article 42 was applicable in this case. It subsequently ruled that the co-existence of a plant variety and a protected designation of origin bearing the same name was not likely to mislead consumers. According to the Council of State, the average consumer who is reasonably well-informed and reasonably circumspect will perceive this name as an indication of the specific plant variety and not as a designation of a product originating exclusively in the department of Messinia.
Thus, the Council of State concluded that the phonetic similarity between these two names, based on a well-known place name, did not prevent their co-existence in accordance with Article 42 of Regulation (EU) No 1151/2012.

*Symvoulio tis Epikrateias, judgment of 2/4/2024, No 428/2024 (**GR**)*

Germany – Federal Constitutional Court

Legal proceedings – Constitutional appeal – Criminal conviction – Drug trafficking – Usability of EncroChat data

The Federal Constitutional Court rejected the constitutional appeal brought by the applicant, who had been sentenced to imprisonment for trafficking significant quantities of narcotics, partly on the basis of the analysis of data obtained from 'EncroChat', a provider of encrypted mobile phones, challenging the use of this data collected by the French authorities and transferred to Germany under a European investigation order.
The Federal Court of Justice had already rejected the appeal for a 'review' of this ruling on the grounds that the 'EncroChat' data could be used as evidence. The constitutional court held that the Federal Court of Justice's failure to make a preliminary reference did not affect the decision in this case, given that the Court of Justice of the European Union essentially confirmed the opinion of the German court in M.N. (EncroChat) judgment in Case C-670/22.
In particular, the German court examined whether the transfer of data already in the possession of the competent authorities of the executing State of the European investigation could have taken place under the same conditions in similar domestic proceedings, based on the rules governing online searches.

*Bundesverfassungsgericht, order of 1/11/2024, BvR 684/22 (**DE**)*
Press release (DE)

Romania – Regional Court, Bucharest

Nationality – Reinstatement of Romanian nationality – Extended time limit for processing applications – Procedure subject to the sovereign right of the State – Limits – Respect for fundamental rights and freedoms

In an appeal against the refusal to rule on an application for reinstatement of Romanian nationality, the Regional Court of Bucharest held that the considerable workload of the national citizenship authority, due to the large number of citizenship applications and strict compliance with the order in which applications are registered, cannot justify the excessive delay in processing these applications, given the time limit laid down by law. It also specified that, while the entire procedure for reinstatement of Romanian nationality falls within the sovereign right of the State to examine each case at its own pace and with the precautions it deems necessary, that sovereign right cannot justify a violation of the fundamental rights and freedoms provided for by the State's legal order and by the international conventions to which it is party.

*Tribunalul București, civil judgment of 14/11/2024, No 8182 (**RO**)*

Romania – High Court of Cassation and Justice

Functioning of the courts – Lack of staff in national courts – Work performed by judges outside normal weekly working hours – Refusal to classify such work as overtime

In this case, the issue concerned national regulations stipulating that overtime worked by budgetary staff in the courts is compensated solely by time off in lieu. It is in this context that the High Court of Cassation and Justice ruled that, in conditions of staff shortages, work performed by judges outside their working hours is not considered overtime within the meaning of the Romanian Labour Code and therefore does not give rise to financial compensation. In this regard, the high court emphasised that the remuneration of judicial staff is governed by special provisions, which do not provide for the possibility of granting payments for additional work performed. In particular, judges' remuneration is determined solely on the basis of specific criteria, namely the level of the court, the position, experience and seniority in the position. Thus, judges' remuneration is not determined on the basis of a minimum or maximum number of cases handled. The volume of work is therefore a simple statistical indicator that fluctuates without leading to a decrease or increase in remuneration.

*Înalta Curte de Justiție și Casație, judgment of 18/11/2024, No 78 (**RO**)*

Germany – Federal Constitutional Court

Legal proceedings – Constitutional appeal – High energy prices – Emergency intervention – Withdrawal of surplus revenue

The Federal Constitutional Court ruled that the infringement of the freedom to choose an occupation protected by Article 12(1) of the Basic Law on the basis of Regulation (EU) 2022/1854, consisting of the redistribution of surplus revenues from certain electricity producers to private and commercial electricity consumers, was justified as a response to an exceptional situation on the electricity market that arose after the start of the war in Ukraine in February 2022.
Against the backdrop of gas shortages caused by the war in Ukraine, the Council adopted Regulation (EU) 2022/1854, requiring Member States to levy a surcharge on gas revenues exceeding a set threshold and to use the revenue in a targeted manner to provide relief to electricity consumers. Germany implemented this requirement with the Strompreisbremsegesetz (Electricity Price Brake Act).
The Constitutional Court found that the redistribution of revenue between businesses and consumers in a market where pricing is subject to free competition must be justified in light of the freedom of enterprise protected by Article 12(1) of the Basic Law. However, given the specific nature of the exceptional situation in question, this restriction was appropriate, considering that electricity is an essential commodity for meeting basic needs.

*Bundesverfassungsgericht, judgment of 28/11/2024, 1 BvR 460/23, 1 BvR 611/23 (**DE**)*
Press release (DE)

Sweden – Supreme Court

Judicial cooperation in criminal matters – Transfer of a judgment for enforcement – Requirement of consent

In criminal proceedings concerning the transfer of a judgment from Sweden to Spain for the enforcement of a sentence, the Supreme Court ruled on the requirement for consent.
It ruled that the exemption from the consent of the sentenced person and of the executing Member State, provided for in the relevant national law, presupposes that a decision on deportation has been taken in the judgment to be transferred for enforcement. A deportation order in another criminal judgment is therefore not sufficient. According to the general rule, consent is required for the transfer, unless the sentenced person is a national of the Member State to which the transfer is to be made and will be deported there after the sentence has been served on the basis of a deportation order issued in the judgment to be transferred. However, in this case, the convicted person had been subject to a deportation order issued in a previous criminal judgment.

*Högsta domstolen, decision of 28/11/2024, No Ä 3500-24 (**EN**) (**SV**)*
Press release (EN)

Sweden – Supreme Administrative Court

Taxation – Value added tax – Provision of services – Supply of company bicycles

In its judgment, the Supreme Administrative Court upheld a tax ruling issued by the Council for Advance Tax Rulings, in which the latter had considered that a municipality providing its employees with company bicycles in exchange for part of their gross salary was supplying the bicycles for consideration and acting as a taxable person in the course of an economic activity.

The high court, referring to the case-law of the Court of Justice (Cases C-40/09, C-612/21, C-846/19, C-87/23), found that there is a direct link between the service provided and the consideration received, since the employees agree to a deduction from their gross salary in exchange for the service obtained. Remuneration may be expressed in monetary terms and performance is interdependent. In such circumstances, the fact that the consideration is deducted from the gross salary is irrelevant for value added tax purposes.

The judgment expands existing national case-law on this matter (*Supreme Administrative Court judgment of 27 May 2024, No 7885-23*), in that the fact that the bicycles are provided by a municipality and not by a private-law employer is irrelevant.

*Högsta förvaltningsdomstolen, judgment of 29/11/2024, No 4096-24 (**SV**)*