ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter – GENERAL MODULES

MODULE 1 – THE EU CHARTER OF FUNDAMENTAL RIGHTS: SCOPE OF APPLICATION, RELATIONSHIP WITH THE ECHR AND NATIONAL STANDARDS, EFFECTS

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IN THE FRAMEWORK OF THE PROJECT "*ACTIVE CHARTER TRAINING THROUGH INTERACTION OF NATIONAL EXPERIENCES*" (ACTIONES)

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MODULE 1

THE EU CHARTER OF FUNDAMENTAL RIGHTS: SCOPE OF APPLICATION, RELATIONSHIP WITH THE ECHR AND NATIONAL STANDARDS, EFFECTS

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1. The Charter of Fundamental Rights of the European Union and the general provisions governing its application and interpretation

Since 1st December 2009, the European Union has its own written, legally binding Bill of Rights, the Charter of Fundamental Rights of the European Union (hereafter: the "Charter"). The Charter does not merely codify the pre-Lisbon case law of the Court of Justice on fundamental rights as general principles of EU law, encompassing a broad range of civil, political, social and economic rights, together with rights particular to EU citizens. It contains provisions corresponding to all the fundamental rights granted by the text of the European Convention of Human Rights (hereafter: the "ECHR") but goes further by updating the formulation of such provisions; in some instances, it also provides for a more extensive protection.

Based on Article 6(1) TEU, the Charter has "the same status of the Treaties". Accordingly, the provisions of EU secondary law must be interpreted in conformity with the Charter and, in case of a conflict that cannot be resolved through interpretation, secondary law can be set aside by the Court of Justice. In addition, national provisions that fall within the scope of the Charter[1] must be compatible with the fundamental rights it contains. When specific conditions are satisfied[2], a conflict between a provision of the Charter and a national provision can be solved directly by the national court by disapplying the conflicting national provision. This peculiar character of certain EU law provisions, known as direct effect, represents an added value of the protection offered by the Charter compared to the ECHR, whose provisions lack such an effect.

For the purpose of the ACTIONES Project, it is important to stress that the Charter does not only provide a written catalogue of fundamental rights. Its seventh and last Title contains a set of rules – commonly referred to as "general provisions" or "horizontal clauses" – concerning the scope of application, the interpretation and the effects of the substantive provisions of the Charter, as well as this latter's relationship with sources external to the EU legal order, such as the ECHR and domestic constitutions. Their knowledge is a pre-requisite for the correct application of the Charter. Accordingly, this Module provides an overview of the most relevant – and complex – general provisions, taking into account the case law of the Court of Justice providing their interpretation.

The presentation of the selected general provisions flows the logical path of reasoning of a national judge facing a case to which the Charter may be relevant. Thus, Article 51 of the Charter, titled "Field of application", is the first general provision with which a national judge shall engage.

If the question "Is the Charter applicable?" is answered in the affirmative, the national judge will have to consider the other general provisions of the Charter that govern the interpretation, the effects and the level of protection of the fundamental rights granted therein. Moreover, when the Charter is applicable, national courts can rely on specific techniques of judicial interaction[3] in order to address conflicts with national law, to solve interpretative problems, or to achieve a coherent interpretation

[1] See section 2 below.
[2] See section 4.2 below.
[3] On these techniques, see Module II.

with national and international sources of fundamental rights' protection (notably, but not exclusively, domestic Constitutions and the ECHR).

In particular, a national court shall address the following questions:

1) Is there any scope for the protection afforded by domestic standard of fundamental rights protection? (**section 3.1**);

2) how does the ECHR and the case law of the European Court of Human Right (hereafter: ECtHR or Strasbourg Court) affect the interpretation of the Charter? (**section 3.2**);

3) which are the effects of the relevant provision(s) of the Charter? Indeed, the provisions of the Charter entail different effects depending on whether they enunciate a (subjective) "right" or as a (legal) "principle" (**section 4.1**). As anticipated, certain provisions of the Charter can have direct effect (**section 4.2**).

By contrast, if the answer to the question "Is the Charter applicable?" is negative, the national judge is not under any legal obligation flowing from EU law to address the case within the framework provided by the Charter. However, s/he may decide to take account of the Charter, and of the relevant case law of the ECJ, in the process of interpreting national fundamental rights. In particular, the protection afforded to a fundamental right based on the domestic sources may be extended through the use of the Charter.

The use of the Charter by the ECtHR also provides an interesting illustration of the added value of the Charter outside its scope of application. Clearly, the Strasbourg Court is never under a legal obligation to apply the Charter. Nonetheless, the latter has a more modern and, at times, more far-reaching formulation than the Convention. In line with its case law whereby the Convention is "a living instrument that must be interpreted according to present-day conditions", the ECtHR has drawn from the Charter arguments supporting a judicial *revirement*, in the sense of embracing a wider protection.

For instance, in *Scoppola v. Italy (II)*,[4] the ECtHR overruled the interpretation according to which Article 7(1) ECHR does not guarantee the right to a more lenient criminal sanction introduced by law after the offence was committed. The Strasbourg Court acknowledged that important developments had occurred in the international scene, including the proclamation of the Charter, whose Article 49 explicitly recognizes the principle of retrospectiveness of the *lex poenalis mitior*.[5] It therefore concluded that "Article 7(1) [ECHR] guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law".[6]

Another case worth noting is *Schalk and Kopf v. Austria*,[7] where the ECtHR embraced a new interpretation of the personal scope of the right to marry, which, according to the literal formulation of Article 12 ECHR, is granted only to heterosexual couples. By contrast, Article 9 of the Charter does not mention the addressees of the right, thus encompassing both homosexual and heterosexual couples. In *Schalk and Kopf*, the ECtHR affirmed that, "[r]egard being had [inter alia] to Article 9 [CFREU], (…)[this Court] would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex".[8]

[4] *Scoppola v. Italy (II)*, no. 10249, ECHR 2009.
[5] *Ibid*., § 105.
[6] *Ibid*., § 109.
[7] Sent. 24 giugno 2010, ric. n. 30141/04, *Reports of Judgments and Decisions* 2010.
[8] *Ibid*., § 61.

2. The scope of application of the Charter at the national level

Understanding the boundaries of the scope of application of the Charter is an essential pre-requisite to determine whether the Charter (and EU law more generally) provides the framework to solve the case at issue, or, rather, it may be use to support a certain interpretation of the applicable national or international sources.

Article 51 of the Charter, which is titled "Field of application", states:

> "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
>
> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".

Four main inferences can be drawn from this Article:

i. the Charter applies to two different sets of acts: EU acts and national acts. However, whilst all EU acts fall within the remit of the Charter, this is applicable only to national acts "implementing EU law";
ii. the Charter cannot be relied on to extend the material competences that the Member States decided to confer on the Union through the Treaties.
iii. the Charter encompasses both "rights" and "principles", which entail different effects;
iv. individuals are not mentioned amongst the passive addressees of the Charter;

As a first issue, attention must be paid to the notion of "national act implementing EU law", which is referred to in Article 51(1) of the Charter. The principle of the neutrality of the Charter as regards the division of competences between the Union and the Member States (point ii) sets a limit primarily to the EU legislator; however, it has a specific implication also on the scope of the Charter at the national level, as we shall see in a while. The inferences under points *ii* and *iii* will be dealt with in sections 4.1 and 4.2.

The ECJ, sitting in Grand Chamber, clarified when a national act "implements EU law" for the purpose of Article 51(1) in its *Åkeberg Fransson* judgment of 26 February 2013.[9] It regarded Article

[9] ECJ (Grand Chamber), judgment of 26 February 2013, case C-617/10, *Åkeberg Fransson* (here). In the pre- *Åkeberg Fransson* phase, the meaning of "implementing EU law" in Article 51(1) of the Charter was the subject of significant debate amongst academics. The formula most commonly used by the ECJ in its pre-legally binding Charter case law, was "within the scope of Union law". Therefore, Article 51(1) raised the question of whether the formulation of this provision corresponded to the precise choice of the drafters to endow the Charter with a different scope of application than that granted – before Lisbon – to the general principles of EU law on fundamental rights by the ECJ. Three main interpretations emerged. According to a narrow reading, the Charter was binding on the Member States only in situations of technical implementation of EU law, i.e. when the case involved national measures adopted in order to give effect to an EU law obligation. The broad interpretation regarded the expressions "implementation of EU law" and "scope of Union law" as synonyms, and therefore argued in favour of the continuity with the pre-Lisbon case law of the ECJ on the general principles. Although the ECJ has not provided any clear definition of "scope of Union law" in that case law, this unequivocally also covers cases beyond the strict technical notion of implementation. Finally, there was also an intermediate reading, which pointed at the existence of an EU law obligation as the criterion to determine whether a case falls within the scope of the Charter. These reading encompassed some cases beyond the category of technical implementation, without, however, endorsing in full the pre-Lisbon case law of the ECJ. For an overview and bibliographic references, see: General Direction of Research and Documentation of the CJEU, *Réflets n.1/2013 Édition spéciale Charte des droits fondamentaux de l'Union européenne*, available here (in French). An English translation is provided by the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union (see here).

51(1) of the Charter as a codification of its *pre*-Lisbon case law on the general principles of EU law concerning fundamental rights, whereby the latter apply to national acts that fall within the scope of EU law. The most relevant passages of the judgment are reproduced here:

> "18 That article of the Charter thus confirms the Court's case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.
>
> 19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect, the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.
>
> (…)
>
> 21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.
>
> 22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction.
>
> 23 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties".

At first sight, this judgment does not add much in terms of clarity: "scope of Union law" is also judicial formula, which, as such, cannot provide real assistance when determining whether the Charter is applicable to the case at hand. Yet, although the pre-Lisbon case law does not offer a veritable definition of "scope of Union law, one can infer the essential meaning of it. **In a nutshell: in order to trigger the application of EU fundamental rights, it is not sufficient to claim that the national measure involved infringes one or more of them. There must be a rule of EU primary or secondary law, other than the fundamental right allegedly violated, that is applicable to the main dispute.** If such a different rule exists, the case falls within the scope of EU fundamental rights and the national measure in question can be checked against them.

The essence of the meaning of Article 51(1) of the Charter, in light of the *Åkeberg Fransson* judgment, is captured in a crystal-clear way by ECJ Judge Allan Rosas (writing in an academic capacity):

> "The Charter is only applicable if the case concerns not only a Charter provision but also another norm of Union law. There must be a provision or a principle of Union primary or secondary law that is directly relevant to the case. This, in fact, is the first conclusion to draw: the problem does not primarily concern the applicability of the Charter in its own right but rather the relevance of other Union law norms".[10]

The condition of a different, applicable EU rule is a corollary of the principle of conferral: by their very nature, fundamental rights are cross-sectorial, because issues concerning their protection can arise in any substantive area of law. If it were possible to trigger the application of the Charter by simply claiming that a national act infringes one of its provisions, the principal of conferral would be put at risk. In the ECJ's own words, "[where] a legal situation does not fall within the scope of Union law, the Court has no jurisdiction to rule on it and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction".[11]

In *Siragusa*, a judgment delivered almost one year after *Åkeberg Fransson*, the ECJ made a precision to the interpretation provided in the latter judgment, pointing out that :

> "24. (…) the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.
>
> 25. In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it".

In particular, the precision added in *Siragusa* concerning the need of "a certain degree of connection" between the situation in the main proceedings and EU law deserves some attention. The national court doubted the compatibility of an order requiring Mr Siragusa to dismantle work carried out in breach of a domestic law protecting the cultural heritage and the landscape with Article 17 of the Charter, on the right to property. As triggers for the application of the Charter, the referring judge mentioned various provisions of the Treaties and EU acts on environmental matters. None of these, however, specifically regulated the subject matter of the case and the Court answered that the case did not fall within the scope of Union law and hence the Charter was inapplicable.

Two main inferences can be drawn from this conclusion.

Firstly, a provision that confers on the Union the power to adopt legislation on a subject matter does not, as such, trigger the application of the Charter to a case concerning that same subject matter. **The application of the Charter requires that a(n other) rule of EU law is applicable to the situation at issue.**

Secondly, an EU act can trigger the protection of the Charter only if lays down rules governing the *specific* situation at issue in the main proceedings. In *Siragusa* the Court made this point clear by quoting its *pre*-Lisbon judgment *Maurin*.[12] Mr Maurin was charged with selling food products after the expiry of their used-by date. The national court doubted the compatibility of the domestic procedure for establishing whether a falsification or fraud relating to products had been committed

[10] See A. Rosas, *When is the EU Charter of Fundamental Rights applicable at the national level?*, 2012, available here.
[11] See, *inter alia*, order of 12 July 2012, Case C-466/11 *Currà and Others*, here, § 26.
[12] Judgment of 13 June 1996, case C-144/95, *Maurin*, here.

with the general principles of Union law concerning fair trial rights. The Court observed that, at the time of the facts, Community law prohibited trade in food products which did not comply with the labeling requirements laid down by the EC legislator.[13] Nevertheless, the case concerned a different situation, notably the selling of foods that complied with labeling requirements, but were sold after their used-by date.[14] The Court therefore regarded the case as falling outside the scope of Union law.

To sum up, the question that a national judge shall address in order to understand whether s/he is under a legal obligation to solve the case within the framework of the Charter is: "**is there an EU law provision, other than a Charter's provision, that lays down a rule which is applicable to the situation in the main proceedings?**". The following section provides an overview of the situations where, according to the current state of evolution of the ECJ's case law, such a qualified connection between EU law and the case before the national court exists.

2.1 A taxonomy - based on the ECJ's case law - of national cases to which the Charter applies

In the following categories of cases, the situation in the main proceedings involves a national provision which is allegedly in contrast with the Charter and falls within the scope of an EU law rule other than the fundamental right supposedly violated. It is important to stress that **this taxonomy is not exhaustive:** it is based on the current state of evolution of the case law of the ECJ, which progressively evolves. Additional examples of connections between EU law and national law may still be brought before the Court of Justice, which may regard them as triggering the application of the Charter. Accordingly, when a national court is presented with a different scenario, which nonetheless entails a connection with an EU law rule suitable to trigger the application of the Charter (thus, a provision that does not merely confer a competence on the Union[15] *and* other than the fundamental right allegedly violated), it may be worth referring a preliminary reference to the ECJ.[16]

The case falls within the scope of application the Charter when it concerns:

A) national measures that give effect to an obligation contained in an EU law provision, which is addressed primarily to the domestic legislature;

B) national procedural provisions that allow for the legal protection, before domestic courts, of the rights conferred on individuals by Union law

C) the application of EU law rules, or of the national provisions giving them effect, by a national court or a national administrative authority;

D) national measures derogating from Union law rules, based on the grounds for derogation explicitly provided by EU primary or secondary law, or based on the ECJ's case law on mandatory requirements;

E) national provisions that clarify notions contained in EU law measures.

[13] Notably, by Council Directive 79/112/EEC, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, O.J. 1979 *L* 33, 1.
[14] *Ibid.*, § 11.
[15] On this negative criterion, see section 2.1.
[16] In such a situation, a national court of last instance would be under a duty to refer an interpretative question under Article 267 TFEU.

After examining these categories, which are supported by consistent case law of the ECJ, attention will be paid to an additional scenario, which (the "*Kücükdeveci* scenario"), which the ECJ so far uphold in a limited number of cases. Finally, the situation where national law makes a reference to Union law will be considered.

A) *National measures that give effect to an obligation contained in an EU law provision, which is addressed primarily to the domestic legislature*

The source of the EU law obligation can be provisions of either EU primary law or EU secondary law. Amongst the former, the obligation of the Member States, laid by Article 19(1), second sentence, TEU, to "provide remedies sufficient to ensure the effective legal protection in the fields covered by Union law" deserves special attention. Conceptually, it fits within the broader scenario discussed here; however, its practical importance and the cross-sectoral nature justify a specific heading (see point B below). As regards EU secondary law, the obligation can find its source in any legally binding EU act, such as a Regulation, a Directive, or a pre-Lisbon Framework Decision.

Importantly, it is not relevant that the national measure was adopted by the domestic legislator with the view to give effect to an EU law obligation, or, rather, it was the product of a purely domestic initiative and, as a matter of fact, it serves the purpose of implementing an EU law obligation. Accordingly, national measures whose adoption preceded that of an EU rule laying down an obligation on Member States (and/or before the entry into force of the Charter) can fall within the scope of the Charter. Otherwise, different national choices as regards the implementation of EU law obligations (ie, adoption of an ad hoc implementing legislation vs. conformity with EU law ensured by pre-existing, purely domestic legislation) may create disparities as regards the application of the Charter to its beneficiaries. What matters is whether the EU law rule that eventually triggers the application of the Charter is applicable to the situation in the main proceedings (*ratione materiae*, *personae* and *temporis*).

The degree of discretion which Member States can enjoy as regards the modalities of implementation of EU law obligations is also irrelevant in this respect. If the EU law provision at issue does not provide for any discretion, there may be a problem of compatibility of the EU law rule itself with the Charter.[17] By contrast, when some discretion exists, Member States are under a duty to give effect to the relevant EU law obligation in a way that both achieves the latter's purpose and is coherent with EU fundamental rights. Some EU law rules lay down very specific obligations, which leave only a limited degree of discretion to the Member States; other obligations, by contrast, have a more open formulation and leave a broad discretion to the Member States. An important sub-set of this category is constituted by national measures that give effect to the obligation to provide for effective, proportionate and dissuasive sanctions or penalties for the infringement of the national rules implementing a Directive.

Example 1 – Obligation stemming from an EU primary law provision: Case C-650/13 *Delvigne*

National measures concerned: Articles 28 and 34 of the French Criminal Code of 1810 (repealed in 1992), according to which a sentence for a serious criminal offence entailed the loss of civic rights, amongst which, notably, the right to vote at elections.

[17] In case of EU secondary law provisions, when there is no space for conforming interpretation with the Charter, a national court should raise a preliminary question to the ECJ, asking to check the validity of the said provision. By contrast, when the EU law rule is of primary status, there is no such possibility and interpretation in conformity of the Charter is the only option available.

EU law trigger rule(s): the obligation of the Member States to ensure that the election of the European Parliament is by direct universal suffrage and free and secret, as laid down by Article 14(3) 4 TEU and Articles 1(3) and 8 of the Act of 1976 concerning the election of the members to the European Parliament (which has primary law *status*).

The case. Mr Delvigne, a French citizen, was convicted of serious crime and given a custodial sentence of 12 years by a final judgment delivered on March 1988. At the time of the facts, the French Criminal Code provided for the loss of civic rights by operation of law. In 1992, a law was passed that repealed that Code with effect from 1 March 1994. The new Code has introduced a different disenfranchisement regime, according to which the total or partial deprivation of civic rights must be the subject of a Court ruling and may not exceed 10 years in case of the conviction for a serious offence. However, the law repealing the old Code included a provision that confirmed the loss of civic rights resulting, by operation of law, from a criminal conviction by a final judgment delivered before the entry into force of the same law. As a consequence, the more favourable regime introduced by the new Code could not apply retroactively to Mr Delvigne.

In 2012, the man challenged before a national court (the *Tribunal d'instance* of Bordeaux) the decision of the competent administrative commission that had ordered his removal from the electoral roll of the municipality where he resided. The national court doubted the compatibility with the Charter of the national provisions at issue (i.e., those of the old Code that provided for the automatic loss of civic rights for an indefinite duration, and the provision of the law repealing it that saved these provisions' effects as regarded judgments that had become final). In particular, the national court referred to Article 39(1) of the Charter on the right of EU citizens to vote at elections of the European Parliament, and Article 49 of the Charter, insofar as this affirms the principle of retroactivity of the *lex poenalis mitior*.

At the outset, the Court of Justice recalled that, according to Article 8 of the Act of 1976, "subject to the provisions of the same Act, the electoral procedure for the European Parliament is to be governed in each Member State by its national provisions" (§ 29). It then went on by stating that "the Member States are bound, when exercising that competence, by the obligation set out in Articles 1(3) and 8 of the Act of 1976, read in conjunction with Article 14(3) TEU, to ensure that the election of Member of the European Parliament is by direct universal suffrage and free and secret. Consequently, a Member State which, in implementing [this obligation], makes provision in its national legislation for those entitled to vote in elections to the European Parliament to exclude Union citizens who (…) were convicted of a criminal offence and whose conviction became final before 1 March 1994, must be considered to be implementing EU law within the meaning of Article 51(1) of the Charter" (§§ 32 and 33). The Court therefore checked the contested national provisions against Articles 39(1) and 49 of the Charter, and ultimately upheld their compatibility with these latter.

Examples 2 and 3 – Obligation to give effect to a Directive: Case C-528/13 *Léger* and Case C-617/10 *Åkeberg Fransson*

Léger

EU law trigger rule: Commission Directive 2004/33/EC, implementing Directive 2002/98/EC as regards certain technical requirements for blood and blood components

National measures concerned: French legislation enacted in order to give effect to Directive 2004/33/EC (Decree of 18 January 2009 laying down the selection criteria for blood donors).

The case. Mr Léger was not allowed to give blood by the competent doctor on the ground that he had had sexual relations with another man. The decision was based on Decree of 18 January 2009 laying down the selection criteria for blood donors, which provides, as regards the risk of exposure

of a prospective donor to a sexually transmissible infectious agent, for a permanent ban on blood donation for men who have had sexual relations with other men. Mr Léger brought proceedings before the *Tribunal administratif* of Strasbourg, which, having doubts concerning the compatibility of the said provision with Directive 2004/33/EC, decided to refer a preliminary question to the Court of Justice.

The ECJ focused, first of all, on point 2.1 of Annex III of the Directive, in order to establish whether it prevents Member States from providing for a permanent ban on blood donation for men who have had sexual relations with other men. This provision is entitled "Permanent deferral criteria for donors of allogeneic donations" and contains criteria concerning, essentially, the following categories of persons: persons who are carriers of certain diseases, including 'HIV 1/2', or who have certain malignant diseases; intravenous or intramuscular drug users; xenotransplant recipients; and "persons whose sexual behaviour puts them at high risk of acquiring severe infectious diseases that can be transmitted by blood".

The Court started by recalling that, when they implement EU rules, the Member States must make sure that they do not rely on an interpretation of wording if secondary legislation which would be in conflict with the requirements flowing from the protection of EU fundamental rights (§41). It then stated that the national court was under a duty to consider whether the French legislature "could reasonably consider that, in the case of a man who has had sexual relations with another man, there is in France a high risk of acquiring severe infectious diseases that can be transmitted by blood" (§ 45). If this was the case, the Court went on, the national court should establish the compatibility of the national provision with the Charter, notably its Article 21(1), which refers to sexual orientation amongst the grounds on which discrimination is prohibited. The Court recalled that, according to Article 51(1) of the Charter, the latter applies to the Member States only "when they are implementing Union law" (§ 46). It then observed that "[in] the present case, the Decree of 12 January 2009, which expressly refers to Directive 2004/33 in its preamble, implements EU law" (§ 47).

Thus, the Court provided the national courts with the necessary guidance for assessing, in case, the compatibility of the contested national provision with Article 51(1) of the Charter. Firstly, it considered that the French legislation concerned may discriminate against homosexuals on grounds of sexual orientation, because, "taking as a criterion for a permanent contraindication to blood donation the fact that of being 'a man who has had sexual relations with another man, [that legislation] determines the deferral from blood donation of male donors who, on account of the fact that they have had homosexual sexual relations, are treated less favourably than male heterosexuals persons" (§§ 49 and 50). Secondly, the Court turned to Article 52(1) of the Charter, which lays down the conditions for limitations to the fundamental rights granted by the Charter, and provided indications to the national court regarding the assessment of the proportionality of the limitation to the principle of non-discrimination introduced by the legislation. The Court concluded that the legislation could be held compatible with the Directive, interpreted in light of the Charter, "where it is established, on the basis of current medical, scientific and epidemiological knowledge and data, that [the sexual behaviour concerned] puts those persons at a high risk of acquiring severe infectious diseases and that, with due regard to proportionality, there are no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods than such a counter indication for ensuring a high level of health protection of the recipients" (§ 69).

Åkerberg Fransson

EU law trigger rule: Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("VAT Directive"), and Article 325 TFEU.

National measures concerned: Swedish legislation adopted before the accession of Sweden to the Union, which gives effect - in substance, though not formally - to an obligation subsequently introduced by the VAT Directive.

The case. A self-employed fisherman (Mr Åkerberg Fransson) provided false information in his tax returns; as a consequence, he had paid a lower rate of VAT than was due. Under the Swedish legal order, such a misconduct can give rise to a criminal prosecution *and* administrative proceedings, so that the wrongdoer may be subject to both a criminal penalty and a tax surcharge. Since the decision to impose tax surcharges on Mr Fransson had become definitive, the referring judge (a Swedish criminal court, the *Haparanda tingsrätt*), doubted whether the principle of *ne bis in idem*, as granted by Article 50 CFR, required it to dismiss the criminal charge, by setting aside the relevant national provision.

The Swedish legislation in question was not specifically meant to give effect to Union law; in fact, it had been adopted before the date Sweden became a Member of the EU. The ECJ nevertheless considered that this legislation fell within the scope of the EU Charter because "the tax penalties and criminal proceedings to which Mr Fransson [had been or was] subject [were] connected in part to breaches of his obligations to declare VAT" (§ 24). The Court referred to Articles 2, 250(1) and 273 of Directive 2006/112/EC and on Article 4(3) TEU, from which it inferred that "every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion" (§ 25).[18]

In the Court's view, the fact that the system of the Union's own resources *inter alia* includes revenue from the application of a uniform rate to the harmonised VAT assessment bases implies that there exists "a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget" (§ 26). The Court explained that, "[g]iven that the European Union's own resources include (...) revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, *there is thus a direct link* between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, *since any lacuna in the collection of the first potentially causes a reduction in the second*" (*ibid.*). In order to stress the connection between the contested legislation and Union law, the Court referred also to Article 325 TFEU, which requires the Union and its Member States to counter fraud and any other illegal activities affecting the financial interests of the Union through effective deterrent measures. The Court pointed to the fact that, under this provision, the Member States are obliged "to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests" (*ibid.*). This precision is functional to demonstrate the existence of an *actual connection* between the EU legal order and the specific provision concerned, as the Swedish rule at stake referred to all taxes, and not specifically to VAT.

Example 4 – Obligation to give effect to the obligation to provide for effective sanctions, laid down by a Directive: Case C-418/11 *Texdata*

EU law trigger rule: Council Directive 89/666/EEC concerning the disclosure of accounting data by branches of companies established in another Member State (the 'Eleventh Directive')

[18] Article 4(3) TEU imposes on the Member States a general duty of sincere cooperation with the Union, as regards the fulfilment of the obligations arising from the acts of the institutions. Article 2 of the VAT Directive lists the transactions subject to VAT, whereas Article 250(1) stipulates that "[e]very taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable". Article 273 stipulates that Member States "may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion".

National measures concerned: The provisions of the Austrian Commercial Code on the obligation to submit annual accounts for branches of foreign companies and the correlative penalties for failure to fulfil the obligation, implementing, in essence, the Eleventh Directive

The case. Texdata, a limited German company pursued its activity in Austria through a branch registered with the Austrian commercial register since 2008. In 2011, the Austrian authorities issued two orders sanctioning Texdata for failure to timely submit the annual account data for two financial years, in line with the provisions of the Austrian Commercial Code.

As the national judge doubted the compatibility of the Austrian sanctioning system with the right to effective judicial protection and the right of defence as guaranteed by Article 47 CFR, it referred a question for a preliminary ruling to the ECJ.

The sanctioning system established under paragraph 283 of the Austrian Commercial Code, provided for one special and one ordinary sanctioning procedure. Should a company fail to comply with the nine-months time limit for submitting the accounting data, pursuant to the special procedure, a penalty order was issued, with no prior notification, no obligation to state reasons and no opportunity for the company to state views. If the sanctioned company submitted a reasoned objection to the penalty order, within a 14-days period, the latter were immediately rendered inoperable and the ordinary procedure was launched allowing both parties concerned to make their views known.

In analysing the question, the ECJ first established that Article 283 of the Austrian Commercial Code fell within the scope of EU law for the purpose of Article 51(1) CFR, as the first put in place a sanctioning system to guarantee the respect of an EU law obligation enshrined under the provisions of the Eleventh Directive (§ 75).

Regarding the substance of the CFR rights concerned, the ECJ appreciated that the sanctioning system was compatible with the right to effective judicial protection and the right of defence as neither the 14-days time limit for objections nor the prohibition to state views in the special procedure went beyond a necessary and proportionate limitation of the the right (§§81, 85-88).

B) ***National procedural provisions that allow for the legal protection, before domestic courts, of the rights conferred on individuals by Union law***

According to an established case law of the ECJ, "in the absence of [EU law] rules governing the matter, it is for the domestic legal system of each member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU law], provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)".[19]

The Lisbon Treaty codified this case law: Article 19(1), second sentence, TEU, states that the "Member States shall provide remedies sufficient to ensure the effective legal protection in the fields covered by Union law". **Accordingly, national procedural provisions that give effect to the EU primary law obligation laid down by Article 19(1), second sentence, TEU, fall within the scope of Union law (hence, of the Charter), regardless of whether those provisions were adopted with the specific purpose to comply with that EU law obligation.**

[19] *Steffensen*, § 60.

Example 1 – Case C-279/09 *DEB*

EU law trigger: the principle of the responsibility of the Member States for breaches of EU law, whereby an individual has, on certain conditions, the right to obtain compensation of the damages caused by such a breach, in combination with the case law of the ECJ whereby, in the absence of common procedural rules, the action is governed by the national procedural rules of each Member State, in compliance with the principles of effectiveness and of equivalence[20].

National measures concerned: provisions of the German Code of civil provisions which, according to the interpretation provided by the *Bundesverfassungsgericht* (German Constitutional Court), do not allow access to legal aid for legal persons.

The case. The applicant, a company operating in the natural gas market, claimed to have suffered damages as a consequence of the delay in the transposition of two directives on the supply of natural gas into the German legal order. It therefore sought to sue Germany in accordance with the *Francovich*-jurisprudence.[21] As it lacked any income or assets, DEB could not afford the payment of litigation costs in advance as required by the relevant domestic legislation; for the same reason, it could not pay a lawyer, whose presence is compulsory under German law for the kind of action in question. In light of the interpretation of the relevant domestic provisions flowing from the case law of the *Bundesverfassungsgericht*, DEB requests for legal aid was refused. The company appealed the decision and, while the court of first instance rejected the claim, the *Oberlandesgericht* (Higher Regional Court) decided to submit a preliminary question concerning, substantially, the compatibility of the relevant domestic rules of civil procedure with the EU principle of effectiveness. In its order for reference, the national judge made no reference to the Charter.[22]

After noting that the case concerned "the principle of effective judicial protection[, which] is a general principle of EU law", the ECJ immediately pointed out that, "[a]s regards fundamental rights, it is important, since the entry into force of the Lisbon Treaty, to take account of the Charter, which has "the same legal value as the Treaties" (§ 30).[23] It then recalled that "Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States when they are implementing EU law" (*ibid*.). Accordingly, the Court decided "to recast the question referred so that it relates to the interpretation of the principle of effective judicial protection as enshrined in Article 47 [CFR]".[24] By doing so, the ECJ implicitly affirmed that national provisions that are *functional* to the exercise of actions aimed at ensuring the effective enjoyment of (self-standing) rights granted by Union law - such as, for instance, the right to have Member States make good the damages ensuing from breaches of Union law – shall comply with EU fundamental rights.

[20] Since its judgment in joined Cases C-6/90 and C-9/90, *Francovich*, the Court has held that the Member States are obliged to make good damages caused to individuals by breaches of (then) Community law for which they can be held responsible, provided that certain conditions are satisfied. The action for damages shall be brought before the competent national judges of the Member State that failed to transpose or did not properly transpose the directive. As regards the procedural rules regulating the action, the Court affirmed that "in the absence of Community [now, Union] legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community [now, Union] law (...) [, which nevertheless] must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation", *ibid*., §§ 42 and 43.

[21] See the previous footnote.

[22] The national provisions in question were, notably, Paragraph 12(1) of the *Gerichtskostengesetz* (Law on Court Costs), and Paragraphs 78(1), 114, 116, 122(1) and 123 of the *Zivilprozessordnung* (Code of Civil Procedure).

[23] ECJ, *DEB*, cit., para. 30.

[24] *Ibid.*, para. 33.

C) ***Application of EU law rules, or of the national provisions giving them effect, by a national court or a national administrative authority***

The duty of the Member States to give effect to Union law in compliance with EU fundamental rights does not concern the legislature only. It targets also the national authorities entrusted with the application of the law within the Member States. Therefore, when they apply (or interpret) EU law rules, or the national provisions giving them effect, national courts and administrative authorities shall apply (or interpret) those provisions, so far as possible, in compliance with EU fundamental rights.

For instance, in the *Stefan* case[25], the Court of Justice affirmed that, even if a Member State does not transpose in its legislation Article 4(2), point c) of the Directive 2003/4/EC, on access to environmental information, which authorises to provide for an exception to the obligation to disclose environmental information in order to respect the right to a fair trial, "Member States are, in any event, required to use the margin of appreciation conferred on them by point c) of Article 4(2) in a manner which is consistent with the requirements flowing from Article [47] of the Charter" (§ 34). It then added that, "since all authorities of the Member States, including the administrative and judicial bodies, must ensure the observance of the rules of EU law within their respective spheres of competence, they are, in a case such as that here at issue in the main proceedings, required, if the conditions are fulfilled for application of the second paragraph of Article 47 of the Charter, to ensure compliance with the fundamental right guaranteed by that article" (§ 35). Accordingly, "an interpretation to the effect that Directive 2003/4 authorises Member States to adopt measures that are incompatible with the second paragraph of Article 47 of the Charter or with Article 6 TEU cannot be accepted" (§ 36).

D) ***National measures derogating from Union law rules, based on the grounds for derogation explicitly provided by EU primary or secondary law, or based on the ECJ's case law on mandatory requirements***

Example 1 – Case C-208/09 *Sayn-Wittgenstein*

EU law trigger rule: Article 21(1) TFEU on the free movement of EU citizens within the Union

National measure concerned: an Austrian law, with constitutional status, precluding the use of titles of nobility by Austrian citizens.

The case. In 2003, the *Verfassungsgerichtshof* (the Constitutional Court of Austria) interpreted the Austrian Law on the abolition of titles of nobility (which has constitutional status) as precluding the use of these titles – including those of foreign origin – by Austrian citizens.[26] Mrs Ilonka Fürstin von Sayn-Wittgenstein, an Austrian national who lived in Germany, was informed that her surname was going to be changed to 'Sayn-Wittgenstein'. 'Fürstin [Princess] von Sayn-Wittgenstein' was the surname with which she had been registered in the Austrian register of civil status after her adoption by a German national. The woman brought an appeal before the *Verwalunggsgerichtshof* (Administrative Court), which referred a preliminary question to the ECJ, essentially asking whether the prohibition against holding titles of nobility, including those of foreign origin, could be qualified as a derogation from Article 21(1) TFEU, justified by reasons of public policy.

At the outset, the Court made it clear that the applicant could validly rely on Article 21 TFEU, being "a national of a Member State [who], in her capacity as citizen of the Union, has made use of the freedom to move to and reside in another Member State" (§ 39). The Court observed, "as a preliminary point", that "a person's name is a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the [Charter] and in Article 8 of the

[25] Court of Justice, judgment of 8 May 2014, case C-329/13, *Stefan*.
[26] Verfassungsgerichtshof, Geschäftszahl B557/03, Sammlungsnummer 17060.

[ECHR]".[27] It then admitted that the discrepancy in surnames was able to hinder the exercise of the right to free movement, by obliging the woman continuously to dispel doubts surrounding her identity.[28] However, the Court considered that the objective pursued by the contested national law – *i.e.*, implementing the principle of equal treatment as enshrined in the Austrian Constitution – was compatible with Union law, stressing that that principle is enshrined also in Article 20 CFR (§ 89). Confirming its case law,[29] the Court made clear that "the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State" (§ 91).[30] After noting that, "in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic", the Court concluded that the prohibition did not appear disproportionate with respect to its stated objective (§§ 92 and 93).

Example 2 – Case C-411/10 *NS*

EU law trigger rule: Article 3(2) of Regulation (EC) n. 343/2003 (the Dublin II Regulation), as interpreted by the Court of Justice.

National measure concerned: application of the Dublin Regulation by the competent domestic authority (notably, a decision on whether to transfer the asylum seeker to the Member State competent to examine its request according to the ordinary criteria provided by the Regulation, or to assume the responsibility to examine the application).

The case. Mr N.S., an Afghan national, arrived in the UK after travelling through Greece, and applied for asylum. In accordance with Article 17 of Regulation (EC) n. 343/2003 – which lays down the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (so-called 'Dublin II' Regulation) –,[31] the Secretary of State for the Home Department requested Greece – the Member State of first illegal entry – to take charge of Mr N.S. in order to examine his asylum request.[32] Mr N.S. opposed his transfer to Greece by alleging that, owing to the chaotic condition of the Greek asylum system, there was a serious risk that his fundamental rights, as granted by, *inter alia*, Articles 1, 4, 18, 19(2) and 47 CFR, would have been violated. He therefore argued that the UK should have examined his application by relying on Article 3(2) of the Dublin II Regulation, which allows the Member State where the application is lodged to assume the responsibility of examining it, even though another Member State would be competent. According to Article 3(1) of this Regulation, a request for asylum submitted within the territory of the Union must be examined by a single Member State, which the Member State where the request was lodged must identify in accordance with the criteria set out by the Regulation. Article 3(2) then adds that, "[b]y way of derogation (...), each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in th[e] Regulation". Whilst the judge of first instance dismissed Mr N.S.' request, stating that the Dublin II mechanism is based on the presumption that all Member States are safe countries from the point of view of fundamental rights' compliance,[33] the appeal court decided to issue a reference for preliminary

[27] *Ibid*., para. 50.
[28] *Ibid.*, paragraphs 66 and 70.
[29] Case C-36/02, *Omega*, §§ 37 and 38.
[30] *Ibid*., para. 91, referring to.
[31] O.J. 2003 *L* 50, 1.
[32] Cf. Article 10 of the Regulation, cit. According to its Article 17(1), "[w]here a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant".
[33] *R. (on the application of S) v. Secretary of State for the Home Department*, [2010] EWHC 705 (Admin).

ruling.[34] One of the questions raised was whether the Member States are bound to respect EU fundamental rights when they decide to assume the responsibility of an asylum request under Article 3(2) of the Regulation.

The ECJ dismissed the argument advanced by the British Government, according to which Article 3(2) of the Regulation should be regarded as a genuine 'sovereignty clause', aimed at safeguarding a prerogative that originally belonged to the Member States. Had the Court accepted this argument, it should have dismissed its fundamental rights jurisdiction, in favour of the (exclusive) applicability of *national* and *international* human rights standards. By contrast, the ECJ affirmed its jurisdiction on the decisions adopted by Member States under Article 3(2) of the Regulation, which it regarded as "grant[ing] Member States a discretionary power which forms an integral part of the Common European Asylum System", being one of "the mechanisms for determining the Member State responsible for an asylum application" (§§ 65 and 68). In the Court's view, this is confirmed by the fact that the consequences of these decisions are governed by the Regulation itself (§ 67). On these premises, the Court concluded that "a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter" (§ 68).

E) **National provisions that clarify notions contained in EU law measures**

Union acts sometimes contain articles which provide the definition of specific notions and terms used within the act concerned. The relevant notion or term has an autonomous and uniform meaning under Union law, and in case of doubt, is to be clarified by the ECJ (which shall interpret it in compliance with the Charter). However, there are also acts in which the EU legislature makes an express reference to national law (i.e. the relevant law of each Member State), leaving to it the definition of the notion or term concerned. As the ECJ explained, "such a reference means that the European Union legislature wished to respect the differences between the Member States concerning the meaning and exact scope of the concepts in question".[35] However, as the Court also made clear, the lack of an autonomous definition under Union law does not mean that the Member States may undermine the effective achievement of the objectives of the Union act concerned, nor their duty to give effect to this act in compliance with EU fundamental rights. Therefore, the national measures that specify the abovementioned notions fall within the scope of the Charter.

Example – Case C-571/10 *Kamberaj*

EU law provision: Article 11(1)(d), of Directive 2003/109/EC on the status of third-country nationals who are long-term residents, according to which "Long-term residents shall enjoy equal treatment as regards (…) social security, social assistance and social protection as defined by national law".

National measure concerned: an Italian legislation (more precisely, a Provincial law, adopted, notably, by the autonomous Province of Bolzano) which provides, with regard to the grant of a house benefit, different treatment for long-term third-country nationals compared to that accorded to citizens of the Union (whether Italian or otherwise) residing in the territory of the Autonomous Province of Bolzano.

The case: The Provincial law in question allocated the funds for housing benefit on the basis of a weighted average determined with reference to the numerical size and needs of each category. However, whereas for Italian citizens and citizens of the Union the two factors taken into account when determining the weighted average are subject to the same multiplier, that is 1, for third-country

[34] *R. (on the application of NS) v. Secretary of State for the Home Department* (Reference to ECJ) [2010] EWCA Civ 990.
[35] *Kamberaj*, § 77.

nationals the element relating to their numerical size was subject to a multiplier of 5, whereas their needs were subject to a multiplier of 1. The Tribunal of Bolzano doubted the compatibility of the Provincial law with the principle of non-discrimination between third-country nationals who are long-term residents and Union citizens as established by Directive 2003/109/EC. After finding that the abovementioned mechanism for the allocation of funds created a difference in treatment between the two categories of treatment, the Court considered whether it fell within the scope of Article 11(1)(d), which concerns discrimination with respect to "social security, social assistance and social protection as defined by national law". While acknowledging that "[s]uch a reference [to national law] means that the European Union legislature wished to respect the differences between the Member States concerning the meaning and exact scope of the concepts in question", the Court observed that it "do[es] not mean that the Member States may undermine the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in that provision".[36] After recalling that, according to Article 51(1) of the Charter, the Member States must respect the fundamental rights granted by the Charter "when they are implementing Union law", the Court relied on Article 34(3) of the Charter. According to this provision, "the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources". The Court then affirmed that national measures of social security and assistance that fulfil the purpose referred to by Article 34(3) CFR must be regarded as falling within the scope of the obligation to equal treatment laid down by the Directive.[37] Thus, it was for the national court to determine whether the Provincial law met that condition. In case it did, the Tribunal of Bolzano should hold that the Provincial law was incompatible to the principle of non-discrimination as implemented by the Directive.

F) **Two more situations worth noting …**

F.1 **The "*Kücükdeveci* scenario"**

Kücükdeveci, a case decided shortly after the entry into force of the Lisbon Treaty[38], the ECJ applied the Charter in a case demonstrating a different type of connection between the Charter and EU law than those examined under points A) to E) above.

In a nutshell,[39] the Court relied on the Charter (notably, its Article 21(1) on non-discrimination) in a case concerning a national measure, adopted independently from Union law, that governed the same subject matter subsequently covered by a EU Directive, laying down a rule not compatible with this latter. The Court observed that the allegedly discriminatory conduct had occurred after the expiry of the period prescribed for the transposition of the Directive by the Member States. It then affirmed that, "[o]n that date, that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal".[40] One may therefore infer that, after the expiry of its transposition period, the provisions of a Directive act as trigger for the application of the Charter in any case that falls within the scope *ratione temporis* of the Directive and that involves a national measure (or provisions) dealing precisely with the same subject governed by the Directive.

One can easily see how far-reaching this form of connection is. However, the fact that there is not yet an established case law of the Court requires some caution[41]. .

[36] *Kamberaj*, §§ 77-78.
[37] *Ibid.*, § 92.
[38] Case C-555/07 of 19 January 2010.
[39] See also Module 4.
[40] *Kücükdeveci*, § 25.
[41] See, however, judgment of 26 September 2013, case C-476/11, *HK Danmark v. Experian*. As regards discrimination cases, a specific limit can also be inferred from the subsequent *Kaltoft* judgment. The anti-discrimination Directives

F.2 **Reference to EU law made by a national provision that lacks any other connection with EU law**

The national legislature sometimes decides to include a reference to certain EU (primary or secondary) law provision in a purely domestic measure. According to an established case law of the Court, this "has jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations in which the facts of the case in the main proceedings fell beyond the field of application of EU law but in which those provisions of EU law had been rendered applicable by domestic law due to a *renvoi* made by that law to the content of those provisions".[42] However, the *renvoi* must be fashioned in way such as to make the EU law provision concerned applicable "directly and unconditionally"[43].

When these conditions are satisfied, a national court may (in case of doubt) ask the ECJ to interpret the EU law provisions referred in light of the Charter. In this scenario, the Charter can have an impact on national legislation that, as such, does not fall within the scope of Union law.

2.2 The scope of application of the Charter as a matter of law *and facts*

The previous taxonomy shows that some national provisions have a structural link with EU law, because the national legislator adopted them in order to give effect to specific EU law obligations. These provisions by necessity fall within the scope of Union law (hence, of the Charter). By contrast, when a national provision does not have such a structural link with EU law, the facts of the case play a decisive role as regards the issue of the Charter's application.

Consider the following two cases, **A** and **B**, which are inspired to two real cases decided by the Court of Justice, respectively Case C-279/09 *DEB* and Case C-258/13 *Sociedade Agrícola*.

Case A: a German company, working in the natural gas sector, seeks to bring an action to establish Germany's liability under EU law. Indeed, following Germany's failure to transpose two EU Directives concerning the marketing of natural gas within the fixed deadline, the company suffered major economic losses. Owing to the lack of any income or assets, the company cannot pay a lawyer and therefore seeks legal aid. Nevertheless, according to the German rules, only natural persons can be granted legal aid. The company challenges these rules before the domestic court.

Case B: a Portuguese commercial company ,working in the trading of agricultural products, wants to bring a legal claim against another commercial company established in Portugal, in order to recover a credit for a service provided in Portugal. Nevertheless, the first company lacks any income and assets and cannot pay a lawyer. It makes an application for legal aid but the request is rejected because according to the Portuguese rules only natural persons can be granted legal aid. The company challenges these rules before the domestic court.

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adopted by the EU legislator cover a limited set of grounds of non-discrimination. In one of its preliminary questions, the national court asked whether Union law must be interpreted as laying down a general principle of non-discrimination on grounds of obesity as regards employment and non-discrimination. After stating that neither the Treaties nor EU secondary law would support a positive answer, the Court recalled its case law whereby "the scope of [anti-discrimination Directives] should not be extended by analogy beyond the discrimination based on the grounds listed [therein]".[41] This suggests that, in a case concerning a national measure that governs the same subject matter covered by an anti-discrimination Directive, and that falls within the latter's temporal scope of application, one cannot rely on Article 21 of the Charter to challenge those measures on grounds of non-discrimination not explicitly contained in the Directive. To put it differently, these grounds are an integral part of the material scope of the Directive

[42] ECJ, judgment of 21 December 2011, Case C-282/10, *Cicala*, § 17.

[43] *Ibid.*, § 19. The ECJ referred to previous cases along the same lines, which is useful when considering whether the *renvoi* made by the national law satisfies the *test* established by the Court.

Both the German and the Portuguese courts before which the two companies brought proceedings have doubts regarding the compatibility of the relevant national rules with Article 47(3) of the Charter on the right to legal aid. There is no EU legislation concerning access to legal aid before the Member States' courts. Thus, there is also no structural link between the national provisions concerned and EU law. Both courts decide to refer a preliminary question to the ECJ, which holds the Charter applicable in case A, whereas it declares its manifest lack of jurisdiction in case B. Why?

The legal action that the German company wants to bring against Germany aims at enforcing a right granted by EU law: the right to have Member States compensate for damages caused by violations of their EU law obligations (such as the obligation to transpose an EU Directive within the fixed deadline). Thus, there is something more than the "mere" claim that a provision of the Charter is violated.

By contrast, there is no EU law rule other than the provision of the Charter that is allegedly violated that applies in case B. All elements of the case are confined within the territory of a single Member State; thus, the Treaty provisions on the free movement of services do not apply. Moreover, the legal action that the Portuguese company wants to bring does not concern a situation governed by EU law. However, if the facts of the case were different (for instance, the provisions on the freedom to provide services were applicable), the Charter could apply.

The main conclusion that can be inferred from this example is that, unless the national provision has a structural link with EU law (ie, it was adopted by the national legislature in order to give effect to EU law), the question of whether that provision falls within this scope of the Charter cannot be answered once and for all. Rather, it is strictly dependent on the facts of the case; accordingly, it may vary from case to case.

3. The relevance of the ECHR and of the national standards of protection within the scope of the Charter

The applicability of the Charter does not necessarily exclude the application of other sources of fundamental rights protection, which are binding on the Member State concern. Below, attention is paid, respectively, to the relationship between the Charter and the Member States' constitutions (**section 3.1**), and those between the Charter and the ECHR (**section 3.2**).

3.1 The relationship between the Charter and the Member States' constitutions

Article 53 of the Charter, titled "Level of protection", states: "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, (…) by the Member States' constitutions". Apparently, this provision places a limit on the absolute character of the primacy of EU law over national law, by allowing the Member States, in situations falling within the scope of the Charter, to rely on to the domestic standard of fundamental rights protection, if that standard provides for more extensive protection than the Charter. The Court of Justice, sitting as the Grand Chamber, firmly rejected this interpretation in *Melloni*.[44]

The case arose from a preliminary reference question issued by the Spanish Constitutional Court. This asked, in essence, whether it could rely on Article 53 of the Charter in order to apply Article 24(2) of the Spanish Constitution to the addressees of a European Arrest Warrant (EAW) relating to judgments delivered *in absentia*. Indeed, the domestic standard could provide for a broader protection of fair-trial rights than that granted by the Framework Decision instituting the EAW mechanism. The

[44] Judgment of 26 February 2013, case C-399/11, *Melloni*.

Court of Justice affirmed that such a use of Article 53 of the Charter "would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution".[45] Thus, it confirmed its well-established case law whereby, "by virtue of the principle of primacy of EU law, (…) rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State".[46]

In the same judgment, however, the ECJ added that "Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised". The Court found that the provision of the Framework Decision that concerns the execution of an EAW relating to a judgment delivered *in absentia* does not grant any freedom of manoeuvre to the Member States. Indeed, that provision states that, as a rule, Member States can refuse the execution of such an EAW; by way of exception, refusal is not allowed when certain circumstances, which are specified by the provision itself, occur. In other words, through the provision at issue, the EU legislator tried to achieve a fair balance between the protection of the rights of the defence of the addressees of an EAW, on the one side, and the safeguard of the efficiency of the EAW system, on the other. The Court therefore concluded that there was no space for the application of Article 24(2) of the Spanish Constitution.

Based on the Court's approach in *Melloni*, in order to understand if there is space for the application of the domestic standard of fundamental rights protection, one must verify whether the EU law rule that triggers the application of the Charter in the specific case[47] leaves some margin of discretion to the Member States as regards its implementation. If yes, then the national court will apply the domestic standard of protection, provided that the level of protection granted by the Charter as well as the "primacy, unity and effectiveness" of Union law, are not compromised (*scenario 1*).

By contrast, there is no space for the application of domestic standards in situations where the EU law rule that triggers the application of the Charter to a specific case sets a precise level of protection for the fundamental right(s) involved (*scenario 2*).

Note that, under the first scenario, the ECJ referred to the level of protection granted by the Charter, "as interpreted by the Court" itself. Morever, the second limit relies on broad concepts, whose application to a specific case may sometimes not be obvious. In case of doubts, national courts may consider issuing a preliminary reference question to the ECJ. Similarly, a national court should send a reference for preliminary ruling to the ECJ, when there are doubts as regards the compatibility of the EU law trigger provision with the Charter.

3.2 The ECHR as a minimum standard of protection with respect to the Charter

Article 52(3) CFR lays down a specific rule concerning the relevance of the ECHR within the Charter's scope. It states, notably, that, "[i]n so far as th[e] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the (...) Convention". The same provision then adds that Union law is not prevented from providing more extensive protection.

In other words, the ECHR represents a minimum *standard* of protection insofar as "corresponding rights" are concerned.

[45] *Melloni*, cit., § 59.
[46] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, § 3, and *Melloni*, cit., § 59.
[47] See section 2 above, notably 2.2.

The official explanation of Article 52(3) CFR contains two lists of "corresponding rights", enumerating respectively, the Articles of the Charter where "both the meaning and the scope are the same as the corresponding Articles of the ECHR", and where the Articles "meaning is the same as the corresponding Articles of the ECHR, but (...) the scope is wider." The two lists are not exhaustive: they reflect the current state of evolution of the law and remain open to "developments in the law, legislation and the Treaties." Indeed, some additional correspondences already emerged in the ECJ's case law. For instance, according to its official explanation, Article 49(1) corresponds to Article 7(1) ECHR, with the exception of the principle of retroactivity of the subsequent law providing for a lighter criminal penalty. This principle can be found in the last part of the Charter's provision. However, in a judgment of 2009, *Scoppola v. Italy (No 2)*,[48] the Strasbourg Court interpreted Article 7(1) ECHR, as encompassing also the principle of the retroactivity of the lighter criminal sanction, by making a reference to Article 49(1) CFR.

When a national measure that falls within the scope of the Charter[49] seems to be in conflict with a fundamental right of the Charter, the national court shall establish whether a "corresponding right" is at issue. If yes, in order to establish whether there is a violation, account shall be taken of the meaning and the scope of the relevant fundamental right as it results from the ECHR, taking account not only of the text of the Convention but also of the interpretation provided by the Strasbourg Court.[50] According to the official explanation to Article 52(3) CFR, the parallelism also extends to the issue of authorised limitations, which must be the same as those laid down by the ECHR. Accordingly, the same grounds for limitations provided under the ECHR apply to the Charter's corresponding rights. Moreover, rights that are absolute under the Convention are equally absolute under the Charter.

Since all the Member States are High Contracting Parties to the ECHR, it is important to ensure the substantive coherence of the protection afforded to corresponding rights under the Convention and under the Charter. The national court shall ensure that the level of fundamental rights protection granted by the national measures that fall within the scope of the Charter is consistent with Article 52(3) of the Charter. At the same time, they should contribute to ensure that EU legislation is in line with this provision, issuing a preliminary question to the ECJ, if needed.

4. The effects of the Charter

The Charter acts as a parameter for the interpretation of the primary and secondary rules of Union law and of the national measures that fall within its scope (see section 2). Its provisions also provide grounds for the review of EU secondary law rules, In case of a(n apparent) conflict, a national court may (or should, depending on the circumstances) send a reference for preliminary ruling to the ECJ, asking it to interpret the provision, or to assess its validity, in light of the Charter.

What if the national measure cannot be interpreted in conformity with the Charter? If the relevant provision of the Charter meets the conditions for direct effect, which the ECJ identified, the national court will be able to enforce it in the case at issue, without having to wait for the intervention of the domestic legislature. However, before examining these conditions (section 4.2), it is worth paying some attention to Article 52(5) CFR, which foresees a specific, and more limited, regime for the provisions of the Charter containing "principles" (section 4.1).

4.1 The justiciability of Charter "principles"

Article 52(5) states:

[48] ECtHR, judgment of 17 September 2009, app. no. 10249, *Scoppola v. Italy* (No. 2), §§ 105 and 109.
[49] See section 2.2. above.
[50] This reference to the case law of the ECtHR can be found in the explanation of Article 52(3) of the Charter.

> "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".

In other words, this provision singles out a category of Charter's provisions – those containing "principles" –, which can only act as parameters of interpretation and grounds of validity/compatibility of Union legislation and national measures implementing Union law. In other words, "principles" cannot be relied on directly to disapply conflicting national provisions.

Article 52(5) of the Charter is unclear as regards the scope of application of "principles". The expression "such acts" in the second sentence of Article 52(5) of the Charter may suggest that "principles" can be relied on to test the compatibility with the Charter only of Union and national measures adopted *with a view* to give effect to the "principle" allegedly violated. The broader reading, whereby any national measure falling within the scope of the Charter can be tested against a "principle" is preferable. Otherwise, the protection of "principles" would be lacking with respect to the acts that are more likely to interfere with them, i.e. those acts that are not adopted with the purpose to implement "principles". According to this broader reading, the distinctive feature of "principles", in justiciability terms, is that they cannot be relied on to disapply conflicting domestic provision.

Problematically enough, there is not a definition of "principle" in the Charter, nor does the explanation of Article 52(5) provide a list of Charter "principles". However, the explanation contains some guidance: for illustrative purposes, it mentions as examples of "principles" Articles 25 (Rights of the elderly), 26 (Integration of people with disabilities), and 37 (protection of the environment). One must infer that the formulation of an entitlement as a "right" or as a "principle" is not a decisive element. The explanation also adds that, "[in] some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34". It is unclear whether this indication refers to the Articles of the Charter that encompass more than one entitlement, or it rather allows for the identification of "elements of a right and of a principle" within the same entitlement.

The case law of the Court of Justice does not provide much guidance as regards the identification of "principles" and their justiciability. So far, the Court has referred to Article 52(5) CFR only in the *Glatzel* judgment.[51]

Since the case concerned a Directive implementing *stricto sensu* a "principle", the judgment does not bring much clarity to the issue of the scope of application of "principles". In addition, it seems that the ECJ limited the capacity of "principles" to act as grounds of validity of Union law (and of compatibility of national law) only to Charter's provisions that confer on individuals directly enforceable *rights*. Yet, the text of Article 52(5) of the Charter suggests that also "principles" can perform this function, at least with respect to EU and national acts adopted in order to implement them.

More clarity on these issues is needed: national courts can contribute by referring preliminary questions to the Court, in the context of cases involving Charter's provisions that may qualify as "principles".

The *Glatzel* case

Mr Glatzel was refused a driving licence for heavy goods vehicles, on the ground that he suffered from a substantial functional loss of vision in one eye, called unilateral amblyopia,. The man brought an action before the *Verwaltungsgericht Regensburg* (Administrative Court). Since this

[51] ECJ (Fifth section), judgment of 22 May 2014, case C-356/12, *Glatzel*.

court dismissed the action, he brought an appeal before the *Bayerisher Verwaltungsgerichtshof*, which decided to stay the proceedings and ask a preliminary reference to the ECJ. In particular, the referring court questioned the validity of point 6.4 of Annex III to Directive 2006/126 (on driving licences), which concerns the minimum standards for the drivers of heavy vehicles, in the light of Articles 20, 21(1) and 26 of the Charter, on (respectively), equality, non-discrimination, and the integration of people with disabilities. The *Bayerisher Verwaltungsgerichtshof* considered that the requirement, laid down by point 6.4 of Annex III to the Directive, whereby the drivers of heavy good vehicles must have a minimum visual acuity of 0,1 for the worse eye constituted discrimination on grounds of disability in respect of person who do not have such visual acuity, since they have binocular vision and a field o vision sufficient for both eyes.

The ECJ started by analysing the compatibility of point 6.4 of Annex III in light of Article 21(1) of the Charter, which prohibits discrimination based, *inter alia*, on disability. The Court found that it did not have sufficient information to determine whether the impairment suffered by Mr Glazel could be considered "disability" for the purposes of Article 21(1) of the Charter. However, the ECJ argued that, if the state of the man constituted discrimination, it could nonetheless be justified "in so far as such requirement actually fulfils an objective of public interest, is necessary and is not a disproportionate burden" (§ 51). The Court found that these requirements were justified; therefore, it upheld the compatibility of point 6.4 of Annex III in light of Article 21(1) of the Charter.

The Court then focused on the validity of the provision in light of Article 26 of the Charter, whereby "[the] Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community".

The Court started by recalling that, "as is clear from Article 52(5) and (7) of the Charter and the Explanations relating to the Charter of Fundamental Rights concerning Articles 26 and 52(5) of the Charter, that reliance on Article 26 thereof before the court is allowed for the interpretation and review of the legality of legislative acts of the European Union which implement the principle laid down in that article, namely the integration of persons with disabilities" (§ 74). The Court then quoted recital 14 and Articles 5(2) of Directive 2006/126, which concern specific conditions for the issue of driving licences to drivers with disabilities, and affirmed that, "in so far as Directive 2006/126 is a legislative act of the European Union implementing the principle contained in Article 26 of the Charter, the latter provision is intended to be applied to the case in the main proceedings" (§§ 75-76). Nevertheless, after quoting the text of Article 26 of the Charter, the Court considered that "the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such". Accordingly, the Court upheld the validity of point 6.4 of Annex III to the Directive also in light of Article 26 of the Charter.

4.2 Reliance on the Charter to disapply conflicting national provisions (direct effect)

According to a settled case law of the Court of Justice, the provisions of EU law that are clear, precise and not subject to conditions can be relied on by legal and natural persons before domestic courts, in order to obtain the disapplication of conflicting national provisions. We speak of, respectively, vertical and horizontal direct effect depending on whether the direct effect of a EU law provision is

relied upon in the context of proceedings opposing a natural or legal person to a Member State (*rectius*, one of its entities), or in disputes between private parties.[52]

In *Association de médiation sociale* (*AMS*)[53], the ECJ confirmed that at least some provisions of the Charter can be relied on to disapply a conflicting national measure (that implements Union law within the meaning of Article 51(1) of the Charter), including in a dispute between private parties. The provisions of the Charter amenable to such effect are those which are "sufficient in itself to confer on individuals an individual right which they may invoke as such".

It follows from *AMS* that the prohibition of age-discrimination in Article 21(1) of the Charter satisfies the test laid down by the Court, whereas Article 27 on the right of workers to information and consultation within the undertaking does not. Plausibly, Article 21 of the Charter satisfies the test also in relation to other of the grounds of non-discrimination mentioned. However, other Articles of the Charter may also satisfy the test. If the pending case involves a different provision of the Charter, it might be useful to ask the CJEU to clarify whether it satisfies the *AMS* test.

The *AMS* case

Association de médiation sociale (hereafter: AMS) is a French non-profit association, governed by private law. At the time of the facts, the working staff of AMS included eight employees with contracts of indefinite duration, and more than a hundred employees hired on the basis of "accompanied-employment contracts" (the *contrat d'accompagnement dans l'emploi*). According to Article L. 1111-3 of the French Labour Code, employees holding the latter type of contract shall not be considered when calculating staff numbers in the undertaking. Thus, AMS did not reach the minimum threshold of 50 employees that, under the Labour Code,[54] makes the creation of a work council and the appointment of a union representative compulsory.

A trade union nonetheless created a section within the AMS, appointing as representative one of the undertaking's permanent employees. AMS sought the annulment of the appointment before French courts. The case arrived before the last instance court, notably the *Cour de Cassation (Chambre sociale)*, which decided to refer two preliminary questions to the Court of Justice. Firstly, it asked whether Article 27 of the Charter, on the right of workers to information and consultation within the undertaking, as specified by Directive 2002/14/EC[55], can be invoked in a dispute between private individuals in order to assess the compatibility of Article L. 1111-3 of the French Labour Code. In case of an affirmative answer, the *Cour de Cassation* also asked whether those provisions (i.e. Article 27 of the Charter as specified by the Directive), should be interpreted as precluding a national legislative provision such as that in question.

Firstly, the Court of Justice reformulated the two preliminary questions raised by the *Cour de Cassation* to ask "whether Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter can be invoked in a dispute between individuals in order to disapply that national provision."

[52] It is worth recalling that the Court of Justice has endorsed a broad notion of "State" for the purpose of vertical direct effect, which includes also "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals". See case C-282/10 *Dominguez*, § 39).

[53] Judgment of 15 January 2014, case C-176/12, *Association de médiation sociale* (*AMS*).

[54] Cf., notably, Articles L. 2142-1-1, L. 2143-3, and L. 2322-1.

[55] Directive 2002/14/EC, establishing a general framework for informing and consulting employees in the European Community.

Secondly, interpreting Article 3(1) of Directive 2002/14, the Court affirmed that Member States can determine different modalities of calculation of employees depending on their working contract, but cannot exclude *tout court* a category of employees from that calculation. Thus, a national provision such as that of the French Labour Code is inconsistent with the Directive.

As a third step, the Court found that Article 3(1) enshrines an obligation to take into account all employees, which "fulfils all of the conditions necessary for it to have direct effect".[56] However, according to an established case law of the Court, a directive cannot "of itself" apply in proceedings exclusively between private parties.[57]

At this point, the Court considered that it should ascertain "whether (…) Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, can be invoked in a dispute between individuals, in order to preclude, as the case may be, the application of the national provision which is not in conformity with that directive".[58] Since the national provision in question was adopted to implement Directive 2002/14, the applicability of the Charter was not disputed.[59]

The Court distinguished *Association de médiation sociale* from *Kücükdeveci*. The fundamental right at stake in the latter case, "the principle of non-discrimination on grounds of age (…), laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such".[60] By contrast, Article 27 of the Charter "to be fully effective (…) must be given more specific expression in European Union or national law"; hence, it cannot be invoked in the context of a horizontal dispute in order not to apply national provisions conflicting with Union law.[61]

The only remedy available to the defendants remained a liability action against France for not having ensured that national law conforms with the Directive, "in order to obtain, if appropriate, compensation for the loss sustained."[62]

[56] *AMS*, cit., § 35.
[57] Ibid., § 36.
[58] Ibid., § 41.
[59] Ibid., § 43.
[60] Ibid., § 47.
[61] Ibid., §§ 45 and 48.
[62] Ibid., § 50.

MODULE 2

Judicial Interaction Techniques

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1. Judicial Interaction Techniques: purpose and terminology[63]

This module aims to briefly discuss the added value of various dimensions of judicial interactions for the application of the EU Charter. It will focus on a three-dimensional dialogue: 1) between national judges and the CJEU (*vertical judicial interaction*); 2) between national judges from the same Member States (*internal horizontal judicial interaction*); and 3) between national judges of different Member States (*transnational judicial interaction*). It will also explore the concrete effects that judicial interactions can bring on a systemic level, that is, on: the domestic legal frameworks and jurisprudence of the Member States, as well as on relations between judiciary, administration and legislator, while keeping the particular focus on the application of the EU Charter.

The module will show how the use of judicial interaction techniques by national courts has helped them to solve issues concerning conflict(s) between national and EU legislation;[64] judicial disagreements at national and/or European level;[65] between various fundamental rights and/or fundamental freedoms;[66] or various public interest concerns and fundamental rights.[67] Additional examples of the functional role of judicial interaction and the role of the EU Charter can be found in the thematic ACTIONES Modules. The cases selected to illustrate the added value of judicial interaction in the implementation of the EU Charter are limited to: *non-discrimination*, *consumer*, *criminal*, *asylum and irregular migration*, since these form the subject areas covered by the ACTIONES Project.

The vertical, horizontal or transnational judicial dialogue(s) have produced concrete changes on the national legislation,[68] on the relation between the domestic judiciaries,[69] on the competences of the

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[63] This Module was inspired by the *JUDCOOP Final Handbook*, available online, http://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/JUDCOOPdeliverables/FinalHandbookUseofJudicialInteractionTechniquesinthefieldofEFRs.pdf It is recommended that the Module is used together with the *JUDCOOP Guidelines on the use of Judicial Interaction Techniques*, available online at in EN and 5 other languages at http://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/EuropeanJudicialCooperationinFR/Documents.aspx

[64] In the field of migration, see: Case C-562/12, *Abdida*, in the ***ACTIONES Module on Asylum and Immigration; in non-discrimination***, see: Case C-555/07, *Kukudeveci*, ***ACTIONES Module on Non-discrimination***; consumer protection, see: Case C-471/11, *Banif Plus Bank*, ***ACTIONES Module on consumer protection***; effective judicial protection, see Case C-279/09, *DEB*, ***ACTIONES Module on effective judicial protection***.

[65] For example, the cases on the applicable benchmark of Art. 4 CFR violations acting as barrier to Dublin transfers of asylum seekers, see the Case C-578/16, C.K. and others, in ***ACTIONES Module on Asylum and Immigration***, and C-411/10, *N.S. and others* in ***ACTIONES Module on Effective Judicial Protection***.

[66] For example, between freedom of expression and data protection, Case C-73/07, *Satamedia*, ECLI:EU:C:2008:727; case commented in JUDCOOP Final Handbook, p.81;

[67] See the Case C-300/11, *ZZ*, in ***ACTIONES Module on Effective Judicial Protection***.

[68] All the thematic Modules contain examples of amendments of national laws following the use of the preliminary reference or disapplication of national law by the EU countries courts. For instance, in consumer protection, see the Spanish amendment on mortgage credit agreements; in asylum, see the Belgian amendment recognising suspensive effect of appeals in immigration cases; following the preliminary references sent by the Italian courts in 2011- *El Dridi* case, in 2012 – *Sagor*, the various provisions of the Italian Alien law have been declared incompatible with EU law and the Italian legislator was forced to intervene in order to remedy the incompatibility with the EU Return Directive. In relation to the right to be heard, see, in particular the right in the Belgian legal order, see the ***ACTIONES Module on Asylum and Immigration***.

[69] For example, according to the preliminary rulings of the CJEU in *Cartesio* and *Elchinov*, the review performed by higher national courts may not jeopardise the direct relationship between lower courts and the CJEU, Case C-210/06, *Cartesio Oktató Szoláltató*, ECLI:EU:C:2008:723; In *Elchinov*, the CJEU held that lower courts are not bound by national jurisprudence, even if originating from superior courts if incompatible with EU law and jurisprudence, see Case C-173/09,

courts vis-à-vis the executive,[70] and on domestic judicial doctrines, for the purpose of securing the supremacy and direct effect of EU law and the EU Charter.[71] Ultimately, it is clear that judicial interaction has contributed first to a more coherent application of the EU Charter,[72] and secondly to an enhanced fundamental rights protection of the individuals. They may have also offered national judges a cost-effective inspirational legal tool for solving the difficult questions concerning the application of the EU Charter raised before them.

For the purposes of this module, the term "judicial interaction techniques" refers to various techniques used by courts and judges to solve issues of normative or judicial interpretation incompatibility in a way that ensures coherence and coordination among different legal and judicial systems in the safeguard of human rights that are protected by various levels of governance (the national, international and supranational normative layers).[73]

In the last decade, judicial interactions among national and European judges have significantly increased. Whether *direct* (e.g. preliminary reference), *indirect* (e.g. citation of European or foreign judgments), *informal* (e.g. meetings between national judges, circulation of legal enquiries or questionnaires on the application of a certain EU legal provisions), they have contributed immensely to the implementation of EU law. The significant added value of these judicial interactions is to offer an opportunity to national judges to discuss and exchange views on the development of jurisprudence, tackling problems of interpretation and application in diverse areas of law, including the application of the EU Charter.

2. Judicial Interaction Techniques as Tools to clarify the application of the EU Charter

Judicial interaction techniques are particularly important when a case must be adjudicated by taking into account not only national law, but also one or more of the supranational sources: EU, ECHR or international law. This is often the case when issues concerning the protection of fundamental rights arise before a court of an EU Member State. The existence of multiple supranational systems providing fundamental rights protection (ECHR, EU law, international human rights law), with partially overlapping spheres of application and different rules on normative interpretation and hierarchy, places a complex mandate on national judges. These are assigned the role of natural judges of both EU law and the ECHR. Therefore, whenever they are called to adjudicate on fundamental rights, national courts need to:

(i) understand whether supranational sources of fundamental rights protection apply to the case pending before them and, if so, which ones;

(ii) determine the precise scope, meaning and level of protection of the relevant supranational fundamental right(s), taking into account the case law of at least one relevant supranational court (CJEU/ECtHR);

Elchinov, ECLI:EU:C:2010:581. More recently, the CJEU held that Article 267 TFEU precludes the mechanism established by Article 99(3) of the Italian Code of Administrative Procedure, which provides for mandatory referral to the plenary session of the Consiglio di Stato by any chamber of that court if it considers it necessary to disregard a principle of law stated by the plenary session. Case C-689/13, *Puligienica Facility Esco SpA (PFE)*, ECLI:EU:C:2016:199.

[70] For example, in Case C-146/14 PPU, *Mahdi*, ECLI:EU:C:2014:1320, the CJEU held that Arts. 6 and 47 EU Charter and the general principle of EU law of effectiveness, together with Art. 15 Return Directive empowers national courts to undertake an individual assessment of the facts and circumstances of the case in circumstances of prolongation of detention of irregular migrants under the scope of application of the Return Directive.

[71] For example, see the *Melloni* case discussed in the following section.

[72] See the conclusions reached by the ACTIONES thematic modules.

[73] The definition was first given by the JUDCOOP Final Handbook.

(iii) ensure the effective application of the relevant supranational norm(s), which might require addressing conflicts between the European rule(s) and national law;

(iv) carry out an operation of balancing between different fundamental rights and/or general interests. If the case falls under the scope of both EU law and the ECHR, the previous analysis is multiplied, and national judges must also engage with the complex issue of the relationships between the two systems (and their courts).

National courts have at their disposal a number of judicial interaction techniques to ensure the primacy of the EU law and EU Charter[74], namely: *duty of consistent interpretation of national law with EU law; power, or in certain circumstance duty to send a preliminary reference for the CJEU; the principle of proportionality; mutual recognition of foreign judgments; comparative reasoning with national legislation and jurisprudence from another Member State; disapplication of national law due to violation of EU norms*.[75] In the following paragraphs each of these judicial interaction techniques will be presented in an attempt to highlight their scope of application, function, and added value for the application of the EU Charter and more generally fundamental rights. Each of the following sections will include commentaries of landmark national and European cases that will illustrate the use of judicial interaction techniques for the purpose of solving conflicts between norms, judicial interpretations, fundamental freedoms and fundamental rights or different fundamental rights, while at the same time ensuring conformity with the EU Charter. The techniques are presented following the order they would normally be considered in practice. Please use this module together with the *Practical Guidelines on the use of Judicial Interaction Techniques on the application of European Fundamental Rights*.[76]

2.1. Consistent interpretation

The first judicial interaction technique that can be used by national courts for the purpose of remedying discrepancies between national and EU law/EU Charter is consistent interpretation. When applying national law that falls within the scope of EU law, national courts have a duty to interpret it as far as possible in light with the wording and purpose of the applicable EU law and EU Charter.[77] According to *Marleasing doctrine*, national courts have a duty to interpret national law in conformity with EU law, even if the respective EU secondary provision has not yet been transposed by the domestic legislator. In *Marleasing*, the CJEU traced the duty of conform interpretation which required, *in casu*, the Spanish referring court to not take into account a particular interpretation of the Civil Code insofar as it would produce a result not envisaged by the Directive. Unlike the disapplication technique, which will be discussed below, consistent interpretation imposes upon national courts a duty to use this technique even before the deadline of the transposition of the Directive has expired.

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[74] The EU principle of primacy claims that *all* EU law (both the founding Treaties provisions and secondary legislation) has absolute and unconditional precedence and should always be given precedence over *all* conflicting provisions of national law (including constitutional law provisions). The latter can therefore never be invoked to avoid the application of EU law. This obligation to award priority to EU law applies to all EU countries' bodies, legislative, executive, and judicial; the principle is a judge made one, first established in Case 6/64, *Costa v ENEL*, ECLI:EU:C:1964:66; Case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114; Case 106/77, *Simmenthal*, ECLI:EU:C:1978:49; Joined Cases C-10/97 to C-22/97, *IN.CO.GE*, ECLI:EU:C:1998:498; and now codified in Declaration 17. See M. Claes, 'The Primacy of EU law in National and European Law', *The Oxford Handbook of European Union Law*, Edited by Damian Chalmers and Anthony Arnull, Oxford University Press, 2016.

[75] On the definition of 'Judicial Interaction Techniques', see Final Handbook 'Judicial Interaction Techniques – Their Potential and Use in European Fundamental Rights Adjudication', available online, p. 38-40.

[76] The Guidelines are available online in EN and 5 other languages at http://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/EuropeanJudicialCooperationinFR/Documents.aspx

[77] C-106/89, *Marleasing*, ECLI:EU:C:1990:395.

Consistent interpretation is also a crucial tool for upholding the autonomous meaning of legal terms in EU law and finding a 'fit' between EU and national law. In the words of the **UK High Court of Appeal**,[78] the wording of EU rules is prone to "[…] being adapted to the legal systems of all Member States." (para. 89)

The judicial interaction technique of consistent interpretation prevents and solves direct conflict between legal norms of national and EU/ECHR origin, between EU and ECHR norms, and between divergent judicial interpretations of national norms in light of EU/ECHR law.

2.1.1. Functions of the consistent interpretation

Through the use of the consistent interpretation technique, national courts can achieve the result of remedying an apparent conflict between national legislation, judicial doctrine or administrative practice and a norm of EU law and/or a provision of the EU Charter. This is perhaps one of the simplest case where consistent interpretation could be useful.

A more complex case is when the CJEU and ECtHR developed tests or interpretations of a fundamental right which, at face value, put national courts in a difficult position of having to choose to apply either the judicial interpretation of the CJEU or of the ECtHR, as a concomitant application is apparently impossible. There have been cases, where national courts were faced with challenging situations of having to ensure consistent interpretation of national law with both EU and ECHR norms which have received diverging interpretation by the CJEU and ECtHR. This has been for instance the case in regard to the interpretation of Article 4 CFR, respectively Article 3 ECHR in the field of transfers of asylum seekers to the responsible Member States under the Dublin procedure.[79]

For instance, while until 2013, the jurisprudence of the ECtHR (*M.S.S v Belgium and Greece)*[80] *and CJEU* (*N.S.)*[81] was in agreement that *proof of systemic deficiencies* in the asylum procedure and in the reception conditions of applicants in the Member State of transfer, which reach the level of a risk of violation of Article 4 CFR act as barrier to Dublin transfers, following the CJEU judgments in the *Puid* and *Abdullahi*, *the two Courts jurisprudence was interpreted by national courts as divergent. While CJEU set only 'systemic deficiencies' as benchmark for suspending Dublin transfers, the ECtHR* (*Tarakhel)*[82] the ECtHR required that also an individual violation of Art. 3 ECHR requires an obligation not to transfer.

In the absence of a hierarchical relation between the judgments of the ECtHR and CJEU, it is left to the national courts themselves to identify ways of bringing about greater coherence.

An example of constructive application of consistent interpretation was provided by the **UK Supreme Court**. In *EM (Eritrea),*[83] the Court established that the legal test to be followed when determining whether particular violations of human rights amount to legitimate grounds for limiting mutual trust should be the ECtHR *Soering* test coupled with the *M.S.S* and *N.S.* threshold. Thereby, both operational, systemic failures in the national asylum systems and individual risks of being exposed to treatment contrary to Article 3 ECHR and Article 4 CFR should be considered as legitimate thresholds for the limitation of the principle of mutual trust. The **UK Supreme Court** held that an interpretation of the *N.S.* judgment should be that "infringements of fundamental rights provide evidence of the systemic deficiency" rather than that "a systemic deficiency had to be demonstrated before violation of a fundamental right."[84] It thus first provided a creative interpretation of the CJEU *N.S.* judgment that would then ensure conformity with the ECtHR *Soering* threshold, and avoid placing the national court in a position of choosing loyalties.

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[78] *Bucnys and others. v. Lithuanian and Estonian Ministries of Justice* [2012] EWHC 2771 (Admin).
[79] The case is discussed in ***ACTIONES Module on effective Judicial Protection***.
[80] *M.S.S. v Greece and Belgium*, Appl. No. 30696/09, ECtHR, Judgment of 21 January 2011.
[81] See, C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865, para. 86. See also *Puid* (C-4/11) EU:C:2013:740.
[82] *Tarakhel v Switzerland*, Appl. No. 29217/12, ECtHR, 4 November 2014.
[83] *R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department*, [2014] UKSC 12, Judgment of 24 February 2014.(hereinafter *EM (Eritrea*)).
[84] *Ibid.*, paras. 89 and 44.

The disadvantage of the consistent interpretation technique is that it cannot have the spill over effect of the preliminary reference. For instance in the case of Dublin transfer, even after the judgment of the UK Supreme Court, disagreement among national courts on the correct benchmark of Article 4 CFR that requires suspension of Dublin transfer persisted. Some national courts adopting the strict test of the systemic deficiencies of the N.S. judgment of the CJEU, while other choosing the ECtHR double test of systemic deficiencies and individual violation of Art. 4 CFR. This has been the case in Slovenia, between the Supreme Administrative Court and Constitutional Court. A disagreement that was finally solved by way of preliminary reference sent by the Slovenian Supreme Court, asking the CJEU precisely on the benchmark to follow in light of the ECtHR jurisprudence.[85]

The Austrian Constitutional Court, U466/11 and others – consistent interpretation of national constitutional standards on fair trial with Art. 47 EU Charter

Type of interaction: Vertical indirect (domestic court – CJEU and ECtHR), Horizontal (linking ECtHR case law with EU Charter compatibility)

Facts: The applicants are Chinese nationals, seeking subsidiary protection in Austria. After seeing their applications, as well as their appeals to the Asylum Court, rejected, they appealed to the Constitutional Court, claiming a violation of their constitutionally protected right to a hearing, which was denied to them in the previous asylum proceedings.

Legal issues: The joined cases concerned issues of asylum law, with the applicants claiming a violation of their right to an effective remedy and to a fair trial as enshrined in Art. 47 EU Charter. The applicants argued, without success, that their right to oral hearing was violated by the Asylum Court on the basis of section 41(7) of the 2005 Austrian Asylum Act, due to the fact that it abstained from holding an oral hearing. Before the Constitutional Court, their claim was based directly on alleged violations of Art. 47 of the EU Charter. This meant that the Constitutional Court had to decide, as a preliminary issue, whether those arguments are admissible – i.e. whether the Charter can provide the relevant standard of review.

***Reasoning of the ACC*:** The Court first extensively cites CJEU case law as well as its own precedent to reaffirm the principle of primacy of EU law, but points out that EU law in general is not an appropriate standard of review in the decisions of the Constitutional Court. While Austrian authorities in general are bound by EU law principles of direct effect and supremacy, the Constitutional Court follows those principles only insofar as a domestic cause of action is established; violations of EU law in general are equated to statutory and not constitutional breaches.

The same does not, however, hold for arguments based on the Charter of Fundamental Rights. In relation to the Charter, the Constitutional Court goes on to cite in detail the CJEU case law building on *Rewe*, in relation to the principles of equivalence and effectiveness of protecting EU law-based rights in domestic legal orders. The Constitutional Court then notes the close connection between the Charter and the ECHR which is, incidentally, directly applicable as a source of constitutional rights in the Austrian legal order. From these two points, the Court concludes, in effect, that the Charter can supply the appropriate standard of review for breaches of constitutional rights. The centralisation of such decisions in the hands of the Constitutional Court is turned into an argument in favour of that reading. At least insofar as 'rights' from the Charter are concerned, the overlap of their content with the ECHR means that they should be translated into national constitutional standards; this may not, however, hold for the principles laid down by the EU Charter, requiring thus a case-by-case assessment (para 5.5).

This justifies the Constitutional Court's finding that it will follow the fundamental rights case law of the CJEU which, in turn, follows the case law of the ECtHR. This may require it to submit preliminary references to the CJEU, but only if there is doubt on the proper interpretation of EU law. Interestingly,

[85] See the Case C-578/16, C.K. and others, commented in ***ACTIONES Module on Asylum and Immigration***.

the Court considers this to be the case when, not just the CJEU, but also the ECtHR, has resolved a certain issue.
Next, the Constitutional Court considers the issue whether the case falls within the scope of EU law as required by the Charter, and finds that it does, due to its subject matter (asylum, regulated extensively by EU measures).
As for the application of Art. 47 of the Charter, the Court notes that it has a broader scope of application than its correspondent right in the ECHR – Art. 6 ECHR. While under Art. 6 ECHR, the right to a hearing only applies in civil law cases, Art. 47 extends that protection to asylum proceedings and thus the applicants can benefit from the particular fair trial safeguards in asylum related proceedings. The Court emphasises that Art. 47 EU Charter does not prescribe an absolute fundamental right, but one which accepts limitations, which must pass the test of the principle of proportionality in order to be found legitimate. Citing the case law of the ECtHR, the Constitutional Court finds that this right can be limited in exceptional circumstances and that the legitimacy of the limitation(s) has to be established on a case-by case basis. *In casu*, in circumstances where it has nothing to contribute to the written record, an oral hearing can thus be dispensed with. On this basis of this argument, the Constitutional Court found no violation of the Charter in the present case.

The Court concluded that:
"[i]n light of this case law, the Constitutional Court neither holds any reservations as to the constitutionality of sec 41(7) 2005 Asylum Act (AsylG), nor does it find that the Federal Asylum Tribunal subsumed an unconstitutional content under this provision by desisting from holding an oral hearing. Desisting from holding a hearing in cases in which the facts seem to be clear from the case-file in combination with the complaint, or where investigations reveal beyond doubt that the plea submitted is contrary to the facts, is consistent with Article 47(2) CFR, if preceded by administrative proceedings in the course of which the parties were heard." – para. 64

Relation of the case to the scope of the Charter: The Constitutional Court considers the issue whether the case falls within the scope of EU law as required by the Charter, and finds that it does, due to its subject matter (asylum, regulated extensively by EU measures).

Relation between the EU Charter and ECHR: In assessing the application of Art. 47 EU Charter, which is part of the list of EU Charter 'rights', having also correspondent rights in the ECHR, the ACC concluded that they should be translated into national constitutional standards; this may not, however, hold for Charter 'principles', whose application require a case-by-case assessment (para 5.5). The ACC rightly identified the scope of application of the right to a fair trial enshrined in Art. 47 as being broader than under Art. 6 ECHR, due to the fact that the former can be invoked and applied in asylum related proceedings, while the latter Article cannot, since it is confined to civil and criminal law cases. While Art. 6 ECHR based right to an oral hearing only applies in civil law cases, Art. 47 extends that protection to asylum proceedings and thus applicants can benefit from it. The assessment of a violation will, however, depend on the application of the principle of proportionality. Citing the case law of the ECtHR, the Constitutional Court finds that this right can be limited in exceptional circumstances and that it does not need to be protected according to the same standard regardless of the type of decision being made by a national court. In circumstances where it has nothing to contribute to the written record, an oral hearing can thus be dispensed with.

Use of judicial interaction technique: Through the use of consistent interpretation technique, the Austrian Constitutional Court recognised that Art. 47 of the EU Charter enjoys domestic constitutional status. The Court links the EU Charter with the jurisprudence of the ECtHR and by doing so indirectly strengthens also the horizontal dialogue between the CJEU and the ECtHR. The Austrian Constitutional Court adjudicates Art. 6 ECHR as not directly applicable, but refers to the jurisprudence of the ECtHR on Art. 6 ECHR in order to derive standards for exceptional derogations

from the right to fair trial. The Court refers to Art. 13 ECHR in order to clarify that Art. 47 EU Charter has a relatively broader scope.

Outcome of the Judicial Interaction: The Austrian Constitutional Court gives precise indications to the national courts on the role and effects of the EU Charter within the national jurisdiction:

"*In summary, the Constitutional Court – after having referred a matter for a preliminary ruling to the Court of Justice of the European Union according to Article 267 TFEU as appropriate – takes the Charter of Fundamental Rights in its scope of application as a standard for national law (Article 51(1) CFR) and sets aside contradicting general norms according to Article 139 and/or Article 140 Federal Constitutional Act (B-VG). In this manner, the Constitutional Court fulfils its obligation to remove from the domestic legal order provisions incompatible with Community law, which is also postulated by the Court of Justice of the European Union (cf. ECJ 02/07/1996, Case C-290/94, Commission v Greece, [1996], ECR I-3285; 24/03/1988, Case 104/86, Commission v. Italy, [1988] ECR 1799; 18/01/2001, Case C-162/99, Commission v. Italy, [2001] ECR I-541; see also ECJ 07/01/2004, Case C-201/02, Wells, [2004] ECR I-723; 21/06/2007, Case C-231/06 -C-233/06, Jonkman, [2007] ECR I-5149). (Rz 43).*" – *para. 44*

2.1.2. Limitations to the use of consistent interpretation

There are cases where the consistent interpretation technique cannot be used to reach the result of bringing the national legal provision at issue in line with EU law/EU Charter. This situations are known as a *contra legem* interpretation. If the national courts is uncertain of whether consistent interpretation is or not possible in the case, it can refer a preliminary reference to the CJEU. For instance, the **French supreme court (Cour de Cassation)** asked the CJEU in ***Dominguez***,[86] whether certain provisions of the French labour Code could be interpreted in conformity with *EU Directive 2003/88 on the organisation of working time*, or the French legislation had to be disapplied in favour of a direct applicability of the Directive regarding the right to paid annual leave. The CJEU suggested that the referring court should seek to adopt an interpretation of the national provisions at issue that would be compatible with Article 7 of Directive 2003/88, making it unnecessary for the national court to disregard national law. The CJEU thus eliminated the case as a *contra legem* limitation on the use of consistent interpretation technique. The Court of Justice required the French supreme court to apply the full set of interpretative methods recognised by domestic law with a view to adopt an interpretation which "would allow the absence of the worker due to an accident on the journey to or from work to be treated as being equivalent to the absence of a worker due to a work-accident."[87]

The exercise of consistent interpretation does not dispel the risk of wrong rulings or of conflicting interpretation. In these cases, a clarification from the CJEU, which could trigger the spill-over effect in the 28 national jurisdictions, would prove decisive (*Melloni, C.K. and others*). Preliminary references (see below) can thus be used by a national court in order to test the validity of its own preferred construction of domestic norms (*Diouf, Dominguez, Melloni*) or ensure the coherent application of fundamental rights standards (*C.K. and others*).

2.2. Preliminary reference

Relevant EU legislative instruments governing the mechanism of preliminary reference:

[86] Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33.

[87] Ibid, see also L. Pech, 'Between Judicial Minimalism and avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez', *Common Market Law Review* (2012), p. 1–40.

1. ***Founding Treaties***

- Art. 19 TEU (*general legal basis*):

The CJEU can give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

- Art. 267 TFEU (*scope of the preliminary reference*):

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

2. *Statute of the CJEU (Arts. 19, 20, 23, 23bis)*
3. *Rules of procedure CJEU (Title III – Arts. 93 –118)*
4. *Recommendations for national courts in relation to the initiation of preliminary ruling procedure (2016)*

The preliminary reference procedure is a direct judicial interaction technique laid down in Art. 19 (3)(b) TEU and Art. 267 TFEU. It aims to achieve uniform interpretation of EU law by all domestic courts and to assist in the effective judicial protection of individuals. All national courts, whatever their status in the national judicial hierarchy can enter in direct dialogue with the CJEU and send preliminary questions on the correct interpretation or validity of EU law. In recent years there is an increasing number of preliminary references sent by national courts, including supreme courts, among others by the *French Conseil d'Etat* (*Melki and Abdeli*)[88], the *French Constitutional Court* (*Jeremy F v Premier ministre*, discussed below), the *Czech Supreme Administrative Court* (*Landtová case*)[89] the *Spanish Constitutional Court* (*Melloni*, discussed below), and the *German Federal Constitutional Court* (*OMT* case),[90] *Supreme Administrative Court of Slovenia* (*C.K. and others*, discussed in ***ACTIONES Module on Asylum and Immigration***).

When a national court has a question regarding the correct interpretation or application of provision(s) from the EU primary law or secondary EU acts[91] or EU Charter,[92] on which the effective resolution of the dispute before that court depends, it has the option to directly ask questions asking for clarification and guidance from the CJEU (Art. 267(2) TFEU).

It should be noted in that respect that it is up to a national court to determine the factual and legislative context.[93] The accuracy of the legal and factual context is not a matter for the CJEU to determine,

[88] C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:363.
[89] Case C-399/09, *Landtová*, ECLI:EU:C:2011:415.
[90] Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.
[91] The term "acts" covers: regulation, directives, decisions and the international agreements concluded by the European Union (Case C-192/89, *Sevince*, judgment of 20 September 1990, paras. 8-10).
[92] For more details on establishing the scope of application of the EU Charter, please see module 1.
[93] Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Stadt Lengerich v. Helmig and Others*, judgment of 15 December 1994, para 8; Case C-186/90, *Durighello v. INP*, judgment of 28 November 1991, para 8. In a case referred by an Italian court, Case C-386/92, *Monin Automobiles* (No. 1) judgment of 26 April 1993, the Court declared the reference inadmissible on the grounds that it was too vague as to the legal and factual situations envisaged by the national court. The latter had indicated neither the contents of the provisions of national law to which it referred, nor the precise reasons which prompted it to question their compatibility with Union law, and to consider it necessary to refer questions for a preliminary ruling. Similarly in Case C-326/95, *Banco de Fomento* judgment of 13 March 1996, the Court said that the order for reference contained no indication by the national court of the factual and legal situation in the case before it or the reasons why it considered that the answers specified by the defendants in the main proceedings were necessary to settle the dispute.

and it enjoys a presumption of relevance.[94] The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give an useful answer to the questions submitted to it.[95] Furthermore, the CJEU does not formally have competence to judge the compatibility of national law with EU law, but its jurisdiction is limited to the interpretation of the latter.[96] However, indicative of the cooperation nature of the preliminary reference technique, in certain circumstances, even if the preliminary questions were not correctly formulated by the national courts, the CJEU reformulates them to affirm its competence and thus gives an answer which the national court can apply to the facts before it.[97] It has to be emphasised that the preliminary reference is not limited to cases where one of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of EU law, as the national judge can raise a point of EU law of her own motion if she has doubts on the correct interpretation of the relevant EU law to the pending case.

Conditions for the admissibility of preliminary reference:

According to the case law of the CJEU the basic rules to be followed by national courts when addressing preliminary questions to the Court of Justice are the following: there must be a pending[98] and genuine dispute[99] between the parties, resulting in an action before a national court or tribunal in which a decision on the question of EU law is "necessary" to enable the national court to give judgment. If that is the case, any court or tribunal "may" make a reference (Art. 267 (2) TFEU) and a "final" court or tribunal "shall" make a reference (Art. 267 TFEU) unless the matter is *acte clair* under the principles laid down in *CILFIT doctrine*.[100] The national courts enjoy a presumption that, in case of a question referred, the interpretation of the EU law is necessary for solving the dispute before them.

Conditions for the admissibility of the preliminary reference:

[94] Case 166/84, *Thomasdunger v.Oberfinanzdirektion Frankfurt am Rhein, ECLI:EU:C:1985:373*.

[95] See, for example, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* op. cit., para. 22; Case C-420/12 *Pohotovosť s. r. o. v Miroslav Vašuta*, para. 27. Exceptional situations where the CJEU still accepts to give a preliminary ruling in spite of the absence of the national legal and factual context exist, see *Crispoltoni* (Joined Cases C-133/93, C-300/93 and C-362/93, *Crispoltoni (No. 2)* judgment of 5 October 1994) the Court was already aware of the legal and factual context of the case, due to an earlier reference made by the same Italian court and concerning the same producer (Case C-368/89, *Crispoltoni (No. 1)* judgment of 11 July 1991). It was therefore prepared to give a ruling. In other situations, the Court is prepared to give a ruling in cases to which it wants to respond, even where the information provided is deficient in some way. In *Perfili* (Case C-177/94, *Criminal Proceedings against Gianfranco Perfili, civil party: Lloyd's of London* judgment of 1 February 1996) for example, the Court was prepared to answer a reference from the Italian Pretura Circondariale – even though there was an absence of any real explanation in the order for reference of the factual and legislative background to the case and there were also doubts as to whether the national court had misinterpreted its national legislation.

[96] Order in Case C-307/95, *Max Mara*, judgment of 21 December 1995.

[97] One of the most common situations where the CJEU reformulates preliminary questions is when then national courts formulated them in terms of interpretation of national law in conformity with Union law, see Case C-402/09, *Tatu v. Statul roman*, judgment of 7 April 2011, para.30. Another situation of reformulation is the alteration of the preliminary questions dictated by the desire to give a helpful answer to the national court, see Joined Cases C-171/94 and C-172/94, *Mercks and Neuhuys v. Ford Motors* judgment of 7 March 1996, where the Court answered a question not posed by the national court "having regard to the facts in the main proceedings and in order to provide a helpful response to the national court" (para 15). Sometimes the CJEU reformulation did not prove useful to the national referring courts, see *Jenkins v Kingsgate* (Clothing Productions) Ltd [1981] UKEAT 145_79_1906 (19 June 1981). For more information on the issue of the content of a request for a preliminary ruling, see K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford University Press, (2014), pp. 65-79.

[98] Case C-338/85, *Pardini v. Ministero del commercio con l'estero* , judgment of 21 April 1988.

[99] Case C-104/79, *Foglia v Novello,* judgment of 11 March 1980.

[100] Case C-77/83, *C.I.L.F.I.T. v. Ministry of Health* , judgment of 29 February 1984.

- there must be a pending and genuine dispute between the parties,
- resulting in an action before a national court or tribunal in which
- a decision on the question of EU law is 'necessary' to enable the national court to give judgment (Case C-338/85, *Pardini v. Ministero del commercio con l'estero*, Case C-104/79, *Foglia v Novello,* judgment of 11 March 1980)
- Necessity - CJEU recognises a presumption of necessity in favour of the national court

The notion of 'national court or tribunal' is an EU autonomous concept which has been defined by the CJEU as:

Any body who fulfils cumulatively the following criteria[101]*:*

1. *Established by law;*
2. *Permanent;*
3. *Jurisdiction is compulsory;*
4. *Procedure inter partes;*
5. *Applies the rule of law;*
6. *Independent;*
7. *Issues decisions of a judicial nature;*

Broekmeulen[102]*:* Appeal Committee, a private body, not recognised by Dutch law as a' court' was considered by the CJEU as a court within Art. 267;

Nordsee[103]: arbitrator appointed by contract between parties, according to German law they decided according to law, their decisions had the force of *res judecata*, but CJEU – not a court: no compulsory jurisdiction (parties can freely choose between an ordinary court and arbitration);

Belov[104]**:** Bulgarian Commission for Protection against Discrimination (equality body) is not a court (does issue judicial decisions, but administrative; questionable independence)

The preliminary reference sent by national courts should contain the following essential information:

- the factual framework;
- national legal framework;
- provisions of Union law held to be relevant;
- the connecting factor between provisions of Union law, the national legal framework and the facts of the case.

[101] For further details, see Jaime Rodriguez Medal, 'Concept of a Court or Tribunal under the Reference for a Preliminary Ruling: Who can Refer Questions to the Court of Justice of the EU?', European Journal of Legal Studies, Issue 18.
[102] Case C-246/80, *Broekmeulen*, ECLI:EU:C:1981:218.
[103] Case 102/81, *Nordsee*, ECLI:EU:C:1982:107.
[104] Case C-394/11, *Belov*, ECLI:EU:C:2013:48.

Additionally, the referring court could optionally include also: arguments put forward by the parties; replies proposed by the parties to the question(s).

Structure of the preliminary reference:

1. Start with the citation of the Rules of Procedure on the type of PR*: ordinary (Art. 94), expedited (Art. 105), urgent - PPU (Art. 107);*
2. Summary of the subject-matter of the dispute and facts;
3. Summary of the legal framework:
    a) Summary of the relevant nat legal provisions;
    b) Summary of the relevant national case law.
4. Statement of reasons which prompted the referring court to address preliminary questions:
    a) Relevant EU legislative provisions and their relation with national legislation (the connecting factor);
    b) Statement of reasons to refer (start with clarification whether it is a preliminary reference for interpretation or validity).
5. The essence of the parties' argumentation;
6. Optional (briefly summarise the reasons to refer – one page maximum);
7. Finish with the preliminary questions.

Length of the preliminary reference: recommended maximum of 10 pages (in original language), point 14 of the Recommendations

Right/Obligation to refer:

Unlike lower national courts, supreme courts more often have an obligation rather than a right to refer a preliminary ruling, since they are more often courts against whose decisions there are no remedies (Article 267(3) TFEU). The latter means that any national court or tribunal against whose decisions there is no judicial remedy under national law is obliged, as a court of last instance, to refer a question of EU law to the CJEU if it is relevant to the outcome of a pending case.[105] Additionally, if at issue is the validity of the EU law itself, all national courts, whether of first or last instance, are obliged to send a preliminary reference to the CJEU (Art. 267(3) TFEU).

Exhaustive exceptions to the obligation to refer were established by the ***Cilfit and Others*** *case.*[106] Namely, if "*the question raised is irrelevant (**irrelevance**) or that the provision of EU law concerned has already been interpreted by the Court (**act eclairé**) or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (**act claire**)*." In order to determine whether an issue of EU law has already been sufficiently clarified or is sufficiently clear for national courts from the EU countries, the CJEU suggested to look at whether there are "*conflicting lines of case-law at national level*" regarding the contested EU law concept/issue and also to assess whether this concept "*frequently gives rise to difficulties of interpretation in the various Member States".* If these circumstances exist, then "*a national court or tribunal against whose decisions there is no judicial*

[105] See Case C 99/00 *Lyckeskog*, paras. 14 et seq., Case C-210/06 *Cartesio*, ECLI:EU:C:2008:723, paras. 75 to 79.
[106] Case C-283/81, EU:C:1982:335.

remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law."[107]

Consequences of non-referal of preliminary questions:

Violating the duty to refer preliminary questions (Art. 267(3) TFEU - *last resort court* or 267(1) TFEI – *question regarding the validity of EU law*) may give rise to the liability of the Member State concerned for any damages that resulted to individual plaintiffs on account of the national courts judgment (*Köbler*).[108] In *Traghetti Mediteraneo*[109], the CJEU found that national legislation generally excluding liability of a Member State for damage caused to individuals by infringement of Union law committed by a national court at last instance is contrary to EU law. While in *Ferreira da Silva*, the CJEU found that the **Supreme Tribunal of Portugal** had infringed its obligation to refer under Art. 267(3) TFEU due to their refusal to refer preliminary questions in a case concerning the interpretation of the concept of a 'transfer of a business' within the meaning of Article 1(1) of Directive 2001/23. Even if the refusal to refer was reasoned, the CJEU held in *Ferreira da Silva*, that the **Supreme Tribunal of Portugal** errerred in considering the interpretation of 'transfer of a business' concept as settled issue of EU law, since there were "conflicting decisions of lower courts or tribunals regarding the interpretation of the concept" that that "concept frequently gave rise to difficulties of interpretation in the various Member States." (para. 45)

The ECtHR has also held that in certain circumstances the refusal to refer preliminary questions may entail a violation of the right to a fair trial. The ECtHR held that an unreasoned refusal to raise the preliminary question under Art. 267(3) amounts to a breach of Art. 6 ECHR.[110]

Consequences of non-referral – Member State's non-contractual liability for damages:

1. CJEU – *Köbler*: a non-referral can lead to the Member State being held liable according to the principle of state liability; *Ferreira da Silva:* national procedural provisions which limit the possibility of an individual to claim damages following the unfounded refusal to refer preliminary questions of a court of last resort should be set aside *(in casu the Portuguese procedural law made the action for damages against the State for infringement of the obligation stemming from the failure to comply with the duty imposed by Art. 267(3) TFEU depedent on the prior setting aside, by the court or tribunal having jurisdiction, of the decision that caused the loss or damage)*[111]
2. *ECtHR – violation of Article 6 ECHR (access to a court)*

Ullens de Schooten v. Belgium – arbitratry refusal amounts to violation of Art. 6 ECHR

Dhabi v Italy: unreasoned refusal to address preliminary questions under Art. 267(3) amounts to a breach of Art. 6 ECHR (App. No. 17120/09)

According to the ECtHR, national courts have "to state the reasons why they consider the question to be irrelevant or that the relevant EU law has already been interpreted by the CJEU or correct application of EU law is so obvious as to leave no scope for any reasonable doubt."

[107] Case C-160/14, *João Filipe Ferreira da Silva e Brito and Others v Estado português*, ECLI:EU:C:2015:565.
[108] Case C-224/01, *Köbler*, EU:C:2003:513.
[109] Case C-173/03, *Traghetti Mediteraneo*, ECLI:EU:C:2006:391.
[110] ECtHR: *Dhahbi v Italy*, App. No. 17120/09, op. cit.
[111] Furthermore, the CJEU stated that "a principle as fundamental as that of State liability for infringement of EU law cannot be justified either by the principle of *res judicata* or by the principle of legal certainty."(Para 59)

Schipani v Italy (2015): same court as in Dhabi (**Italian supreme court Corte di Cassazione**) –had considered the arguments of EU law, but it omitted all references to whether the issue was an acte clair or an acte éclairé (Appl. No. 38369/09)

What is effective remedy against a refusal to send a preliminary reference under the ECHR system?

(Schipani v Italy): Köbler state liability is not part of domestic remedies that need to be exhausted, as it was held to not be effective in that case.

2.2.1. Types of preliminary references – ordinary, expedited and the urgent preliminary ruling procedures

In addition to the ordinary preliminary reference procedure, Art. 267(4) TFEU provides for the obligation of the CJEU to act within the minimum delay when a case concerns a person in custody. There exist two types of procedures that allow the CJEU to deliver its preliminary ruling more quickly than the normal procedural rules would allow[112]:

- the expedited and
- the urgent preliminary ruling procedures.

Expedited Preliminary Reference

According to the new CJEU Rules of Procedure, Article 105(1), a national court may request of its own motion, or the President may decide to apply, the expedited procedure where the nature of the case requires so. The expedited procedure does not substantially differ from the ordinary procedure: the time for the hearing and the period cannot be less than 15 days from the approval of the expedited procedure, however, the total duration of the procedure is shorter, namely between three and six months.[113]

Urgent Preliminary Ruling (PPU)

Article 23a first paragraph of the CJEU Statute and Article 107(1) of the Rules of Procedure provide that for issues related to the Area of Freedom Security and Justice (Title V of Part Three of the TFEU), national courts can request for a preliminary ruling to be delivered under the urgent procedure. The necessary conditions to be fulfilled are that: (see para. 40 of *Recommendations of the CJEU to national courts*):

- the person in proceedings is in custody or deprived of liberty; or
- proceedings relate to parental authority or custody of children.

It has been noted that, on average, it takes around 66 days for an urgent preliminary ruling procedure to be completed, with no case exceeding a duration of three months.

Requests for expedited or urgent preliminary ruling must (Recommendations paras. 41-44):

- Include in clearly identifiable way whether they request expedited or PPU
- Include reference to the relevant article: *Art. 105 for expedited procedure; Art. 107 for PPU*;

[112] It has been noted that the average time taken by the CJEU to dispose of references for a preliminary ruling is decreasing annually. For example, in 2012: the average duration of proceedings was 15.7 months, as opposed to 16.4 months in 2011 and 16.1 months in 2010. See A. Biondi & S. Bartolini, "Recent Developments in Luxembourg: The Activities of the Courts in 2012" (2014) European Public Law, No. 1, 1–14.

[113] Sometimes the procedure was concluded sooner than 3 months, see Joined Cases C-188/10 and C-189/10 *Melki and Abdeli*, judgment of 22 June 2010 (2 months and 6 days).

- The type of preliminary reference must be stated at the beginning of the document;
- Include matters of fact and law which require the urgency;
- Include the risks involved in following the ordinary procedure;

Example of expedited PR: Case C-698/15, *Watson*, ECLI:EU:C:2016:70

Example of PPU – Jeremy F from French Conseil d'État (discussed here below)

Jeremy F against Prime Minister

Type of Interaction: Vertical Direct (French Conseil Constitutionnel – CJEU) – first preliminary reference addressed by the French Conseil Constitutionnel

Effective legal remedies in case of extension of the European Arrest Warrant effects – use of the PPU

Case C-168/13, Jeremy F, judgment of 30 May 2013

Facts: The applicant is a UK citizen who fled to France after being charged before the UK courts for child abduction. Upon arrest by the French police, he consented to extradition before the appellate court in Bordeaux but did not invoke the specialty rule under the European Arrest Warrant Framework Decision (EAW FD) that would prohibit British officials from adding charges not included in the European Arrest Warrant (EAW). After the issue of the initial EAW, British authorities asked the appeal court for permission to prosecute him for another offence, i.e. unlawful sexual conduct with a female minor, which was not included in the first EAW.

Legal issues/preliminary questions: Conformity of the French legislation implementing the EAW FD, which did not provide for an appeal with suspensive effect against the court decision giving consent to an extension of the EAW, with the right to a fair trial and effective judicial remedy as ensured by the French Constitution, Arts. 5 (4) and 13 ECHR and Art. 47 EU Charter.

The Bordeaux appeal court decided to expand the arrest warrant. Jeremy F appealed this decision before the French Cour de Cassation, which referred to the Conseil Constitutionnel (FCC) a priority question of constitutionality relating to Arts. 695-46 of the French Code of Criminal Procedure, whereby the judgment of the Bordeaux appellate court was final and not subject to appeal. This raised concerns of incompatibility with the principle of equality before the law and the right to an effective judicial remedy.

For the first time, the FCC resorted to the preliminary reference mechanism (Art. 267 TFEU), and asked the CJEU to consider the referred questions under the urgent preliminary reference procedure. The FCC essentially asked whether the EAW FD precludes domestic provisions that do not provide for the possibility of an appeal with a suspensive effect against a decision to execute a EAW or a decision giving consent to an extension of the warrant. It seems that the FCC formulated the preliminary questions in a way that showed its preference for an interpretation of national law whereby a suspensive effect should be recognised within the appeal procedure.

Conclusions of the CJEU: The CJEU considered that its task was to establish whether the absence of an appeal against the decision consenting to the extension of an EAW was compatible with the right to an effective judicial remedy as set out in Art. 13 of the ECHR and Art. 47 of the Charter. The CJEU cited the *Chahal* judgment of the ECtHR in favour of the proposition that Art. 5(4) ECHR is *lex specialis* to Art. 13 ECHR in cases of detention in view of extradition, and *Marturana v. Italy* in support of the view that Art. 5(4) does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention.

After this summary of the ECtHR jurisprudence, the CJEU cited its own judgment in *Diouf* as an example of a similar interpretation of the right to an effective remedy; there, in a different context, it was found that "the principle of effective judicial protection affords an individual a right of access to a court but not to a number of levels of jurisdiction." Thus, it found that EU law neither demands nor prohibits appellate proceedings. It does, however, require Member States to execute arrest warrants quickly - in most cases, within 10 days after the consent to surrender the suspect.

Judgment of the referring court following the preliminary ruling of the CJEU: In its subsequent decision, the FCC restated the operative part of the CJEU preliminary ruling without change, but nevertheless found that the challenged provisions constitute an unjustified restriction of the right to fair trial and an effective judicial remedy under the French Constitution, and that the words "without recourse" must be declared unconstitutional.

Relation of the case to the scope of the Charter: The referring Court found Art. 47 EU Charter applicable to the case due to the fact that the subject matter fell under the scope of EU law: compatibility of national law transposing the EAW FD.

Relation between the EU Charter and ECHR: The referring Court cited both Art. 6 ECHR and Art. 47 EU Charter as standards reference of review of the challenged national law, in addition to the domestic constitutional standards of protection of the right to a fair trial and effective remedy.

Outcome of using the Judicial Interaction Techniques: In solving the aforementioned conflict, the French Conseil Constitutionnel (FCC) addressed its first preliminary reference to the CJEU. The urgent preliminary procedure was used by the FCC due to its obligation to deliver a judgment in a maximum of 3 months. When deciding on the necessity of obtaining a preliminary ruling from the CJEU, the FCC first determined if the Member States were recognised a margin of discretion when implementing the FD on EAW. The FCC included in the preliminary reference addressed to the CJEU its own interpretation of the balance between the principle of mutual recognition of criminal judgments and the right to effective remedy, seemingly in favour of higher guarantees for the right to an effective remedy, making a strategic attempt to influence the CJEU. Traces of horizontal interaction between the European courts can be identified. Similarly to Melloni, the CJEU strategically uses Arts. 6 and 5(4) ECHR and the jurisprudence of the ECtHR to justify its own interpretation of the right to an effective remedy (Arts. 47 and 48 EU Charter). The CJEU held that the ECtHR does not require the establishment of a second level of jurisdiction for the examination of the lawfulness of detention, and based on Art. 51 EU Charter, nor is it required under Art. 47 of the EU Charter.

The CJEU showed respect of the national constitutional traditions by recognising the possibility of Member States securing a higher level of protection of the right to an effective remedy, as long as the effective application of the EAW FD is not frustrated.

Following the preliminary ruling of the CJEU, the FCC used the discretion left by the CJEU in securing a second level of jurisdiction, an appeal, by opting to ensure a higher level of protection of the right to an effective remedy, and declaring the national provision adopted for the purpose of implementing the EAW FD (in particular the "without recourse" part) contrary to the constitutional provision guaranteeing the right to a fair trial, and thus opting for a higher national standard of protection of the respective fundamental right to a fair trial.

2.2.2. Categories of preliminary references

In its preliminary ruling, the CJEU may either state that the conflict of norms, judicial interpretation, or between various fundamental rights and/or fundamental freedom(s) is non-existent, give guidance for its resolution by way of offering particular interpretation, application of relevant tests, or state clearly the need to disapply the national law whenever it is applied in the context of the EU law.

Through the preliminary reference mechanism, the CJEU may also find that a certain legal provision from a secondary EU law is in conflict with the EU Charter and invalidate it.[114]

According to Tridimas[115], there are *three categories of preliminary references that the CJEU delivers*, depending on the margin for manoeuvre it leaves to the referring court:

1. *Outcome preliminary rulings*: they provide the national courts with a ready-made solution to the dispute; (see, for instance, ***Melloni*** and ***Radu*** cases, discussed below);
2. *Guiding preliminary rulings*: they may provide the referring court with guidelines as to how to resolve the dispute (see, for instance, the CJEU preliminary ruling in– ***G&R*** and ***Boudjilida***[116] setting out guidelines on the application of the right to be heard which is part of the EU law general principle of rights to defence and the EU Charter right to good administration; or the ***Jeremy F*** case herein discussed);
3. *Deferential preliminary rulings*: they may answer the question in such general terms that, in effect, it defers to the national judiciary on the point in issue (e.g., see eg Case C-341/08 *Petersen*, ECLI:EU:C:2010:4).

Objectives of the preliminary reference:

The two main objectives and results of the judicial interaction technique of preliminary reference are: ensuring the coherence of the EU legal order and the respect of the fundamental principles of EU law (primacy, direct effect, and effectiveness). For this reason, the CJEU sometimes rephrases the questions formulated by national courts into principled questions of EU law, whose resolution is equally applicable in all Member States. All questions on the interpretation of EU law and on the validity of secondary EU legislation can form the object of an admissible preliminary reference, unless a provision of EU law requires no further interpretation because its meaning is manifestly clear, or when its interpretation or validity has been already clarified by a previous ruling of the CJEU.[117] As alluded to above, the CJEU is entitled only to decide on the interpretation and validity of EU law, however often the ruling of the CJEU has *de facto* the straightforward effect of sanctioning the validity – or the unlawfulness – of domestic law under EU legal obligations. Another outcome of this procedure is to provide the tools to the national judge, helping him/her to find the consistent interpretation of domestic norms with EU law obligations, or determine instead the disapplication of the latter. The CJEU can also shape the application of the proportionality and necessity tests, to provide guidance to the referring court with respect to specific factual and legal background of the main proceedings.[118] In the non-discrimination field, the use of preliminary rulings has helped domestic judges to clarify several aspects of EU law: e.g. the possibility of horizontal direct effect, the allocation of burden of proof, the conception of discrimination by association, the possibility of invoking grounds not listed in the Directives.

Outcomes of the preliminary reference, inter alia:

- *Legislative change/amendment in the national legal order* (e.g. the Court of Justice interpreted the Return Directive upon request of Italian courts on three occasions: in 2011 with the *El*

[114] C-293/12 and C-594/12, *Digital Ireland*, ECLI:EU:C:2014:238 ; Case C-236/09, *Test Achat,* ECLI:EU:C:2011:100.
[115] T. Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability', in *The Oxford Handbook of European Union law*, A. Arnull and D. Chalmers (eds), (2016) OUP.
[116] Commented in the *ACTIONES Module on Asylum and Immigration*.
[117] See *Da Costa* and *CILFIT* op. cit.
[118] See in the Digital Ireland.

Dridi case, in 2012 with *Sagor*[119] and in 2015 with *Celaj*.[120] As a result of the first two preliminary rulings, various provisions of the Italian Alien law[121] have been declared incompatible with EU law and the Italian legislator was forced to intervene in order to remedy this with two legal reforms; various other example of amendments in non-discrimination, consumer protection, criminal law, and other areas can be found in the thematic ACTIONES Module.

- *Adaptation of national jurisprudence to EU law and CJEU jurisprudence* (e.g. following the CJEU preliminary ruling in *Melloni*, the Spanish courts gave up the judicial doctrine of absolute application of the right to a fair trial in criminal law, accepting as legitimate the limitation established by the Framework Decision establishing the European Arrest Warrant);

- *Extending the scope of competence of national courts in relation to the discretionary powers of the administration* (e.g. Mahdi);[122] or vis-à-vis other national superior courts or judicial forums.[123]

In line with the case law, the CJEU clearly requires all Member State courts to abide by its judgments. This is true not only with respect to the preliminary reference addressed to the judge of the main proceedings; all national judges must respect all judgments of the Court. Indeed, Court's judgments have an extended effect (*erga omnes*) as they clarify the interpretation of EU law rather than ensuring only the solution of the specific dispute.

Functions of the preliminary reference:

- (*formally*) Help in providing interpretation of EU law;
- (*de facto*) Help on the compatibility of national rules with EU law;
- (*de facto*) Decision on the compatibility of secondary EU law with EU Charter (*Digital Rights Ireland*, *Test Achats*);
- Eliminating procedural limitations hindering the power of ordinary national courts:
  - *Rheinmühlen*[124]*: national law* binding a national court to points of law by the rulings of superior courts, precluding the exercise of power to refer, was declared incompatible;
  - *Filipiak*[125]: judgment of the Constitutional Court cannot bind national courts to continue applying national law incompatible with EU law (principle of primacy of EU law obliges the national court to apply EU law and to refuse to apply conflicting provisions of national law);
  - *Palmasi*[126]: national law limiting the power a chamber of a court of final instance to refer questions directly to the CJEU, by requiring to first refer to the plenary session,

[119] Court of Justice of the European Union, *Md Sagor*, C-430/11, ECLI:EU:C:2012:777 (2012). The conclusions of the Court in *Sagor* where reiterated in *Mbaye*, C-522/11, ECLI:EU:C:2013:190 (2014).
[120] Court of Justice of the European Union, *Skerdjan Celaj*, C-290/14, ECLI:EU:C:2015:640 (2015).
[121] Legislative Decree No 286/1998 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign national (Ordinary Supplement to GURI No 191 of 18 August 1998).
[122] Case C-146/14 PPU, *Mahdi*, ECLI:EU:C:2014:1320.
[123] Case C-689/13, *Puligienica Facility Esco SpA (PFE*), ECLI:EU:C:2016:199; *Križan and Others; Cartesio (see more at p.11 and footnote 40).*
[124] Case C-166/73, *Rheinmühlen*, ECLI:EU:C:1974:3.
[125] Case C-314/08, *Filipiak*, ECLI:EU:C:2009:719
[126] C-261/95, *Palmisani*, EU:C:1997:351.

was declared incompatible. (*Consiglio di giustizia amministrativa per la Regione siciliana*);

National legislation, constitutional or supreme courts cannot limit the power of the national courts to directly interact with the CJEU under Art. 267 TFEU. In cases where provisions of national law have limited the possibility for a national court or tribunal to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, the Court has "*ruled systematically in favour of the broadest freedom for national courts or tribunals to refer to it questions on the validity and interpretation of EU law*".[127] In a preliminary ruling referred by **Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy**), the CJEU held that "*Article 267 TFEU must be interpreted as precluding a provision of national law, in so far as that provision is interpreted to the effect that, where a question concerning the interpretation or validity of EU law arises, a chamber of a court of final instance must, if it does not concur with the position adopted by decision of that court sitting in plenary session, refer the question to the plenary session and is thus precluded from itself making a request to the Court of Justice for a preliminary ruling*."[128]

2.2.3. National courts' power to raise *ex officio* EU law issues

As a general principle, Member States are free to set limitations on the power of national courts to consider of their own motion matters of law overlooked by the parties in their pleas. This is usually done to respect the autonomy of the parties to delimit the ambit of the dispute in civil matters, and to ensure the expedient administration of justice. Logically, if national law permits discretion or imposes an obligation on national judges to raise issues of national law *ex officio*, this is extended to substantive EU provisions, as confirmed in *Kraaijeveld* ruling.[129] In the *van der Weerd* case[130] the CJEU stated that a national court is not required to consider the relevant point of the EU law if the parties had had a genuine opportunity to raise the point themselves in the course of proceedings, "*irrespective of the importance of that provision to the Community legal order*."[131] The requirement of a "genuine opportunity" led the Court to authorize the national appeal judge to consider EU law of its own motion, irrespective of limiting procedural rules, when the first instance proceedings could not consider EU law and *"it seem[ed] that no other national court or tribunal in subsequent proceedings may of its own motion consider the question of the compatibility of a national measure with [EU] law.*"[132]

Nevertheless, the case law of the CJEU provides the guidelines as to when the principle of equivalence and effectiveness entitle national judges to consider issues related to EU law on their own motion, even when the parties have not raised them. The principles of equivalence and effectiveness ensure that national rules of procedure do not undermine the correct enjoyment of EU

[127] View of Advocate General Mazák in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:319, point 62). See also, for the affirmation of that principle by the Court, judgment in *Rheinmühlen-Düsseldorf* (166/73, EU:C:1974:3, para. 3) and, for its continuing confirmation, judgments in *Mecanarte* (C-348/89, EU:C:1991:278, para. 44); *Palmisani* (C-261/95, EU:C:1997:351, para. 20); and *Cartesio* (C-210/06, EU:C:2008:723, paragraph 88); *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, para. 41); *Elchinov* (C-173/09, EU:C:2010:581, para. 26); *Kelly* (C-104/10, EU:C:2011:506, para. 61); *Križan and Others* (C-416/10, EU:C:2013:8, para. 64); *A* (C-112/13, EU:C:2014:2195, para. 35).

[128] Case C-689/13, *Puligienica Facility Esco SpA (PFE*), ECLI:EU:C:2016:199, para. 36.

[129] Case C-72/95 *Aannemersbedriff PL Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland*, judgment of 24 October 1996.

[130] C-222/05–225/05 *van der Weerd*, op. cit.

[131] Ibid., para. 41.

[132] Case C-312/93 *Peterbroeck*, op. cit., para. 19.

law rights making it impossible or more difficult compared to domestic rights. The *Van Schijndel* judgment spells out the circumstances in which consideration of EU law is mandatory:[133]

1. National courts are required to raise the issue of EU law on their own motion where **public policy interests** require it, and there are procedural safeguards allowing judges to consider national rules of public policy *ex officio*.
2. As the rule of thumb, the effectiveness of the EU law requires that the most important substantive constitutional aspects of EU law, in particular those pertaining to the functioning of the internal market must be taken into consideration by national judges at all stages of the proceedings. This is the conclusion that can be drawn from *Eco Swiss China Time*[134] ruling which concerned the compatibility of an arbitration award with matters of public policy, specifically with Art. 101 TFEU on competition. This is not surprising: since **competition provisions are fundamental for the EU law** and **essential for the existence of internal market**, they qualify as rules of national public policy, see point 1 above.
3. Clearly, the CJEU took advantage of this possibility when it determined the desirable manner of implementation of the Directive on unfair terms in consumer contracts.[135] It thus spelled out the domestic courts' power first[136] and later the obligation[137] to examine whether a given term of a contract is unfair. If the national court considers a contractual term unfair, it shall not apply the unfair term irrespective of whether the "unfairness" was raised or not by one of the parties in first or second instance proceedings,[138] unless the consumer insists on its application.[139]

In the field of fundamental right protection under the Charter or the general principles of EU law, the question regarding the application *ex officio* of EU law is double-fold. As such, EU fundamental rights do not apply directly to the facts[140] of national proceedings or to domestic law in general: their application depends on whether *other rules* of substantive EU law apply (see art. 51(1) of the Charter as interpreted in *Fransson* and *Pfleger*).[141] As a result, the parties that wish to invoke fundamental rights guarantees provided for by EU law carry the *onus* of raising the points of EU law twice: they must point to applicable rules of EU law in the main proceedings and, in addition, to the applicability of EU law fundamental rights guarantees. However, if they only discharge their burden of pleading with respect to the substantive rules of EU law, application of fundamental rights obligations is not barred, irrespective of domestic procedural law. Because compliance with fundamental rights is a condition of validity of EU norms, it follows that national judges can always raise their relevance ex officio, insofar as the application of substantive EU law has been duly raised by the parties under the conditions described above. In other words, once EU law has been introduced in the proceedings according to the national procedural regime, assessment of fundamental rights must be done either at the initiative of the parties or at the own initiative of the national court. The judge can autonomously consider their application, since it might be relevant to a genuine question on the validity or

[133] Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel*, op. cit., later confirmed in joined cases C-222/05 and C-225/05 *J. Van der Weerd and others v Minister van Landbouw, Natuur en Voedselkwaliteit*, op. cit., at paras. 19-22.
[134] C-126/97, *Eco Swiss China Time v. Benetton* , judgment of 1 June 1999.
[135] Joined Cases 240/98 to 244/98 *Oceano Grupo Editorial SA v Rocio Muciano Quintero and Salvat Editores v. Jose M. Sanchez Alcon Prades and others* , judgment of 27 June 2000; C-473/00 *Cofidis SA v Jean-Luis Fredout*, judgment of 21 November 2002; Case C 488/11, *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV*, judgment of 30 May 2013; Case C-397/11 *Erika Jőrös v Aegon Magyarország Hitel Zrt,* judgment of 30 May 2013.
[136] Joined Cases 240/98 to 244/98 *Oceano*, op. cit.
[137] Case C-168/05 *Elisa Maria Mostaza Claro v Centro Movil Milenium SL* judgment of 26 October 2006. Case C-243/08 *Pannon GSM Zrt. V. Erzsebet Sustikne Gyofri* judgment of 4 Jue 2009.
[138] Case C 488/11 *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV*, judgment of 30 May 2013.
[139] See, Case C-243/08 *Pannon,* op. cit.
[140] With the exception of the fundamental rights of non-discrimination provided for in Art. 157 and in the non-discrimination Directives can have direct effect.
[141] Case C-390/12, *Pfleger*,, judgment of 14 November 2013.

interpretation of the substantive rules of EU law invoked, and therefore it might give rise to a question to the Court of Justice under Art. 267 TFEU.

Effects of the preliminary rulings:

- The referring court is bound by the ruling (166/73 *Rheinmühlen, ECLI:EU:C:1974:3*)
- The interpretation binds also other courts (C-8/08, *T-Mobile Netherlands, ECLI:EU:C:2009:343*)
- The preliminary ruling produces effects *ex tunc* (the day of entry into force of the interpreted rule), unless the CJEU restricts its temporal effects (the Member State has to ask precisely for it – *Tatu*[142])
- Any decision inconsistent with the CJEU interpretation is defective and thus invalid (*Polish Supreme Court* 8.12.2009, I BU 6/09)

2.3. Disapplication

According to the *Simmenthal* doctrine,[143] national courts are obliged to disapply any conflicting provisions of national law.[144] This is only necessary if consistent interpretation of internal law proves impossible.[145] EU law obliges judges to look for the "consistent interpretation" of domestic law that does not contravene EU law.[146] When such interpretation is not possible and the EU norm satisfies the requirements for direct effect (i.e., it creates an obligation that is clear, precise and unconditional), the judge must set aside the domestic norm and apply the EU one instead, in order to ensure its efficacy.

There may be different approaches to the question of which of these two techniques is preferable in difficult cases. Some national judges might prefer to attempt consistent interpretation to avoid disapplying a national rule, whilst others might prefer to preserve the established interpretation of a national law rule and leave the task of amending it to the legislator. The CJEU encourages the exhaustion of consistent interpretation attempts in order to avoid outright conflict.[147]

Importantly, the duty of disapplication stems directly from EU law and national courts are not obliged to seek the prior opinion or the permission of national higher courts.[148]

A national court which is called upon to apply provisions of European Union law is under a duty to give them full effect, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently. Again, it is not necessary for the

[142] Case C-402/09, *Tatu*, ECLI:EU:C:2011:219.
[143] Case C-106/77, *Amminstrazione delle Finanze dello Stato v Simmenthal* op. cit., para. 22.
[144] A more updated judgment of the CJEU restating the disapplication obligation in case of conflict between domestic provisions and rights guaranteed by the Charter can be found in Case C-617/10, *Åkerberg Fransson*, op. cit. para. 45*:* "*As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means*."
[145] Case C-282/10, *Dominguez*, op.cit., para. 23
[146] Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others*, para. 27.
[147] See, for instance, Case C-282/10, *Dominguez*, op. cit, paras. 27-30.
[148] See, Case C-555/07, *Kücükdeveci*, op. cit., at para. 55.

court to request or await the prior setting aside of such provision by legislative or other constitutional means.[149]

Note that the direct effect of EU law, which is the precondition for disapplication of domestic norms, is generally attributed to regulations and Treaty provisions, subject to the requirements of *Van Gend en Loos* (a provision creates a right, is specific, and unconditional). Directives have only vertical effect, therefore a non-transposed directive can be invoked and enforced *in lieu* of contrary domestic rules only in disputes against State entities or emanations of the State.[150] This is true regardless of whether the public authority acts as a commercial entity or exercising public powers.[151]As to whether general principles and the provisions of the Charter can have horizontal direct effect, the question is still open, although there is a trend that suggests that the answer is in the positive,[152] provided of course that the single norm satisfies the *Van Gend en Loos* requirements.[153]

Domestic rules set aside as a result of conflict with EU law are not voided, but their application is precluded in cases governed by EU law. Disapplication may be required even when the domestic interpretation provides higher protection of a right, if that would jeopardize the unity and effectiveness of EU law (*Melloni*). The requirement to set aside national norms contrary to EU rules empowers a lower level national court to circumvent the national judicial hierarchy (as it was the case in the *Winner Wetten* and *Filipiak* preliminary references). However, when there is no direct effect, disapplication is not a requirement of EU law. In similar cases, it is for each jurisdiction to regulate the way in which a domestic norm incompatible with a EU rule without direct effect can be removed, or remedy granted to the individuals affected (State liability is required since *Francovich*,[154] the legislator might be asked to amend the legislation, or/and the domestic norm can be subjected to a review of constitutionality).[155]

Especially when the judge from a lower instance expects the appellate level or the supreme court to disagree with her interpretation of EU law, then, making a preliminary reference might be a wise option: the ruling of the CJEU will provide sufficient authoritative power for her subsequent decision to withstand scrutiny (at least on the point of EU law)[156], will provide guidance to the legislator to amend the EU-illegal legislation[157] and will, incidentally, serve as precedent for all EU jurisdictions. When the matter, instead, is not very sensitive, or when there is a CJEU ruling confirming the application of EU law, disapplication can be attempted, but the message to the legislator will be very tenuous: the disapplied norm will stay in force and other domestic courts might well consider it applicable.

Radu and Melloni – disapplication of national law on the basis of the CJEU preliminary ruling and the EU Charter (in particular Arts. 47 and 53) in the field of criminal law

Type of Interaction: Vertical Direct and Indirect (Romanian courts - CJEU); Case C-396/11, Radu, judgment of 29 January 2013

Type of Interaction: Vertical Direct and Indirect (Spanish Constitutional Court – CJEU); Case C-396/11, Radu, judgment of 29 January 2013

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[149] Case C-314/08, *Filipiak* , para. 81.
[150] In the area of non-discrimination the case law have given the horizontal direct effect to provisions of the directive. Compare: Case C-144/04, *Mangold*, op. cit. and Case C-555/07, *Kücükdeveci*, op. cit.
[151] Joined Cases C-250/09 and C-268/09 *Georgiev*, judgment of 18 November 2010, para. 70.
[152] See *Mangold* and *Kücükdeveci* op. cit.
[153] See more details on the topic of the horizontal application of the EFRs as provided by the EU Charter Module I.
[154] Joined Cases C-6/90 and C-9/90, *Francovich* op. cit.
[155] See for instance Italian Corte Costituzionale, judgment no. 227 of 2010, on the constitutionality of Italian norms that are inconsistent with the European Arrest Warrant Framework Directive (an instrument without direct effect).
[156] See C-416/10 *Križan and Others*, judgment of 15 January 2013.
[157] As in the *Griesmar* case, Close Up 5 in JUDCOOP Final Handbook.

Radu

Facts of the case: The dispute arose before the Court of Appeal of Constanţa, which was asked to execute four EAWs issued by German authorities against R.C.V for four EAWs issued by the German authorities against Mr Radu, for the purposes of prosecution in respect of acts of aggravated robbery. Mr. R.C.V did not consent to his surrender and in order to avoid the execution of the warrants made recourse to two judicial interaction instruments.

Legal issues: First, R.C.V. invoked the exception of unconstitutionality of provisions of the national law implementing the EAW Framework Decision 2002/584/JHA. He argued that these provisions violate Art. 23(5) of the Constitution (preventive arrest during criminal investigations) and Art. 24(1) (the right to a fair trial), as well as Art. 6(3) ECHR concerning the rights of the accused. The reason for this, he claimed, was that the national judge is extremely limited in executing the EAW, since the national judge can assess only the form and content of the warrant. The Court of Appeal of Constanta seized the Constitutional Court and suspended the trial until the completion of the constitutionality review.

The Constitutional Court rejected the exception of unconstitutionality by decision no.1290/14.10.2010. In its reasoning the Constitutional Court held that a contrary decision would breach the principle of mutual recognition of criminal judgments. The constitutional review also found that a provisional custody following the issue of an EAW satisfies the requirements of the right to liberty and right to a fair trial as guaranteed by the Constitution. The case was returned to the Court of Appeal.

Second, R.C.V. requested the Court of Appeal of Constanta to refer a preliminary reference to CJEU. The defendant argued that "the judicial authorities of the executing Member State were obliged to ascertain whether the fundamental rights guaranteed by the Charter and the ECHR were being observed in the issuing Member State. If that was not the case, those authorities would be justified in refusing to execute the European arrest warrant concerned, even if that ground for non-execution is not expressly provided for by Framework Decision 2002/584."

The High Court of Cassation and Justice had to assess the appeal raised by the Prosecutor to the follow-up judgment of the referring Court of Appeal of Constanta in the Radu case. The High Court had to establish whether Articles 6, 48 and 52 the Charter and the correspondent ECHR Articles require the requested national court to refuse to execute 4 EAWs, and, if such a possibility was permitted by the national legislation implementing of EAW Framework Decision 2002/584/JHA.

Preliminary questions referred by the Romanian court: The Court of Appeal of Constanta upheld the request for a preliminary reference and referred six questions, which raised essentially three issues:

- whether the Charter and the ECHR form part of primary EU law;
- the relationship between Article 5 of the ECHR and Art 6 TEU and Art. 48 and 52 of the Charter, on the one hand, and the provisions of the EAW Framework Decision 2002/584/JHA, on the other hand;
- whether the executing judicial authority can refuse to execute the EAW in the event of fundamental rights violations, that are not expressly provided by the EAW FD.

Conclusions of the CJEU: Unlike the Opinion of the AG, the CJEU reformulated the addressed preliminary question, and considerably limited the scope of questions: the relation between the EU Charter and the ECHR was not addressed, neither the issue of the proportionality assessment of the limitation of fundamental rights based on the automatic execution of the EAWs. The Court considered that the referring Court essentially asked whether the EAW FD, read in the light of Art. 47 and 48 of the Charter and of Art. 6 of the ECHR, must be interpreted as meaning that the executing judicial

authorities can refuse to execute a EAW issued for the purposes of conducting a criminal prosecution on the ground that the issuing judicial authorities did not hear the requested person before the arrest warrant was issued.

The CJEU by judgment of 29 January 2013 of Grand Chamber (C-396/11) held that the Charter does not allow a refusal to execute an EAW on the basis that the requested person was not heard by the issuing authority.

Judgment of the referring court following the preliminary ruling of the CJEU: The referring Court of Appeal Constanta, by Decision no. 26/P/11.03.2013, rejected the execution of the four EAWs and the surrender of R.C.V.

For one of the warrants, the Court of Appeal based its refusal on the *ne bis in idem* principle, since R.C.V. had been already sentenced for the same act by the Romanian authorities and was serving the sentence (see Article 3 (2) EAW Framework Decision 2002/584/JHA, grounds for mandatory non-execution).

For the other three warrants, the Court of Appeal based its refusal on two main arguments:

First, the Court reasoned that the principle of mutual recognition and the application of EAW Framework Decision 2002/584/JHA is subject to the limits of Article 6 TEU and the EU Charter. Citing the CJEU preliminary ruling which was interpreted as given precedence to the right to a fair trial and right to liberty as enshrined in the EU Charter and ECHR, the Court held that the judicial authority of the executing state might refuse the surrender and execution of an EAW in exceptional cases, other than the limited ones provided for by the EAW Framework Decision 2002/584/JHA and the national transposing norm. The respect of fundamental rights was considered such an exceptional case.

Second, the Court held that the surrender would constitute a disproportionate interference with the right to liberty and right to family life, taking into account the long period of time between the offence and prosecution of R.C.V. – 12 years. Also the Court held that the prosecution in Romania would ensure a better exercise of the right to defence.

The decision of the Court of Appeal Constanta was challenged in front of the Supreme Court by the Public Prosecutor's Office.

The Supreme Court admitted entirely the appeal formulated by the Public Prosecutor, and quashed the Court of Appeal's decision (Judgment no. 2372 of 17 July 2013). Similar to the Constitutional Court, the Supreme Court gave priority to the principle of mutual recognition. The Supreme Court found that the decision of the Court of Appeal was unlawful as an incorrect application of the law. Later, the Supreme Court decided that the limitations to fundamental rights were necessary and proportionate, given the gravity of the offences. Based on the above findings, the Supreme Court ordered the execution of three EAWs and the surrender of R.C.V to the German authorities. One EAW's execution was rejected, according to *ne bis in idem* principle. The surrender was authorised under the condition that if found guilty the requested person would be transferred to Romania for serving the sentence.

Reasoning (in particular, role of the Charter): The national courts involved had different interpretations as regards the application of the proportionality principle (Article 51 EU Charter) and the effects of the Articles 47 and 48 in relation to a matter that was exhaustively covered by EU legislation.

At issue was the standard of protection of the right to a fair trial and right to liberty, as well as the right to family life: would the automatic execution of EAW constitute a proportionate interference with these fundamental rights, and secondly can national courts conduct an assessment of the

execution of EAW based on fundamental rights other than those exhaustively provided by Article 4 EAW FD?

The referring Court disagreed with the CJEU as regards the role of the EU Charter and the proportionality assessment. Contrary to the strict guidance of the CJEU, the referring Court held that the judicial authority of the executing state might refuse the surrender and execution of an EAW in exceptional cases, other than the limited ones provided for by the EAW Framework Decision 2002/584/JHA and the national transposing norm. The respect of fundamental rights was considered such an exceptional cases. Consequently, the Court held that the surrender would constitute a disproportionate interference with the right to liberty and right to family life, taking into account the long period of time between the offence and prosecution of R.C.V., namely 12 years.

The High Court of Cassation and Justice agreed with the Public Prosecutor that there was no disproportionate interference with the right to a fair trial and effective remedies, or family life, given the gravity of the criminal offences of which Mr Radu was accused.

Relation of the case to the scope of the Charter: All national courts involved in the case found the EU Charter applicable. The connecting factor was the fact that the challenged national legislation was implementing the EAW FD.

Use of judicial interaction technique: The Court of Appeal of Constanta strategically uses the judicial interaction techniques to achieve an outcome that would be more difficult to justify otherwise. The Court adopts a bottom-up approach. First, the Court asks the Constitutional Court to clarify the conformity of national measures transposing EU law with EU fundamental rights and ECtHR law. Failing to achieve the sought result, the Court asks the CJEU for a similar interpretation. Following the silence of the CJEU to its preliminary requests and negative reply to its proposed interpretation, the Court relies on the Charter of Fundamental Rights of the EU and ECtHR case law against the strict application of EAW Framework Decision 2002/584/JHA.

The various judicial interaction techniques used at national and EU level in an attempt to increase the fundamental rights grounds for challenging the execution of EAWs:

1. *Preliminary reference* for the purpose of recognising fundamental rights as grounds for non-execution of an EAW, in addition to those expressly provided by Art. 4 EAW FD – this proposal was rejected by the CJEU.

2. *Proportionality* interaction technique is used to strike the balance between the fundamental right to fair trial and the principle of mutual recognition.

3. *Disapplication.*

4. *Horizontal judicial interactions* - Domestic constitutional review is followed by a reference to the CJEU, showing a bottom-up strategic use of the techniques of judicial cooperation by the national appellate court. Consistent interpretation with EU fundamental rights law beyond the CJEU judgment. The Court of Appeal goes beyond the ruling issued by the CJEU and finds breaches of fundamental rights as such to constitute grounds for refusal, even when it seems clear from the CJEU judgment that fundamental rights claims, outside those expressly provided in Articles 3 and 3 of the EAW Framework Decision 2002/584/JHA are not permitted as grounds of refusal; postponing the surrender on grounds of fudnamental rights might be legitimate under the EAW if, the national court proves the principle of uniform and effective application of the EAW is not endangered (see the Jeremy F case, commented in the database).

5. *Mutual recognition* (the different understandings of the scope of application of mutual recognition by the national courts and the CJEU).

Melloni

Facts: The Court of Appeal of Bologna (Italy) issued an EAW for the surrender of Mr. Melloni, an Italian national, condemned in his absence to ten years' imprisonment for the crime of bankruptcy fraud, who had been represented by two lawyers of his choice.[158] Audiencia Nacional decided to execute the EAW, holding that, although the prison sentence had been handed down in his absence, Mr. Melloni had information about the trial and had voluntarily decided not to be present. Mr. Melloni filed an individual complaint (*recurso de amparo*) before the Constitutional Court, claiming the violation of his right to a fair trial with full guarantees (Art. 24.2 Constitution) by the Audiencia Nacional, since the latter did not demand that Italy issue guarantees that the sentenced person would have an opportunity to apply for a retrial of the case and to be present at the judgement.

Legal issues: The Constitutional Court decided to stay proceedings and make a reference for a preliminary ruling to the CJEU.[159]

The reference included three questions about: 1) the interpretation of Art. 4a(1) the EAW Framework Decision; 2) the validity of the same clause in light of Arts. 47 and 48(2) of the Charter (right to fair trial and right to criminal defence); and 3) the interpretation of Art. 53 of the Charter (constitutional rights with higher levels of protection).

In response to the preliminary reference, the CJEU concluded that:

1) The executing state cannot, according to the EAW Framework Decision, condition the execution of the EAW on the possibility of a retrial.

2) Art. 4a(1) of the Framework Decision is compatible with Articles 47 and 48(2) of the Charter.

3) Art. 53 of the Charter of Fundamental Rights of the European Union does not change these findings.

Conclusions of the CJEU: This was the first time the CJEU was presented with the interpretation of Art 53 Charter. The CJEU held that: "[…] Art 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised" (para. 60). However, in the specific case of *Melloni*, the CJEU held that Art. 53 EU Charter and the national higher standards of protection of the right to a fair trial cannot be used to prevent the application of the EAW FD. The later EU secondary instruments harmonised the situation covered by the preliminary reference, namely the conditions for the execution European arrest warrant issued for the purposes of executing a sentence rendered *in absentia*. Consequently, allowing a Member State to avail itself of Article 53 of the Charter of Fundamental Rights to make

[158] A different thread of dialogue can be followed in Italy on the same issue: the ECtHR, in *Somogy vs. Italy*, Application No. 67972/01, judgment of 18 May 2004, ruled against Italy, finding a violation of Art. 6, because the system was too formalistic, assuming that no effective inquiries were held to verify the claims of the defendant (no real information about the proceedings). Similarly, in *Sejdovic vs Italy* (Application no. 56581/00, judgment November 10, 2004, Grand Chamber ruling of March 31, 2006), the ECtHR excluded the need for a new proceeding in the event of voluntary subtraction to justice, when a real, formal notification occurred, even in the case of a voluntary escape. Italy adapted its legal framework following the ECtHR's judgments, modifying the discipline of the trial *in absentia* through decree no. 17/2005, converted with amendments into Law 60/2005, while trying at the same time to harmonize internal law with the EAW FD. However, later on, the Constitutional Court declared Art. 175.2 of the Italian Code of criminal procedure (which provided that, in case of an *in absentia* decision, the defendant shall, upon request, be granted a fresh term in which to apply for the appeal of the decision, unless he or she had knowledge of the proceeding and has voluntarily decided not to appear or to lodge an appeal) unconstitutional in so far it did not allow a fresh term to be granted in the case where an appeal has been filed by the defence, as a case of consistent interpretation between ECtHR standards and constitutional principles. See Italian Constitutional Court, decision 4 December 2009, p. 317.

[159] See ATC 86/2011, of 9 June 2011.

the surrender of a person conditional on a requirement not provided for in the framework decision would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that decision, undermine the principles of mutual trust and recognition which that decision purports to uphold and would therefore compromise its efficacy. Therefore an interpretation of Art. 53 EU Charter that would allow the Member States to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution is precluded on the basis of the principle of primacy of EU law (para.58 of the *Melloni* judgment).

Judgment of the referring court following the preliminary ruling of the CJEU: The resolution of the case by the Spanish Constitutional Tribunal was delivered on 13 February 2014. It decided to revise its previous interpretation of the right to a fair trial, and followed the interpretation given by the CJEU in *Melloni.* As a result, the level of constitutional protection was lowered. At the same time, in an *obiter dicta*, the Constitutional Court recalled its *controlimiti* doctrine.

Interestingly, whilst the Spanish Supreme Court follows to the letter the ruling of the CJEU in *Melloni* (even though it addresses a deeply rooted preference of Spanish legal system that would be problematic for other MSs), in *Radu* the referring displeased court goes beyond what the CJEU decided. It finds breaches of fundamental rights, as such, to constitute grounds for refusal, even when it seems clear from the CJEU judgment that the letter of the EAW FD, in particular Art. 3, 4 and 4a, constitutes the only point of reference. It takes the Romanian High Court of Cassation and Justice to restore the CJEU compliant order. It applies an interpretation in conformity with EU fundamental rights leading to a technique between disapplication and consistent interpretation, given that the exhaustive nature of the refusal grounds is overridden.

Choice and use of Judicial Interaction Techniques: Both Romanian and Spanish courts used the preliminary reference techniques coupled with the consistent interpretation with the CJEU preliminary ruling. Both preliminary questions raise the issue of the relationship between the fundamental rights guarantees and the apparently exhaustive EAW grounds of refusal. Whilst in *Radu* the issue is addressed in a more abstract manner requiring the decisive statement on the part of the CJEU on the position and importance of fundamental rights with reference to implementation of the EAW, in *Melloni* the CJEU is called upon to determine whether a national court can apply a higher level of protection of fair trial than that guaranteed by the EU law. In the latter case, the preliminary reference is used as a means of resolving a potentially long-standing conflict between Spanish courts and the judicial systems of other Member States, given the unusually high level of protection granted in Spain for in absentia trials and the right to defence.

The Spanish doctrine of 'indirect violation' is interesting as it shows how acts of one State are interpreted as violations of a fundamental right in another State; thereby providing an example of the inherent necessity of dialogue or at least interaction in the area of the right to fair trial. This may even show an element of horizontal interaction in all similar cases: it is necessary to engage with the legislation, but also the practice of courts in another Member State to see if a retrial (or other guarantees ensured under the right to a fair trial in the domestic system of the executing state) would be possible. The vertical interaction with the CJEU is anticipated by the domestic constitutional review.

The CJEU provides the answers to the two referring courts, itself employing further techniques: in *Radu* it applies proportionality in order to strike a balance between the fundamental right to a fair trial and the principle of mutual recognition of foreign judgments.

In *Melloni*, the CJEU applies consistent interpretation with the ECtHR standard (in reply to the Wilson Adran John reasoning) following on the strategic use of this standard by the referring court defending domestic solutions.

Outcome of the judicial interaction techniques: In spite of the fact that both national courts used the same judicial interaction techniques, they reached two different results due to their different interpretation of the CJEU's set requirements in its preliminary rulings. The use of the preliminary reference technique by the Spanish Constitutional Court and the close following of the *Melloni* judgment of the CJEU by the referring court ensured the objective of coherence between the national practice and the EU EAW FD, an obligation directly binding on national courts; however the objective of enhancing the protection of fundamental rights, in this case the right to a fair trial, by giving effect to the higher national standard of protection of fundamental rights could not be ensured at the same time. On the other hand, the Romanian referring court in the *Radu* case chose to give priority to the enhancement objective to the detriment of coherence, and rejected the surrender of the individual based on fundamental rights grounds not expressly provided in the EAW FD: the *ne bis in idem* principle and disproportionate interference with Mr Radu's right to liberty and the right to private and family life.[160]

Kücükdeveci – Use of disapplication on the application of Art. 21 of the EU Charter in the field of non-discrimination on grounds of age

Type of Interaction: Vertical Direct and Indirect (German courts – CJEU)

Case C-555/07, Kücükdeveci, Judgment of 19 January 2010

Facts: In *Kücükdeveci* (C-555/07)[161] the ordinary judge needed to assess the legality of a provision from the German Civil Code allowing employees to give a comparatively shorter notice of dismissal to employees who have started working before the age of 25. The plaintiff maintained that this provision was discriminatory, because it arbitrarily affected early-workers. Discrimination in the workplace is regulated by the EU Directive 2000/78, which includes age among the prohibited grounds. However, directives are deprived of direct horizontal effects. That is, individuals cannot derive from them an enforceable right capable of setting aside domestic norms that can be relied upon by another private party, which was the case of the present dispute. On the other hand, the CJEU had previously stated that non-discrimination on grounds of age is a general principle of EU law.[162] In the meantime the EU Charter entered into force and Art. 21 of the Charter of Fundamental Rights provides the principle of non-discrimination: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." Yet, in order to apply the EU Charter based principle of non-discrimination, it first had to be established that the facts of the case fall within the scope of application of EU law.(see Art 51 of the Charter).[163]

Legal issues: The challenged national provision introduced a difference of treatment (different notice periods of dismissal) between persons with the same length of service, depending on the age at which they joined the undertaking. The national court was thus faced with the questions of: 1) with what EU law was the national provision in conflict: Directive 2000/76 or the general principle of non-

[160] It seems that the referring court sided with the interpretation given by the European Commission as noted in its 2011 Report on the implementation of the EAW FD and agreed by the AG Sharpston in her Opinion in Case C-396/11 *Radu*. "[…] *one of the criticisms levelled at the manner in which the Framework Decision has been implemented by the Member States is that confidence in its application has been undermined by the systematic issuing of European arrest warrants for the surrender of persons sought in respect of often very minor offences which are not serious enough to justify the measures and cooperation which the execution of such warrants requires. The Commission observes that there is a disproportionate effect on the liberty and freedom of requested persons when European arrest warrants are issued concerning cases in which (pre-trial) detention would otherwise be felt inappropriate*." (see: C-396/11 *Radu*, Opinion of AG Sharpston, op. cit. para. 60).

[161] Case C-555/07, *Kücükdeveci*, op. cit.

[162] Case C-144/04, *Mangold*, op. cit.

[163] For a discussion on the need to establish first an EU law provision that covers the facts of the case in order to trigger the application of the EU Charter fundamental rights, please see Module I.

discrimination on grounds of age, or both; 2) if there was a conflict could it be justified by a legitimate aim; 3) could the national judge disapply the national legislative measure if it was found to be incompatible with EU law in a dispute between private parties when according to the Marshall doctrine EU Directives do not have horizontal application.

The German court held that the difference in treatment provided by the national legislation (German Civil Code) did not raise an issue of constitutionality, but it did consider its possible incompatibility with EU law. It therefore, addressed a preliminary reference to the CJEU to determine exactly if there was a conflict with EU law and how to handle it.

Conclusions of the CJEU: The CJEU first confirmed its previous decision taken in *Mangold*, and noted that non-discrimination on grounds of age, as recognized in the EU Charter of Fundamental Rights, and in the Employment Equality Directive 2000/78, is a general principle of EU law, and requires judges to set aside conflicting legislation even in horizontal disputes.

By recognizing the horizontal direct effect of the general principle (a new doctrine) the CJEU strengthened its **alliance with ordinary courts**, and thus granted the opportunity to the national courts to set aside inconsistent national legislation without having first to obtain the constitutional courts' confirmation of the unconstitutionality of the challenged legislation.

Choice and use of Judicial Interaction Techniques: Preliminary reference which offered guidelines on the application of the proportionality test to the discriminatory treatment introduced by the national legislation; and **legitimized its disapplication.** In the present case the CJEU held that although the difference in treatment is justified on the basis of the personnel flexibility which falls under the employment and labour market aims provided by Art. 6(1) of the Employment Equality Directive, it is not necessary and proportionate with the aim, and it therefore permitted the national referring court to disapply the national legislative provision following an application of the proportionality test. It has to be noted that in another case referred by a German court, a measure resulting in discrimination on grounds of age (German law restricted applications to join the fire service to those under the age of 30) was found to be appropriate based on the aim of genuine occupational requirement because it promotes a better level of professionalism by encouraging long-term employment in certain critical positions (e.g., see *Wolf*). [164]

Alternative Use of Judicial Interaction Techniques and Possible Outcomes: The national court could have avoided the preliminary reference to the CJEU and disapplied the national provision based on the *Mangold* judgment. It should be noted that the *Mangold* case presented certain specific circumstances which were not present in *Kücükdeveci* and thus the preliminary reference was the optimal choice before proceeding to disapplication. Consistent interpretation was not possible in this particular context due to the wording of the provisions.

2.4. Instances of transnational judicial interactions: mutual recognition/ comparative reasoning

2.4.1. Mutual recognition and mutual trust

The TFEU provides for its own form of judicial interaction - placed under the title of judicial cooperation in civil and criminal matters which is to be applied in the field of the AFSJ. It takes a form of a principle of mutual recognition based on mutual trust. The principle of mutual recognition

[164] Case C-229/08, *Colin Wolf v. Stadt Frankfurt am Main*, judgment of 12 January 2010, para. 46.

of foreign judicial and quasi-judicial acts is required in the fields of asylum,[165] civil,[166] and criminal cooperation.[167]

In short, mutual recognition requires courts to treat foreign judgments and other decisions as a source of law, thus recognizing the legitimacy of other legal orders and demonstrating trust towards the judicial systems of other States. However, the principle of mutual trust in the Member States' legal system's compliance with Fundamental Rights has recently been challenged in light of the failures identified in several Member States to protect the fundamental rights of the people subject to the AFSJ instruments: asylum seekers, individuals subject to the EAW, implementation of the Brussels II bis Regulation.[168] This principle has been contested in light of either the incompatibility of EU secondary legislation with fundamental rights or its application was rejected based on the claim of giving priority to national higher standards of protection of fundamental rights.

Recently, the principles of mutual recognition and trust have been the subject of increasing jurisprudence from the CJEU[169] and the ECtHR usually in cases where the application of these principles was challenged in favour of the application of an enhanced protection of European Fundamental Rights.

The CJEU gives priority to effectiveness and autonomy of EU law and to a quasi-absolute application of mutual trust, with some variations permitted in favour of a higher standards of protection of human rights in specific AFSJ sectors. On the other hand, the ECtHR will not refrain from generally assessing the conformity of the Member States' EU implementing legislation with the ECHR, and furthermore finding a violation of the ECHR, regardless of the CJEU previous judgments on the issue.[170] This approach was evident in the 2011 *M.S.S v Belgium and Greece* and 2014 *Tarakhel v Switzerland* judgments. In both cases, the ECtHR found the Member States to be in violation of the ECHR following the application of the EU principle of mutual trust within the field of Dublin

[165] Examples of mutual recognition in the field of migration and asylum: mutual recognition of the long-term resident status (Directive 2003/109), labour migrant status (Blue Card Directive 2009/50), of illegally staying migrants and requirement of return (Return Directive 2008/115/EC); in asylum law, recognition by other Member States of refugee status and subsidiary protection status granted in accordance with the Qualification Directive 2004/83, pursuant to the amended long-term residents directive (Directive 2011/51), and Dublin Regulation (Regulation No 343/2003).

[166] Art. 81(1) TFEU within the field of judicial cooperation in civil matters reads as follows: "*The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States."*

[167] Art. 82(1) TFEU reads as follows: "*Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83*." The principle of mutual recognition applies to custodial sanctions, financial penalties, probation measures, alternative sanctions, confiscation orders, arrest warrants, certain evidence warrants, pre-trial supervision measures, and, finally, to the existence of previous convictions for the purpose of taking them into account in new criminal proceedings. The second Handbook on Judicial Interaction in the field of the Right to a Fair trial concentrated on the most challenged mutual recognition instrument in criminal matters, which is the EAW FD (Council Framework Decision 2002/584/JHA, of 13 June 2002, on the European arrest warrant and the surrender procedures between member states, amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial OJ L 81, 27.3.2009, pp. 24–36).

[168] Council Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000 OJ [2003] L 338/1, 23.12.2003.

[169] C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department,* op. cit. and Case C-493/10, *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* op. cit.; *Melloni* op. cit,, *Radu,* op. cit. and *Jeremy F,* op. cit. cases in regard to the EAW FD; Case C-491/10 PPU, *Aguirre Zarraga* judgment of 22 December 2010.

[170] *M.S.S. v Greece and Belgium,* Appl. No. 30696/09, ECtHR, Judgment of 21 January 2011; ECtHR judgment in *Tarakhel v Switzerland,* Appl. No. 29217/12, ECtHR, 4 November 2014.

transfers of asylum seekers. The CJEU had the opportunity to clarify the scope of application and operation of mutual trust first in *N.S.*, where the Court referred extensively to the *M.S.S.* judgment and followed the ECtHR approach by first, endorsing the existence of systemic deficiencies in Greece and secondly holding that this situation is justifying a limitation to the application of mutual trust. However, the two judgments seemed to be at odds as regards the precise threshold for allowing distrust among the Member States.

ECtHR threshold	**CJEU threshold**
M.S.S. v Belgium and Greece (Jan 2011) – reiterated the *Soering v UK individual violations of FRs test* – substantial grounds for believing the transferred asylum seeker would face a real risk of treatment contrary to Art. 3 ECHR	*N.S. and others* (Dec. 2011) Mirrors ECtHR BUT rejects individual infringements of FRs, only "*systemic flaws in the asylum procedure and reception cdts. for asylum applicants in the MS responsible*" as ground for rebutting the presumption of cf with FRs *Puid* and A*bdullahi* maintained the test (Greece MS of transfer)

Following the *M.S.S.*, *N.S.* and *Abdullahi* judgments, national courts were not sure how to interpret the scope of application of 'systemic deficiencies' within the migration field, in particular whether mutual trust was to be lifted only in cases where the violation of Art. 4 CFR amounted to systemic deficiencies, or also in individual cases of violation of Art. 4 CFR, and whether only violations of absolute human rights should be taken into account or also of relative human rights, such as the right to family life and fair trial and effective remedies rights. In the absence of a hierarchical relation between the judgments of the ECtHR and CJEU, it is left to the national courts themselves to identify ways of bringing about greater coherence.

For instance, the UK courts have followed different approaches to the scope of application of the principle of mutual trust, either sharing the CJEU narrow threshold of 'systemic deficiencies' for the limitation of mutual trust, or a wider limitation approach by way of including also the ECtHR individual violations threshold. The *EM (Eritrea)* case[171] and C.K. and other case[172] is illustrative of the divided approaches taken by national courts on the precise scope of application of mutual trust and choices of the different thresholds for the limitation of mutual trust established by the two supranational courts. While, the **UK Court of Appeal** interpreted the trilogy of cases - *KRS v United Kingdom*, *M.S.S. v Belgium and Greece* and *N.S. and Others*- as requiring to follow a threshold where only "systemic" and not also "sporadic violations of international obligations" should be taken into account,[173] the **UK Supreme Court** adopted the wider threshold of limitation of mutual trust by taking into consideration not only the above mentioned trilogy of cases but also previous jurisprudence of the ECtHR, such as the landmark *Soering* case.[174] The **UK Supreme Court** held that, should it follow the Court of Appeal's interpretation of *N.S.*, it would give rise "to an inevitable tension with the Home Secretary's obligation to abide by EU law" since under EU law, the Member States have to comply with the ECHR, and also the 1998 Human Rights Act which requires the Home Secretary to conform to the ECHR. In *EM (Eritrea)*, the UK Supreme Court established that the legal

[171] *R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department*, [2014] UKSC 12, Judgment of 24 February 2014.(hereinafter *EM (Eritrea)*).
[172] Case C-578/16, commented in the ***ACTIONES Module on Asylum and Immigration.***
[173] The UK Court of Appeal held that: "What in the MSS case was held to be a sufficient condition of intervention has been made by the NS case into a necessary one. Without it, proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II."
[174] ECtHR, *Soering v UK*, Appl. No. 14038/88, Judgment of 7 July 1989.

test to be followed when determining whether particular violations of human rights amount to legitimate grounds for limiting mutual trust should be the ECtHR *Soering* test coupled with the *M.S.S* and *N.S.* threshold. Thereby, both operational, systemic failures in the national asylum systems and individual risks of being exposed to treatment contrary to Article 3 ECHR and Article 4 EU Charter should be considered as legitimate thresholds for the limitation of the principle of mutual trust.

Similar disagreements between national courts of the EU countries continued after the *Tarakhel* judgment of the ECtHR, until the CJEU had the occasion to clarify that the test it pursued regarding the limitations to the principle of mutual trust in asylum is similar to the one set by the ECtHR.[175]

Within the field of judicial cooperation in criminal matters, the **Spanish Constitutional Court** strictly followed the ruling of the CJEU in *Melloni*, and gave up its long established doctrine of 'indirect violations' in favour of applying the lower level of protection of the right to a fair trial as ensured at the EU level,[176] with the result of giving full effect to the principles of mutual trust, mutual recognition, primacy, unity and effectiveness of EU law.

The EAW cases show that the different standards of protection of fundamental rights across the Member States strain the EU law principles of mutual trust and recognition. In these cases, such as *Melloni* and *Radu*, the CJEU is chosen as the mediator between different national standards, but also between national standards and EU law. Apart from the structural aspect, the preliminary reference procedure is obviously relevant for the resolution of the case in which it is made, but also of other related disputes; the court may thus stay proceedings pending the resolution of a case by the CJEU/ECtHR.

2.4.2. Other forms of horizontal and transnational judicial interactions

Horizontal interaction can also occur between courts belonging to different jurisdictions. National courts can use the comparative method to draw inspiration from foreign practice relating to the same supra-national obligations (e.g., the implementation of State immunity; the interpretation of a Directive; the reforms required to ensure compliance with a ruling of the ECtHR).

In practice, comparative reasoning is used to achieve a number of purposes, *inter alia*: to strengthen the reasoning and distinction of a given case; to find a solution when present legal tools provide none (a judgment of the Dutch Council of State was behind the decision of the Irish High Court to address a preliminary reference in the M.M. case[177]); to operate within the margin of appreciation as casually practiced by the ECtHR.

Sabam v Scarlet

Facts: In 2004, SABAM, the Belgian collective society in charge of authorising the use by third parties of the musical works of Belgian authors, composers and editors, claimed in front of the *Tribunal de Première Instance* of Bruxelles that the Scarlet Extended SA, an internet service provider, was breaching the copyright of the authors included in the SABAM catalogue. In particular, users of Scarlet's services were downloading works in SABAM's on-line catalogue, without authorisation and without paying royalties. Downloading occurred through peer-to-peer networks (a transparent method of file sharing which is independent, decentralised and features advanced search and download functions). The court ordered Scarlet, in its capacity as an ISP, to stop the copyright

[175] See the *C.K. and others*, op.cit., preliminary reference addressed by the Slovenian Supreme Court following a disagreement regarding the circumstances limiting the principle of mutual trust with the Constitutional Court.
[176] Namely by the EAW Framework Decision.
[177] Case C-277/11, commented in the *ACTIONES Module on Asylum and Immigration*.

infringements by making impossible to users to send or receive in any way electronic files containing a musical work in SABAM's repertoire by means of peer-to-peer software.

Scarlet appealed to the *Cour d'appel de Bruxelles*, claiming that the injunction failed to comply with EU law because it imposed on Scarlet, *de facto*, a general obligation to monitor communications on its network, in contrast with the provisions of the E-commerce Directive and the requirements of fundamental rights protection.

Legal issue: On the basis of this claim, in 2010, the Appeal Court decided to stay the proceedings and referred a question for preliminary ruling to the CJEU, asking whether EU law allows the Member States to authorise a national court to order an ISP to install – on a general basis, as a preventive measure, exclusively at its expense and for an unlimited period – a system for filtering all electronic communications in order to identify illegal file downloads.[178]

Before the delivery of the decision by the CJEU, but after the publication of the AG *Cruz Villalón* opinion's on the case, the UK High Court delivered its judgement in the *20th Century Fox v BT* case.[179] This case concerns the legal remedies that can be obtained to combat online copyright infringement. The case solved the dispute between the six applicants, a group of well-known film production companies or studios that carry out business in the production and distribution of films and television programmes, and the British Telecom (BT), UK's the largest ISP. The applicants sought an injunction against BT pursuant to section 97A of the Copyright, Designs and Patents Act 1988,[180] in order to block or at least impede access by BT's subscribers to a website currently located at www.newzbin.com.

Conclusions of the CJEU: In its decision,[181] the CJEU provided that holders of intellectual-property rights may apply for an injunction against intermediaries, such as ISPs, whose services are being used by a third party to infringe their rights. Though, rules regarding injunctions are a matter for national law, these must respect the limitations arising from European Union law, such as, in particular, the prohibition laid down in the E-Commerce Directive, under which national authorities must not adopt

[178] The full preliminary ruling read as following:

"*(1) Do Directives 2001/29 and 2004/48, in conjunction with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, permit Member States to authorise a national court, before which substantive proceedings have been brought and on the basis merely of a statutory provision stating that: 'They [the national courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right', to order an [ISP] to install, for all its customers, in abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent?*

(2) If the answer to the [first] question … is in the affirmative, do those directives require a national court, called upon to give a ruling on an application for an injunction against an intermediary whose services are used by a third party to infringe a copyright, to apply the principle of proportionality when deciding on the effectiveness and dissuasive effect of the measure sought?"

[179] *Twentieth Century Fox Film Corporation et al v British Telecommunications plc* [2011] EWHC 1981 (Ch), 28 July 2011.

[180] Article 97A of the Copyright, Design and Patents Act in the provision implementing Article 8(3) of the Information Society Directive 2001/29/EC. It provides that "(1) The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright. (2) In determining whether a service provider has actual knowledge [...] a Court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to – (a) whether a service provider has received a notice [...]; and (b) the extent to which any notice includes – (i) the full name and address of the sender of the notice; (ii) details of the infringement in question."

[181] Case C-70/*10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, judgment of 24 November 2011.

measures which would require an ISP to carry out general monitoring of the information that it transmits on its network.

It is true that the protection of the right to intellectual property is enshrined in the Charter of Fundamental Rights of the EU. There is, however, nothing in the wording of the Charter or in the Court's case law to suggest that that right is inviolable and must for that reason be absolutely protected. In particular, the effects of the injunction would not be limited to Scarlet, as the filtering system would also be liable to infringe the fundamental rights of its customers, namely the right to protection of their personal data and their right to receive or impart information, which are rights safeguarded by the Charter of Fundamental Rights of the EU. Thus, the injunction could potentially undermine freedom of information. The system might not adequately distinguish between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.

Follow-up of the CJEU preliminary ruling: Impact of the CJEU preliminary ruling in the Scarlet case on UK case law

The UK courts, after the confirmation of its balancing effort between property right and freedom of expression and the request to identify clearly the content of the injunction, granted several subsequent injunctions blocking access to peer-to-peer file-sharing websites.[182]

German case law[183]

The dispute emerged between Atari Europe, maker of computer games, and Rapidshare, a file hosting service provider, which allowed its users to download illegal copies of the Atari game "Alone in the dark" (the latter had been uploaded by Rapidshare customers). After a first reaction of the hosting service, taking down the files as identified by Atari, Rapidshare did not proceed to verify whether the same game had been uploaded by other users, triggering the claim of Atari in front of the Dusseldorf court, after which the appeal ended in front of the German Federal Supreme Court.

The Court held that Rapidshare was not to be deemed a "Täter" (the actual infringer), but only a so called "Störer", i.e. secondarily liable. Therefore, it could only be held responsible if (1) it had a duty to review the content hosted on its servers, and (2) had not exercised this duty. In line with earlier cases, the court explained that host providers generally do not have to check the content of any files uploaded by their users. Although Rapidshare can be used for purposes of unlicensed dissemination of copyrighted works, the court affirmed that there are also a sufficient number of legitimate forms of using the hosting platform. Therefore, Rapidshare could only become subject to specific duties to check uploads once notified of a clear infringement. The court then addressed whether Rapidshare was under the obligation to delete the specific files from the specific location or if it had to perform searches for further places where the game could be found and monitor their website traffic. According to the Court, Rapidshare had to make all reasonable efforts to prevent other users from uploading "Alone in the Dark". In particular, the court pointed out that it had to do what was *technically and economically* reasonable - to prevent users to provide the game on its servers - without jeopardizing their business model. The court found that, by not filtering user uploads for the phrase "Alone in the Dark", Rapidshare could possibly have breached their duty to inspect user uploads. Moreover, the court also held that Rapidshare was obligated to review a "limited number" of search engines, that by the purpose provide Rapidshare link collections, and to delete files containing the game found through these search engines.

[182] See *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), 20 February 2012; *Emi Records and others v. British Sky Broadcasting Ltd and others*, [2013] EWHC 379 (Ch) 28 February 2013; *The Football Association Premier League Ltd v British Sky Broadcasting Ltd & Ors* [2013] EWHC 2058 (Ch), judgment of 16 July 2013.

[183] See Judgment of 12 July 2012 - I ZR 18/11 - *Alone in the dark*.

As the court did not feel that it had sufficient factual information as regards the feasibility and cost of monitoring user uploads, it remanded the case to the lower court, the Higher Regional Court of Düsseldorf.

ECHR - the limits freedom of expression poses on the State's right to regulate access to the internet in order to preserve public interest.[184]

In *Ahmet Yildirim v. Turkey* judgment,[185] the ECtHR addressed the case of a PhD student which claimed to have been subject to "collateral censorship" when his Google-hosted website was shut down by the Turkish authorities as a result of a judgment by a criminal court ordering to block access to Google Sites in Turkey. The measure stemmed from a decision of the Denizli Criminal Court of First Instance, initially designed as a preventive measure ordered by the court in the context of the criminal proceedings brought against a third-party website, hosted by Google, which included content deemed offensive to the memory of Mustafa Kemal Atatürk, the founder of the Turkish Republic. Due to this order, Yildirim's academically-focused website, which was unrelated to the website with the allegedly insulting content regarding the memory of Atatürk, was effectively blocked by the Turkish Telecommunications and Information Technology Directorate (TIB). According to the TIB, blocking access to Google Sites was the only technical means of blocking the offending site, as its owner was living outside Turkey. Yildirim's subsequent attempts to remedy the situation and to regain access to his website hosted by the Google Sites service were unsuccessful.

The ECtHR found that the decision taken and upheld by the Turkish authorities to block access to Google sites amounted to a violation of Article 10 ECHR. In particular, the ECtHR condemned the unfettered discretion left by Turkish legislation to administrative authorities, which allowed them to disregarded the fact that the measure would have rendered large amounts of information inaccessible, thus directly affecting the rights of internet users and having a significant collateral effect. Consequently, the tight control over the scope of preventive bans and effective judicial review to prevent any abuse of power required by Art. 10 ECHR was hindered. In particular, the existing legal framework did not require the competent court to weigh up the various interests at stake, in particular by assessing whether it was necessary and proportionate to block all access to Google Sites.

Use of Judicial Interaction Techniques: Consistent interpretation and Comparative Reasoning: The SABAM v Scarlet string of cases demonstrates the establishment of a standing line of reasoning among the courts which takes place in a vertical manner. Subsequently, thus elaborated position is taken over by the ECtHR which engages in comparative horizontal dialogue with the CJEU. **Consistent interpretation** can be observed in the two cases that took place following the initial CJEU judgment.

In order to assess the position of the parties, Justice Arnold took into account several aspects related to the legal framework, including Article 10 ECHR, Article 1 of the First Protocol to ECHR, as well as a detailed analysis of EU law and jurisprudence. Moreover, the court took into account a selection of similar cases regarding injunctions solved in other jurisdictions (see point 96), leading Mr Justice Arnold to affirm that: "The main conclusion I draw from [the foreign cases] is that, so far, no uniform approach has emerged among European courts to such applications. I do not find this surprising given that Member States have implemented Article 8(3) of Information Society Directive in different ways and given that the Court of Justice has only provided relevant guidance recently." (points 97, see also point 96).

The final decision of Justice Arnold relied heavily on the case law of the CJEU and also on the Opinion of the AG Villalón in *Scarlet*. As a matter of fact, Arnold LJ argued that, even if the CJEU

[184] Although the case is not about a conflict between copyright and freedom of expression, as the previous cases detailed in this box, its interest lies for the point discussed in the cross-reference with the CJEU on the compatibility of generalised measures of internet control.

[185] ECtHR: *Ahmet Yildirim v. Turkey*, Appl. no. 3111/10, judgment of 18 December 2012.

would have entirely endorsed the AG opinion, the case at stake was different, as the order sought by the applicants was "clear and precise; it merely requires BT to implement an existing technical solution which BT already employs for a different purpose; implementing that solution is accepted by BT to be technically feasible; the cost is not suggested by BT to be excessive; and provision has been made to enable the order to be varied or discharged in the event of a future change in circumstances. In my view, the order falls well within the range of orders which was foreseeable by ISPs on the basis of section 97A, and still more Article 8(3) of the Information Society Directive. I therefore conclude that the order is one "prescribed by law" within Article 10(2) ECHR, and hence is not contrary to Article 10 ECHR." (point 177).

Thus, UK Courts **strongly relied on the criteria provided by the CJEU**, referring directly to the decision in *Scarlet* in their reasoning as regards the balance between freedom of expression and copyright (**consistent interpretation)**. By contrast, the German court did not directly point at the CJEU's decision, though it focused on the balance between the freedom of the internet service provider to conduct its business and the protection of copyright as the CJEU did. Note the **comparative aspects of the judgments and the use of each other's reasoning.**

Horizontal dialogue between the CJEU and the ECtHR: Although not expressly citing each other's jurisprudence, efforts of coordination can be identified from the interpretation analysis adopted by the two regional courts. The ECtHR judgement follows the conclusion reached by the CJEU in *Scarlet,* requiring that in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the general interest pursued by the measure (e.g. the protection of copyright)" and the protection of the fundamental rights of individuals who are affected by such measures, (see CJEU C-70/10, Scarlet, para. 45, and ECtHR Ahmet Yildrim v Turkey).

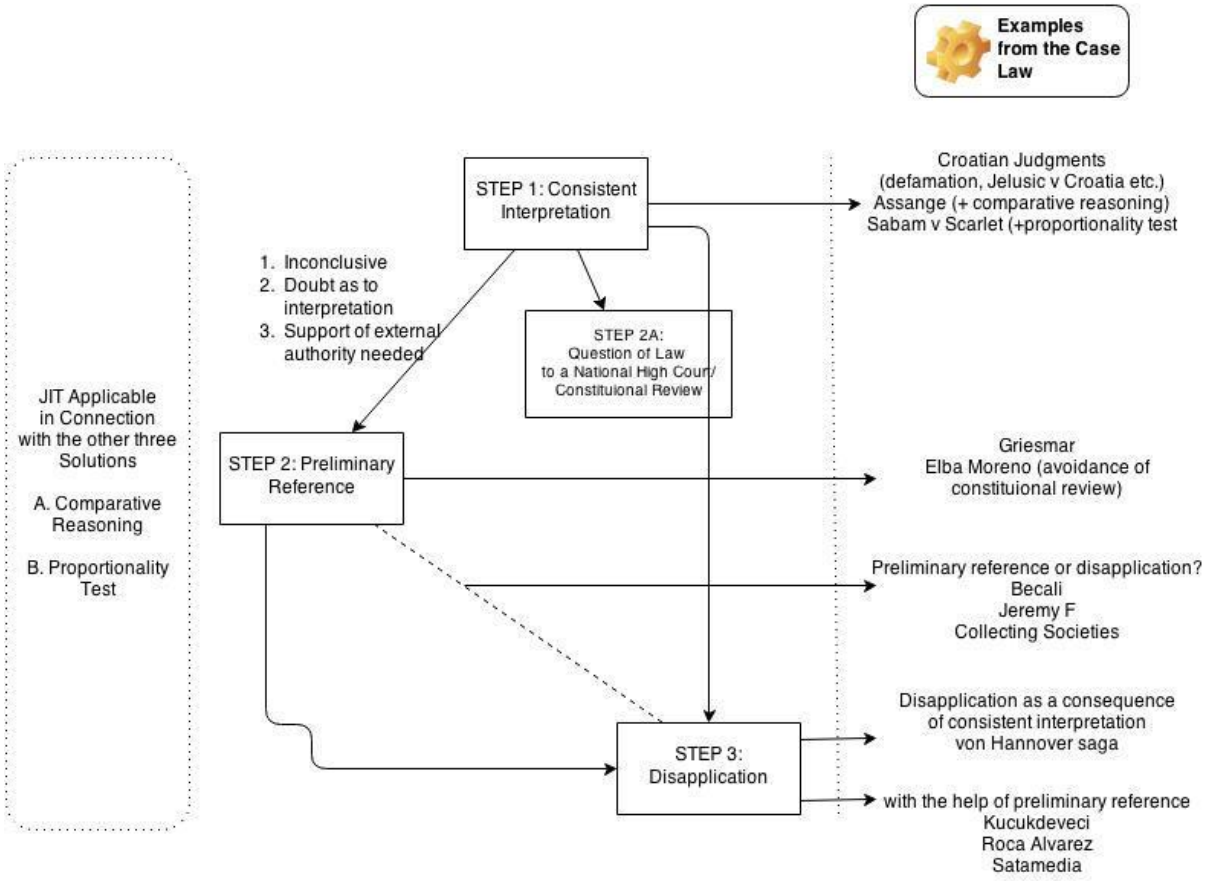
3. General observations – guidelines on the order of using Judicial Interaction Techniques

The choice of judicial interaction techniques by national judges is determined by the existence (or not) of an actual conflict between a national provision and a supranational norm. For instance, if the national judge does not doubt the meaning of the applicable EU law provision, s/he will consider whether the national provision is clearly compatible, or, in any event, if there is room for consistent interpretation. Therefore **Consistent Interpretation** with EU law is **Step 1**. Should they find that, from the point of view of their national judicature, consistent interpretation does not provide them with conclusive, clear cut and undisputable answers, they may consider two options: requesting help from the CJEU – thus taking **Step 2** and initiating a **Preliminary Reference Procedure**. Alternatively, they may refer a question of law to their own supreme courts (Step 2A), yet in the area of European law that is to be discouraged in line with the case law of the CJEU.

If, however, they are confronted with a clear situation in which a national norm cannot be reconciled with EU law or, if the domestic constitutional system so provides, with the ECHR, they need to make **Step 3** and **disapply** the national norm – either on their own by independently seeking an answer in the body of case law - or following the CJEU's indication in a concrete preliminary ruling issued in response to their request.

These structured steps that judges must make in their reasoning can be aided by two additional techniques of judicial interaction that are of horizontal character. Both **comparative reasoning and proportionality** may provide grounds for judgments, allow for inserting a structurally determined reasoning comparable to similar exercises undertaken by courts in other states or those on European level.

The graph below offers an overview of the toolbox at the disposal of national judges indicating when each of the tools may be applied and the manner in which conflicts may be resolved with their help. If this is not the case, the national judge might decide to refer a preliminary question to the CJEU (as a rule, national courts of last instance must make a reference).[186]



Regardless of the outcome of direct or indirect vertical judicial interaction for the legal order of the referring court or other national jurisdiction, these types of interaction lead to a beneficial exchange of views among judicial authorities: more elaborate judicial reasoning; questioning of existing judicial doctrines or domestic political or executive practices. Ultimately, they help tackle concrete difficulties resulting from the practical implementation of the EU law.

[186] Art. 267(3) TFEU. For detailed indication on the logical sequence of the use of judicial interaction techniques, please see also The Guidelines are available online in EN and 5 other languages at http://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/EuropeanJudicialCooperationinFR/Documents.aspx

MODULE 3

EFFECTIVE REMEDIES

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1. Preliminary issue: terminology

The right to an effective remedy is an obligation of the State to provide a judicial relief when a violation of a right is acknowledged. This right entails a double dimension: on the one hand the procedural right to an effective access to a fair hearing and the substantive right to an adequate redress.

As will be described in more detail below, the right to an effective remedy has been characterised as a general principle of EU law,[187] stemming from the constitutional traditions of the Member States by the Court of Justice of EU (hereinafter CJEU).[188] The recognition as a general principle of EU law entails that effective remedies, *rectius* effective judicial protection, must be ensured when the CJEU reviews the validity of secondary law as implemented by Member States as well as when the Court interprets Treaty provisions as applied by EU bodies.[189]

A first practical use of the principle was identified by the CJEU in the case *von Colson and Kaman*, where the Court was asked to evaluate if a specific national remedy was sufficient to ensure the protection of Union rights as defined by the Directive on 76/207 on equal treatment of men and women. Here, the Court affirmed that "*national remedies had to guarantee real and effective judicial protection*".[190] A couple of years later, the CJEU developed the definition including within the definition of effective judicial protection also the right to effective judicial review and access to a competent court in the landmark case of *Johnston*.[191] Further extension to areas where the principle applies took place in the *Heylens* case, where the Court affirmed that "*the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right [free access to employment] is essential in order to secure for the individual effective protection of his right*".[192] Then, the principle was applied to other areas where no direct connection with Treaty freedoms was present.[193]

Later on, also secondary law started to include the requirement of effective judicial protection, basing the interpretation of such provision on the CJEU case law.[194] Finally, with the entry into force of the Lisbon Treaty, the principle acquired a written primary law status with Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter CFREU), providing for an explicit recognition of the 'right to an effective remedy and to a fair trial'.

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[187] A general principle of EU law can be described as a fundamental principle of the legal system, encompassing certain basic values and enjoying a certain amount of recognition. According to Tridimas general principles may be distinguished between, on the one hand, principles based on the rule of law and governing the relationship between the individual and the Union; and on the other hand, principles relating to the supranational relationship between the Union and its Member States. See T. Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford: Oxford University Press, 2006

[188] See Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para 18; Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, ECLI:EU:C:1987:442, para 14; Case C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, ECLI:EU:C:2010:503, para 58.

[189] Tridimas, *The General Principles of EU Law*, cit., p. 51-52.

[190] Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, ECLI:EU:C:184:153, para 23.

[191] *Johnston*, para 17.

[192] *Heylens*, para 14.

[193] See Case C-340/89, Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg, ECLI:EU:C:1991:193; C-104/91, Oleificio Borelli SpA v Commission of the European Communities, ECLI:EU:C:1992:491; Case C-19/92, Dieter Kraus v Land Baden-Württemberg, ECLI:EU:C:1993:125.

[194] See below.

It is important to note that the principle is also enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which respectively address the right to a fair trial and the right to effective remedies.[195]

The connection between the general principle of EU law, art. 6 and 13 ECHR and art 47 of the Charter of Fundamental right is then expressly clarified by the CJEU in the *Alassini* case, where it is affirmed that "*it should be borne in mind that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union*".[196]

This interconnections between these provisions will be discussed in the following sections.

2. Sources

Is there a right to effective remedies?

The right of effective remedies is explicitly defined by Art 47 CFREU, which provides:

> "*1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
>
> *3. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*"

As is clear from the wording, Art 47 CFREU does not limit its scope to a narrow interpretation of the right to effective remedies; rather it addresses the wider concept of the right to effective judicial protection. Within this concept the CJEU jurisprudence includes several elements,

4. *the right to bring an action* as stated in *Földgáz Trade*,[197] where the CJEU affirmed that "*Article 5 of Regulation No 1775/2005, read in conjunction with the Annex to that regulation, and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation concerning the exercise of rights of action before the court or tribunal having jurisdiction to review the lawfulness of acts of a regulatory authority, which, in circumstances such as those at issue in the main proceedings, does not make it possible to confer on an operator, such as E.ON Földgáz, locus standi for the purpose of bringing an action against a decision of that regulatory authority relating to the network code*";
5. *right of access to a tribunal* as stated in *Otis* where the Court affirms that "*with regard, in particular, to the right of access to a tribunal, it must be made clear that, for a 'tribunal' to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the case before it*";[198]

[195] For the comparison between CFREU and ECHR see below.
[196] See Joined Cases C-317/08 to C-320/08, Rosalba Alassini v Telecom Italia SpA et al., ECLI:EU:C:2010:146para 49.

[197] See Case C-513/10, Földgáz Trade Zrt v Magyar Energetikai és Közmű-szabályozási Hivatal, ECLI:EU:C:2015:189.
[198] See case C-199/11, *Europese Gemeenschap v Otis NV and Others*, ECLI:EU:C:2012:684, para 49.

6. *the right to be heard* as stated in *Boudjlida*, where the Court affirms that "*The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken*";[199]
7. *the rights of the defence* as stated in *A*, where the Court affirms that "*all the provisions of Regulation No 44/2001 express the intention to ensure that, within the scope of the objectives of that regulation, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence enshrined in Article 47 of the Charter are observed*";[200]
8. *the principle of equality of arms* as stated in *Sanchez Morcillo I*, where the Court affirms that "*That principle is, however, an integral element of the principle of effective judicial protection of the rights that individuals derive from EU law, such as that guaranteed by Article 47 of the Charter*" and adding that "*the principle of equality of arms […] is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent*";[201]
9. *the principle of audi alteram partem* as stated in *Banif Plus Bank*, where the court affirmed that "*the national court must also respect the requirements of effective judicial protection of the rights that individuals derive from European Union law, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. Among those requirements is the principle of audi alteram partem, as part of the rights of defence and which is binding on that court, in particular when it decides a dispute on a ground that it has identified of its own motion*".[202]

As with all articles of the Charter, Art 47 CFREU binds the Member States (including all institutional actors, such the legislator as well as national courts)[203] only when they act within the scope of EU law, as provided by art 51 CFREU.[204] Thus, in order to trigger the application of the guarantees listed in Art 47 CFREU, another provision of EU law should apply to the case.[205] Accordingly, if such a connecting link is missing, an argument based on a potential breach of Art 47 CFREU may not be invoked.

Moreover, Art 47 CFREU must be interpreted and exercised "*under the conditions and within the limits' defined by relevant Treaty provisions which make provision for it*", pursuant to Art 52(2) CFREU. In this sense, the reference is Art 19(1) TFEU, which establishes that national judges are

[199] See Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:203.
[200] See case C-112/13, *A v B and Others*, ECLI:EU:C:2014:2195, para 51.
[201] See case C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099, para. 48-49.
[202] See case C-472/11, *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, ECLI:EU:C:2013:88, Para 29.
[203] Obviously, this obligation may assume different forms depending on the type of institutional actor: the national (and European, as it is evident [203]in case C-362/14 *Schrems*) legislator shall draft the national law implementing EU law in the light of the Charter; whereas the national courts shall interpret national law, which falls into the scope of EU law, in the light of the Charter. Note that in some countries, national courts have started to interpret national law, *not* falling into the scope of EU law, in the light of EU law, showing the indirect effect of harmonisation triggered by the general obligation.
[204] See Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, and also case C-418/11 Texdata Software, confirming *Fransson*. "*Since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of [EU] law, situations cannot exist which are covered in that way by [EU] law without those fundamental rights being applicable. The applicability of [EU] law entails applicability of the fundamental rights guaranteed by the Charter*".
[205] See the negative appraisal provided by the CJEU in cases C-457/09, *Chartry* ECLI:EU:C:2011:101; C-224/13, *Lorrai* ECLI:EU:C:2013:750; and C-370/12, *Pringle* ECLI:EU:C:2012:756, paras 180–182.

judges of Union law, in that Member States "*shall provide the remedies sufficient to ensure effective legal protection in the fields covered by Union law*".

What is the relationship between art 47 CFREU and art 6 and 13 ECHR? Do they have the same scope?

As mentioned in the Explanations to the Charter, Art 47 is based on the common constitutional traditions of the Member States and on Arts. 6 and 13 ECHR.

Art 6 ECHR provides:

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*
>
> *Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*"

Art. 13 ECHR provides:

> "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*"

Although ECHR served as a point of reference in the decisions of CJEU, as well as a source of inspiration in the drafting of Art. 47 CFREU, the scope and content of Arts. 6 and 13 ECHR do not completely overlap with either the general principle of the right to effective judicial protection or with the right to effective remedies and to fair trial as provided by the Charter.

This different scope of application may result, in relation also to the national constitution norms applicable, in the following situations faced by the national judges:

a) areas where art 47 CFREU, art. 13 and/or 6 ECHR and national constitutional provisions may apply (with similar yet not completely overlapping standards, e.g. *Tall* case[206]);
b) areas where art 13 and/or 6 ECHR and national constitutional provision may apply, i.e. areas outside the scope of EU law (again with similar yet not completely overlapping standards, e.g. Scordino v Italy[207]).

As regards the European provisions, the main differences between the scope of application of Art. 47 vis-à-vis Arts. 6 and 13 ECHR are the following:

(1) Art. 6 ECHR is limited to disputes relating to civil rights and obligations or criminal proceedings whereas Art. 47 CFREU is effective both in those cases and in pure administrative law proceedings.[208]

(2) Art. 47 CFREU may be relied upon by parties where there exists a violation of any right conferred on them by EU law and not only in respect of the rights guaranteed by the Charter, whereas Art. 13 ECHR is limited to the right guaranteed by the Convention itself. In this sense, there is a direct

[206] See Case C-239/14, Abdoulaye Amadou Tall v Centre public d'action sociale de Huy, ECLI:EU:C:2015:824.
[207] See EctHR, Scordino v. Italy, Application no. 36813/97, 29 March 2006, which triggered the set of national decisions of the Italian Supreme Court (Cassation Court, Criminal I, n. 2800, 1 December 2006) and of the Italian Constitutional Court (n. 348 and n. 349, 22 October 2007) regarding the legal status of the ECHR provisions in the national system of sources.
[208] See below.

relationship between effective judicial protection and rule of law as stated in *Union pequenos agricultores*, where Court affirmed:

> "*38 The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.*
>
> *39 Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.*" [209]

(3) Art. 47 CFREU only guarantees the right to an effective remedy before a tribunal (which includes any national institution that guarantees an examination and decision procedure where the claimant may be heard and may receive an adequate remedy)[210], whereas Art. 13 ECHR refers in general to "*a national authority*". Thus, under the ECHR system the 'authority' does not need necessarily to be a judicial authority, however it does need to be capable of making binding decisions.[211]

Although the relevant provisions of the ECHR and CFREU do not exactly overlap, art. 52 CFREU provides that the Charter needs to be interpreted to at least the same level of protection as the relevant right in the ECHR. This is confirmed by the explanatory notes to the Charter, which requires that its meaning and scope shall be determined not only by reference to the text of the ECHR but also by reference to the case law of the ECtHR.

This approach was expressly adopted by the CJEU in its decisions, and in particular in *DEB* where the ECtHR's case law was analysed in detail so as to verify if under the ECHR the grant of legal aid to legal persons was in principle possible. This however led the CJEU to find a broader protection under the Charter than that provided for by the ECHR. This example shows how the CJEU ensures consistency between rights guaranteed by the Charter and the ECHR, taking the ECtHR jurisprudence either as an element to confirm or support the CJEU findings,[212] but without taking the level of protection afforded by ECHR as a ceiling.

DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland

Facts:
DEB has applied for legal aid in order to bring an action to establish that the Bundesrepublik Deutschland has incurred State liability under EU law, as it delayed the implementation of the

[209] See Case C-50/00, *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462.
[210] See below.
[211] See *Kudla v Poland*, para 151 where the ECtHR affirms that "*The Court finds nothing in the letter of Article 13 to ground a principle whereby there is no scope for its application in relation to any of the aspects of the "right to a court" embodied in Article 6 § 1. Nor can any suggestion of such a limitation on the operation of Article 13 be found in its drafting history.Admittedly, the protection afforded by Article 13 is not absolute. The context in which an alleged violation – or category of violations – occurs may entail inherent limitations on the conceivable remedy. In such circumstances Article 13 is not treated as being inapplicable but its requirement of an 'effective remedy' is to be read as meaning 'a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]' (see the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 31, § 69). Furthermore, 'Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws to be challenged before a national authority on the ground of being contrary to the Convention' (see the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 47, § 85). Thus, Article 13 cannot be read as requiring the provision of an effective remedy that would enable the individual to complain about the absence in domestic law of access to a court as secured by Article 6 § 1.*"

[212] See *Alassini*, para 63, *Melloni*, para 50; *Jaramillo*, para 43, *Kendrion*, para 81, *Abdida* para 51-52.

Directive 98/30/EC concerning common rules for the internal market in natural gas and of Directive 2003/55/EC concerning common rules for the internal market in natural gas (repealing the former) into national law. This delay was the cause of substantial losses for DEB.
The first instance (Regional Court of Berlin) refused to grant legal aid. In the appeal proceedings, before the Higher Regional Court, the latter took into account the jurisprudence of the Federal Court of Justice as regards the interpretation of the national provision applicable to the case; however, acknowledged that in case of refusal of legal aid to DEB, this might be inconsistent with the principles of effectiveness.
Legal issues:
The Higher Regional court raised one question:
"*In view of the fact that Member States may not, through the structuring of conditions under national law governing the award of damages and of the procedure for pursuing a claim seeking to establish State liability under [EU] law, make the award of compensation in accordance with the principles of State liability in practice impossible or excessively difficult, must there be reservations with regard to a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs, and a legal person, which is unable to make that advance payment, does not qualify for legal aid?*"

***Reasoning of the Court*:**
The CJEU addressed the analysis of the principle of effectiveness evaluating if the fact that a legal person is unable to qualify for legal aid renders the exercise of its rights impossible. In particular, the denial of legal aid could in practice limit access to a court to the legal person.
The CJEU immediately approach the problem affirming that "*the right of a legal person to effective access to justice and, accordingly, in the context of EU law, it concerns the principle of effective judicial protection. That principle is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') […]*". In that sense, the CJEU then connected through art 51 and 52 CFREU the protection afforded by the Charter to the one provided by art 6 of ECHR (para 32 and 35).
This connection is even more clear in the following analysis where the CJEU addresses explicitly the case law of ECHR, affirming that:
"45 *Review of the case law of the European Court of Human Rights shows that, on several occasions, that court has stated that the right of access to a court constitutes an element which is inherent in the right to a fair trial under Article 6(1) of the ECHR (see, inter alia, Eur. Court H.R., judgment in McVicar v. the United Kingdom of 7 May 2002, ECHR 2002 III, § 46). It is important in this regard for a litigant not to be denied the opportunity to present his case effectively before the court (Eur. Court H.R., judgment in Steel and Morris v. the United Kingdom of 15 February 2005, ECHR 2005-II, § 59). The right of access to a court is not, however, absolute.*
46 Ruling on legal aid in the form of assistance by a lawyer, the European Court of Human Rights has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively (Eur. Court H.R., judgments in Airey v. Ireland, § 26; McVicar v. the United Kingdom, §§ 48 and 49; P., C. and S. v. the United Kingdom of 16 July 2002, ECHR 2002-VI, § 91, and Steel and Morris v. the United Kingdom, § 61). Account may be taken, however, of the financial situation of the litigant or his prospects of success in the proceedings (Eur. Court H.R., judgment in Steel and Morris v. the United Kingdom, § 62).
47 As regards legal aid in the form of dispensation from payment of the costs of proceedings or from provision of security for costs before an action is brought, the European Court of Human Rights has similarly examined all the circumstances in order to determine whether the limitations applied to the

right of access to the courts had undermined the very core of that right, whether those limitations pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (see, to that effect, Eur. Court H.R., judgments in Tolstoy Miloslavsky v. the United Kingdom of 13 July 1995, Series A No 316-B, §§ 59 to 67, and Kreuz v. Poland of 19 June 2001, ECHR 2001 VI, §§ 54 and 55).

48 It is apparent from those decisions that legal aid may cover both assistance by a lawyer and dispensation from payment of the costs of proceedings.

49 The European Court of Human Rights has also held that, although a selection procedure for cases may be established in order to determine whether legal aid may be granted, that procedure must operate in a non arbitrary manner (see, to that effect, Eur. Court H.R., judgment in Del Sol v. France of 26 February 2002, § 26; decision in Puscasu v. Germany of 29 September 2009, p. 6, last paragraph; judgment in Pedro Ramos v. Switzerland of 14 October 2010, § 49).

50 That court had occasion to examine the situation of a commercial company which had applied for legal aid in the context of French legislation, which provides for such aid only in the case of natural persons and, exceptionally, in the case of non-profit-making legal persons having their seat in France and lacking sufficient resources. The European Court of Human Rights held that the difference in treatment between profit-making companies, on the one hand, and natural persons and non-profit-making legal persons, on the other, is based on an objective and reasonable justification which relates to the tax arrangements governing legal aid, since those arrangements provide for the possibility of deducting all costs of proceedings from taxable profits and of carrying over losses to a subsequent tax year (Eur. Court H.R., decision in VP Diffusion Sarl v. France of 26 August 2008, pp. 4, 5 and 7).

51 Similarly, in the case of a community of users of communal rural property applying for legal aid in order to challenge an action for restitution of title to land, the European Court of Human Rights considered that account should be taken of the fact that funds approved by private associations and companies for their legal representation come from funds accepted, approved and paid by their members and noted that the application was made in order to intervene in civil litigation relating to the ownership of land, the outcome of which would affect only the members of the communities in question (Eur. Court H.R., decision in CMVMC O´Limov. Spain of 24 November 2009, paragraph 26). That court concluded from this that the refusal to grant free legal aid to the applicant community had not undermined the very core of its right of access to a court."

From the previous analysis the CJEU concluded that the grant of legal aid to legal persons is not in principle impossible, but requires the examination of the applicable rules and of the economic situation of the company. In this sense, the CJEU provides general criteria to the national court in order to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts, namely: the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. Additionally, the CJEU proposed also specific criteria applicable to legal persons, namely : the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

However, the coordination between art. 6 and 13 ECHR and art 47 CFREU is not always perfect, as different outcomes may be decided by European courts in similar cases.[213] For instance, the CJEU

[213] See also the cases presented in JUDCOOP Final Handbook, p. 34.

deemed the national measures implementing the Directive 2005/85 on asylum as compatible with the requirements of effective judicial protection, in particular those providing for an accelerated procedure to examine asylum application, granting low standards of protection as to the applicant's right to defence, participation in the proceedings and review of legality. In *Samba Diouf*, the CJEU affirmed that national provisions were proportionate to the legitimate aim pursued. Instead, the ECtHR addressing a similar problem, but focusing on the specific application of the French fast track procedure for asylum seekers carried out by administrative authorities, deemed that the objective of swifter decisions that underlid the limitation to judicial review in accelerated procedures as disproportionate and incompatible with art. 13 ECHR.[214]

This different interpretation then affects the decisions of national courts, as they may face the choice of adhering to one or the other standard, with the consequence of subsequent quash of their decisions in the following instances before higher, or supranational, courts.

More recently the CJEU has addressed the issue regarding the consistency between rights guaranteed by the Charter and the ECHR in other cases. Although the stronger position giving independent 'life' of Art. 47 CFREU vis-à-vis Art. 6 ECHR was only stated by the AG Opinion in *Melloni* case,[215] the CJEU affirmed in *Otis* that since Art. 47 CFREU secures the protection afforded by Art. 6 ECHR, it henceforth referred only to Art. 47 CFREU.[216]

This is in accordance with Art. 53 CFREU, which provides that the level of protection guaranteed by Art. 47 CFREU may not be lower than that guaranteed by ECHR, but does not preclude that wider protection may be granted by EU law, both as regards the standard and the scope of protection.

However, this does not mean that the EU law always provides for a higher standard of protection of fundamental rights that the one provided by national constitutions. This is can be shown by the *Melloni* case where CJEU faced the question of the Spanish Constitutional Court.[217] The CJEU held that Art. 53 CFREU and the national higher standards of protection of the right to a fair trial cannot be used to prevent the application of the European Arrest Warrant Framework Directive. The EU secondary instruments harmonised the conditions for the execution European arrest warrant issued for the purposes of executing a sentence rendered in absentia. Consequently, the CJEU affirmed that allowing a Member State to avail itself of Art 53 CFRUE to make the surrender of a person conditional on a requirement not provided for in the framework decision would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that decision, undermine the principles of mutual trust and recognition which that decision purports to uphold and would therefore compromise its efficacy. Therefore, an interpretation of Art. 53 EU Charter that would allow the Member States to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution is precluded on the basis of the principle of primacy of EU law (para 58).

Therefore, except for the cases where the standards of protection is equal under the perspective of national constitutions, Charter and ECHR, the assumption is that the Charter standard of protection will be always be at least equal if not higher than the one defined by the ECHR; but in comparison to national constitutions, it is possible that the Charter provides for an equal or even a lower level of protection.

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[214] ECtHR, I.M. v France, No. 9152/09, judgement of 2 February 2012

[215] See AG Cruz Villalon in C-399/11 *Melloni*: effective judicial protection per Art.47 "*acquired a separate identity and substance, which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once it is recognised and guaranteed by the European Union, that fundamental right goes on to acquire a content of its own*".

[216] See Otis, para. 47 "*Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47 (Case C-386/10 P Chalkorv Commission [2011] ECR I-13085, paragraph 51).*"

[217] See the wider analysis provided in Module 2.

3. The features of remedies: effectiveness, proportionality and dissuasiveness

Another set of additional features of remedies emerging from the case law of the CJEU are those that prescribe that the remedies should be effective, dissuasive and proportionate. If on the one hand, the elements of effectiveness and dissuasiveness are based on the principles of equality and effectiveness; the requirement of proportionality, on the other hand, appears as an additional feature to be evaluated by European and national courts, based on the more general principle of Union law applicable to Member States when acting within the scope of application of the Treaty.

The CJEU has never clarified expressly such features, although it has used the principles to evaluate national provisions.[218]

It is difficult to draw a clear boundary between effectiveness, proportionality and dissausiveness as these three features are unavoidably interrelated. However, a set of guidelines drawn by the CJEU case law may help in their analysis.

When is the remedy effective?

Effectiveness refers to the relationship between a particular goal set by the policy maker ad the legal remedies available to reach the goal set by the legislator. (e.g. consumer protection or fair market competition). Within this analysis a set of criteria should be taken into account: the national remedial system should be able to provide for general deterrence (*ex ante* dissuasion from violation); should aim at restoration of harm (if possible *restitutio in integrum*); and should aim at prevention of future harm.

When is the remedy proportionate?

Proportionality refers to the seriousness of the offence and the size and type of remedies applicable to the offender.

For instance the CJEU in the *Reindl* case affirmed that "*In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken of, inter alia, the nature and the degree of seriousness of the infringement which the penalty seeks to sanction and of the means of establishing the amount of the penalty*".[219]

In *Kusionova*, the CJEU addressed the effects in practice of the penalty on the consumer, affirming that "*[w]ith regard to the proportionality of the penalty, it is necessary to give particular attention to the fact that the property at which the procedure for the extrajudicial enforcement of the charge at issue in the main proceedings is directed is the immovable property forming the consumer's family home*" and given that the loss of a home is one of the most serious breaches of the right to respect for the home, the CJEU stated that "*with regard in particular to the consequences of the eviction of the*

[218] Only in the AG Kokott, in *Berlusconi* provided a more detailed definition: "*A penalty is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Community law. What is decisive in this regard is not only the nature and level of the penalty but also the likelihood of its being imposed. Anyone who commits an infringement must fear that the penalty will in fact be imposed on him. There is an overlap here between the criterion of dissuasiveness and that of effectiveness.*

A penalty is proportionate where it is appropriate (that is to say, in particular, effective and dissuasive) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous. Moreover, the effects of the penalty on the person concerned must be proportionate to the aims pursued.

The question whether a provision of national law contains a penalty which is effective, proportionate and dissuasive within the meaning defined above must be analysed by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises." (para 90-92).

[219] See Case C-443/13, *Reindl*, ECLI:EU:C:2014:2370, para. 40.

consumer and his family from the accommodation forming their principal family home, the Court has already emphasised the importance, for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13."[220]

As regards the specific aspects regarding the selection of the type of remedies available to the judge in the implementation of Consumer Sales directive provisions, the CJEU clarified in *Weber and Putz* that "*In considering whether, in the case in the main proceedings, it is appropriate to reduce the consumer's right to reimbursement of the costs of removing the goods not in conformity and of installing the replacement goods, the referring court will therefore have to bear in mind, first, the value the goods would have if there were no lack of conformity and the significance of the lack of conformity, and secondly, the Directive's purpose of ensuring a high level of protection for consumers. The possibility of making such a reduction cannot therefore result in the consumer's right to reimbursement of those costs being effectively rendered devoid of substance, in the event that he had installed in good faith the defective goods, in a manner consistent with their nature and purpose, before the defect became apparent*." The CJEU then adds that "*in the event that the right to reimbursement of those costs is reduced, the consumer should be able to request, instead of replacement of the goods not in conformity, an appropriate price reduction or rescission of the contract, pursuant to the last indent of Article 3(5) of the Directive, since the fact that a consumer cannot have the defective goods brought into conformity without having to bear part of these costs constitutes significant inconvenience for the consumer*."[221]

When is the remedy dissuasive?

Dissuasiveness refers to the capability to lead potential violators to comply with the law.

For instance, in *Credit Lyonnais* the CJEU evaluated if the penalty imposed by the legislator in situations where banks do not verify in advance the creditworthiness of consumers may affect the subsequent behaviour of banks, and affirmed that "*given the importance […] of the objective of consumer protection inherent in the creditor's obligation to assess the borrower's creditworthiness, the penalty of forfeiture of entitlement to contractual interest cannot be regarded, more generally, as being genuinely deterrent if the referring court were to find […] that — in a case such as that which has been brought before it, in which the outstanding amount of the principal of the loan is immediately payable as a result of the borrower's default — the amounts which the creditor is likely to receive following the application of that penalty are not significantly less than those which that creditor could have received had it complied with that obligation.*" Hence, "*if the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive.*"[222]

Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării

Facts:

ACCEPT, a non-governmental organisation whose aim is to promote and protect lesbian, gay, bisexual and transsexual rights in Romania, lodged a complaint before the National Council for Combatting Discrimination against SC Fotbal Club Steaua București SA and Mr Becali, claiming that the recruitment criteria applied to select football players in the club were in breach of the principle of equality. In particular, the association pointed to the interview of Mr Becali concerning the possible

[220] See *Kusionova*, para 62-66.

[221] See *Weber & Putz*, para 76-77.

[222] See C*redit Lyonnais* para 52-53.

transfer of a professional footballer, Mr Becali had stated essentially that he would never hire a homosexual player. The Equality body took the view that those statements constituted discrimination in the form of harassment and identified as penalty a warning towards Mr Becali, as this type of sanction was the only one then possible under Romanian law.
ACCEPT brought an action against that decision before the Court of Appeal of Bucharest, which taking into account the differences between the case and the decision of CJEU in Case C-54/07 *Feryn* referred questions for a preliminary ruling to the CJEU.

Legal issues:
The Court of Appeal of Bucarest presented the following questions:
'(1) Do the provisions of Article 2(2)(a) of [Directive 2000/78] apply where a shareholder of a football club who presents himself as, and is considered in the mass media as, playing the leading role (or "patron") of that football club makes a statement to the mass media in the following terms:
"Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Obviously people will talk, but how could anyone write something like that and, what's more, put it on the front page … Maybe he's [the football player X] not a homosexual … But what if he is? I said to an uncle of mine who didn't believe in Satan or in Christ. I said to him: "Let's say God doesn't exist. But suppose he does? What do you lose by taking communion? Wouldn't it be good to go to Heaven?" He said I was right. A month before he died he took communion. May God forgive him. There's no room for gays in my family and [FC Steaua] is my family. It would be better to play with a junior rather than someone who was gay. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose."
"Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Maybe he's not a homosexual. But what if he is? There's no room for gays in my family, and [FC Steaua] is my family. Rather than having a homosexual on the side it would be better to have a junior player. This isn't discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose. Even if God told me in a dream that it was 100 percent certain that X wasn't a homosexual I still wouldn't take him. Too much has been written in the papers about his being a homosexual. Even if [player X's current club] gave him to me for free I wouldn't have him! He could be the biggest troublemaker, the biggest drinker … but if he's a homosexual I don't want to know about him."
(2) To what extent may the abovementioned statements be regarded as "facts from which it may be presumed that there has been direct or indirect discrimination" within the meaning of Article 10(1) of Directive 2000/78 ... as regards the defendant [FC Steaua]?
(3) To what extent would there be probatio diabolica if the burden of proof referred to in Article 10(1) of [Directive 2000/78] were to be reversed in this case and the defendant [FC Steaua] were required to demonstrate that there has been no breach of the principle of equal treatment and, in particular, that recruitment is unconnected with sexual orientation?
(4) Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down in Article 13(1) of [GD No 2/200]1 on the legal regime for sanctions, conflict with Article 17 of [Directive 2000/78] given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?'

***Reasoning of the Court*:**
The CJEU addressed the meaning of discrimination as provided by the Directive and then points to the elements regarding the type of penalty that should be used to sanction a discriminatory behaviour. In this sense the CJEU observed that the directive precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation, it is only possible to give a 'warning' after the expiry of six months from the date on which the facts occurred. As this penalty lacks the essential requirement of effectiveness, proportionality and dissuasiveness.
In particular, the CJEU affirmed that:

"*67 It is for the referring court to ascertain in particular whether, in circumstances such as those set out in the preceding paragraph, those with legal standing to bring proceedings might be so reluctant to assert their rights under the national rules transposing Directive 2000/78 that the rules on sanctions adopted in order to transpose that directive are not genuinely dissuasive (see, by analogy, Draehmpaehl, paragraph 40). Regarding the dissuasive effect of the sanction, the referring court may also take account, where appropriate, of any repeat offences of the defendant concerned.*
68 It is true that the mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic (see, to that effect, Feryn, paragraph 39), particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages.
69 However, in the present case it is for the referring court to ascertain whether a sanction such as a simple warning is appropriate for a situation such as that at issue in the main proceedings (see, by analogy Case C-271/91 Marshall [1993] ECR I-4367, paragraph 25). In that connection, the mere existence of an action for damages under Article 27 of GD No 137/2000, for which the limitation period for bringing proceedings is three years, cannot, as such, make good any shortcomings, in terms of effectiveness, proportionality or dissuasiveness of the sanction, that might be identified by that court with regard to the situation set out in paragraph 66 of the present judgment. As Accept maintained at the hearing before the Court, where an association of the type referred to in Article 9(2) of Directive 2000/78 does not act on behalf of specific victims of discrimination, it could be difficult to prove the existence of harm suffered by such an association for the purpose of the relevant rules of national law.
70 Furthermore, if it were the case that, as Accept argues, the sanction consisting in a warning is generally only imposed in Romanian law for very minor offences, that fact would tend to suggest that such a sanction is not commensurate to the seriousness of a breach of the principle of equal treatment within the meaning of that directive."
Then the CJEU left the task of interpretation to national courts, requiring them to interpret national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

Can criminal law provide for additional elements as regards proportionality?

As regards criminal proceedings, the proportionality feature of the remedies guaranteed should be analysed also in relation to Art. 49 CFREU providing:

> "*Principles of legality and proportionality of criminal offences and penalties:*
>
> *1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.*
>
> *2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.*
>
> *3. The severity of penalties must not be disproportionate to the criminal offence.*"

This provision aims at protecting individual freedom by requiring for the punishability of conduct prior to legal prohibition, as well as the protection of confidence in terms of predictability and accountability of criminal law. As regards the principle of proportionality of penalty, the Charter is a

novelty as no other international legal instrument provides a similar statement. However, such principle is not new in national law and practice of Member States.

This principle applies to the legislator, allowing criminalization and the punishment of behaviour only in so far as it is required, appropriate and suitable for protecting the object of legal protection within legitimate goals of penalty. But it is also applicable to the judge, imposing the selection of a penalty proportionate to the offence, taking into account the objective severity of the wrong and the individual severity of blameworthiness.

It is important to note that criminal sanctions can also be impose within different types of enforcement systems, i.e. criminal and administrative. In case of administrative enforcement, sanctions may be deemed of "criminal nature", thus, as affirmed both by ECtHR and CJEU, for those sanctions the criminal law principles should apply. In particular, the ECtHR case law shows the identification of a category of punitive sanctions, within which substantive and procedural criminal law safeguards should be applied, to an extent proportional to the severity of the coercion or punishment.[223]

Are the features of effectiveness, proportionality and dissuasiveness imposed by EU law?

It is important to note these specific features of remedies have their basis in EU secondary law provisions. In the areas covered by the ACTIONES project, there are several examples where EU directives require Member States to impose effective, dissuasive and proportionate remedies. For example:

Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law Art. 2 (10) *Member States shall lay down the rules on penalties, including criminal sanctions where appropriate, applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified. The Member States shall notify those provisions to the Commission by 25 May 2011, and shall notify it without delay of any subsequent amendment affecting them.*

Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals Art. 5 (1)

[223] See ECtHR, *Jussila v. Finland*, 23 November 2006, application No 73053/01, cons. 43: "There are clearly 'criminal charges' of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties, prison disciplinary proceedings, customs law, competition law, and penalties imposed by a court with jurisdiction in financial matters. Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency". See also ECtHR, *Grande Stevens and others v. Italy*, 4 March 2014, application No 73053/01, cons. 94 et seq.

Member States shall take the necessary measures to ensure that infringements of the prohibition referred to in Article 3 are subject to effective, proportionate and dissuasive sanctions against the employer.

Non-discrimination

Articles 15 of Directive 2000/43/EC and 17 of Directive 2000/78/EC require Member States to lay down rules on sanctions for cases of infringement of the national provisions adopted pursuant to respective Directives and to take all measures necessary to ensure that they are applied. The sanctions, which may include the payment of compensation to the victim, must be effective, proportionate and dissuasive. Similar requirements with slightly different wording are defined by Article 14 of Directive 2004/113/EC (penalties), Article 18 (compensation or reparation) and 25 (penalties) of Directive 2006/54/EC, Art. 10 of Directive 2010/41/EU (compensation or reparation).

Criminal law
Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

Art. 3 Criminal penalties
1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties.
2. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1 is punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.

4. Limits

National procedural autonomy and the so called Rewe-test

EU law, while conferring rights to individuals through primary and secondary law provisions,[224] does not provide for specific remedies in each and every legislative intervention adopted. However, the Court of Justice of European Union (hereinafter CJEU) has unequivocally affirmed that the Treaties "*created a complete system of legal remedies*".[225] Such a straightforward sentence is realised more fully if one looks at the wider framework of multi-level structure of EU system, where the coordinated effort of European and national bodies, whether legislative, judicial or administrative ones, is at work.

As a matter of fact, the CJEU affirmed that where EU law does not in itself identify specific judicial remedies applicable for violations, or alternatively demands only for general requirement of effective, proportionate and dissuasive remedies,[226] Member States legal systems will provide for them, the latter being required to establish a sufficiently complete system of legal remedies and procedures.[227] This cooperation between the two levels, European and national, provides for the practical implementation of the old maxim of *ubi jus ibi remedium*.[228]

[224] As stated by the seminal decision Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.
[225] See *Unión de Pequeños Agricultores*, para 40; Case C-263/02, *Jégo-Quéré*, para 30; Case C-167/02, *Rothley*, para 46; C-461/03 *Gaston Schul*, para 22.
[226] For a set of examples taken from the legal areas analysed within the ACTIONES project see above.
[227] See *Unión de Pequeños Agricultores*, paras 40, 41; *Oleificio Borelli*, para 15.
[228] See below.

Through this allocation of competence, the Member States retain their competence in procedural matters, including in those cases where Union rights are at stake. However, where there is a case of unjustified interference in the exercise of a right arising from the Union legal order, the national courts and the national procedural system should ensure the existence of a remedy capable of providing for the enforcement of that right. This decentralised enforcement system involving Member States courts is defined as national procedural autonomy.

The level of autonomy of Member States as regards procedural guarantees is not without caveats. In 1976, the landmark cases of Rewe and Comet addressed in a clear manner the test that national procedural law should undergo in order to be deemed sufficient to ensure the exercise of Union rights. [229] The CJEU decision affirmed that:

> "*in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature […] the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.*"[230]

Later on, the CJEU clarified such concept, starting to adopt a standard formula, which provides that

> *"In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.*"[231]

The principles that should guide the evaluation of the CJEU in front of national remedies and procedures have since been termed the principle of equivalence and the principle of effectiveness.

Under the principle of equivalence, the terms of comparison are the remedies provided by national law for non-EU based claims vis-à-vis those available for EU based claims. The judicial or legislative treatment of the former should be 'equivalent' to the one applicable to the latter. This applies to procedures including situations and possibilities of class action as well as substantive law. The similarity of a situation is subject to detailed case-by-case analysis, the Court looking at the purpose and effect of a national measure in question and exists '*where the purpose and cause of action are similar*',[232] or where the case concerns '*the same kind of charges or dues*'.[233] It is important to stress that the principle does not imply necessarily that actions based on EU law always should benefit from the most favourable procedural regime in national law; rather, it implies that those claims that are deemed to be comparable should be treated equally, prohibiting straightforward discrimination based on the origin of the claim (whether national or European).[234]

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[229] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*; and Case 45/76, *Comet*.

[230] See *Rewe*, para. 5, since then repeated in dozens of cases, e.g. Case C-128/93, *Fisscher*, para. 39; Case C-410/92, Johnson, para. 21; Case C-394/93, Alonso-Pérez, para. 28; Case C-246/96, Magorrian and Cunningham, para. 37; Case C-78/98, Preston, para. 31; Joined Cases C-52/99 and C-53/99, Camarotto and others, para. 21; Case C-432/05, Unibet (London) Ltd and Unibet (International) Ltd., para 39; Case C-268/06, Impact, para. 44; Case C-40/08, Asturcom Telecomunicaciones SL, para 41.

[231] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and the Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, para. 83.

[232] Case C-326/96 Levez, para 41.

[233] Case C-231/96 Edis, para 36; Joined Cases 66/79, 127/79 and 128/79 Salumi, para 21.

[234] See that the principle of equivalence is a specific application of the broader principle of non-discrimination.

Under the principle of effectiveness, the term of reference is the national conditions that may apply to the EU-based rights, such conditions should not make impossible or extremely difficult to exercise such right. The threshold from mere "*impossibility*" to "*impossible or extremely difficult*" was raised through the jurisprudence of the CJEU.[235] This reframing of the effectiveness test was important in introducing a balancing exercise by the CJEU itself: in order to evaluate if the exercise of EU based right is made "*excessively difficult*" a comprehensive review is needed. Thus, the analysis of the CJEU should not limit itself to the specific national procedural provision applicable, rather it should addressed the procedural system as a whole,[236] taking into to account all the particularities of national legal systems.

Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA

Facts:
Mr Sanchez Morcillo and Mrs Abril Garcia signed a notarial act with Banco Bilbao for the loan of EUR 300 500 secured by a mortgage on their property. After the failure to pay the loan, Banca Bilbao started an accelerated procedure for the repayment of the loan, and, pursuant the contractual clause the default interest applicable in this case was to be charged at 19% (almost four times the one applicable in Spain at that moment).
Banco Bilbao demanded payment of the entire loan together with ordinary interest and default interest and the enforced sale of the property mortgaged in its favour. The consumers presented an objection against the enforcement proceeding which was rejected by the Court of First Instance. In the appeal before the Audiencia Provincial de Castellón, the court showed doubts as to whether this national legislation is compatible with the objective of consumer protection pursued by Directive 93/13 or with the right to an effective remedy guaranteed by Article 47 of the Charter.

Legal issues:
The Audiencia Provincial de Castellón presented the following questions:
'(1) Is it incompatible with Article 7(1) of Directive 93/13, which imposes on Member States the obligation to ensure that, in the interests of consumers, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers, for a procedural rule, such as that laid down in Article 695(4) [of the LEC], which, as regards the right to an appeal against a decision determining the outcome of an objection to enforcement proceedings in relation to mortgaged or pledged assets, to permit an appeal to be brought only against an order discontinuing the proceedings or disapplying an unfair clause and to exclude an appeal in other cases, the immediate consequence of which is that whilst the party seeking enforcement may appeal when an objection to enforcement is upheld and the proceedings are brought to an end or an unfair term is disapplied, the consumer party against whom enforcement is sought may not appeal if his objection is dismissed?
(2) Within the ambit of EU legislation on consumer protection in Directive 93/13, does the principle of the right to an effective remedy, to a fair trial and to equality of arms, guaranteed by Article 47 of the Charter, preclude a provision of national law, such as that laid down in Article 695(4) [of the LEC], which, concerning the right of appeal against a decision ruling on an objection to enforcement against mortgaged or pledged assets, allows an appeal to be brought only against an order discontinuing the proceedings or disapplying an unfair term but excludes appeals in other cases, the direct result of which is that whilst the party seeking enforcement may appeal when an objection to enforcement is upheld and the proceedings brought to an end or an unfair term is disapplied, the party against whom the enforcement is sought may not bring an appeal if his objection is dismissed?'

[235] See Case 199/82, San Giorgio, para 12-14; Case C-312/93, Peterbroeck, para 12; Case C-261/95, Palmisani, , para 27.
[236] See *Peterbroeck*, Judgement, para.14: "*by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration*".

***Reasoning of the Court*:**
The CJEU addressed the principle of effectiveness evaluating the whole procedural systemin detail, observing that:
"*37 However, taking into consideration the role of Article 695(1) of the LEC within the context of the procedure as a whole, the following findings must be made.*
38 First, it is apparent from the case-file submitted to the Court that, according to the Spanish procedural rules, mortgage enforcement proceedings relating to an asset that meets an essential need of the consumer, namely, provision of a dwelling, may be initiated by a seller or supplier on the basis of an enforceable notarial instrument, without the contents of that instrument having been subject to judicial scrutiny in order to determine whether one of more of the clauses is unfair. Such a right, afforded to a seller or supplier, renders it all the more necessary that the consumer, in the position of a debtor against whom mortgage enforcement proceedings are brought, can avail himself of effective judicial protection.
39 As regards the scrutiny exercised by the enforcing court, it should be observed, on the one hand, that as the Spanish Government confirmed at the hearing, notwithstanding the legislative amendments to the LEC made after the judgment in Aziz (EU:C:2013:164) introduced by Law 1/2013, Article 552(1) of the LEC does not oblige the enforcing court to examine of its own motion whether the contractual clauses upon which the request is based are unfair, but only a discretionary power to do so.
40 On the other hand, pursuant to Article 695(1) of the LEC, as amended by Law 1/2013, the party against whom mortgage enforcement proceedings are brought may raise an objection when founded, in particular, on the unfairness of a contractual clause upon which the enforcement is based or which allowed the sum due to be determined.
41 In that respect, however, it must be emphasised that, under the terms of Article 552(1) of the LEC, the assessment by the court of an objection based on the unfairness of the contractual clause is subject to time constraints, such as that of hearing the parties within 15 days and giving a ruling within 5 days.
42 Furthermore, it is apparent from the information provided to the Court that the Spanish procedural system in relation to mortgage enforcement is characterised by the fact that, once the procedure has been initiated, any other legal claim that the consumer might bring, including claims contesting the validity of the instrument enforced, enforceability, certainty, or extinction or the amount of the debt, is dealt with in separate proceedings and by a separate decision, without either one or the other having the effect of staying or terminating the pending enforcement proceedings, except in the residual circumstances in which a consumer has lodged a preliminary application for annulment of the mortgage before the marginal note regarding issue of the security certificate (see, to that effect, Aziz, EU:C:2013:164, paragraphs 55 to 59).
43 Having regard to those characteristics, if the consumer's objection to the enforcement of the mortgage against his property is dismissed, the Spanish procedural system, taken as a whole and in the manner applicable in the main proceedings, exposes consumers, and possibly, as is the case in the main proceedings, their family, to the risk of losing their dwelling in an enforced sale, while the enforcing court may have, at most, delivered a rapid assessment of the validity of the contractual clauses upon which the seller or supplier bases his application. The protection that the consumer, as a mortgage debtor against whom enforcement proceedings are brought, might obtain by way of a separate judicial scrutiny undertaken in the context of substantive proceedings brought in parallel with the enforcement proceedings, cannot offset that risk because, even if the scrutiny revealed the existence of an unfair clause, the consumer would not be granted a remedy reflecting the damage he had suffered by restoring him to the situation he was in before the enforcement proceedings against the mortgaged property, but, at best, an award of compensation. The purely compensatory nature of the remedy that might be awarded to the consumer would confer on him only incomplete and insufficient protection. It would not constitute either adequate or effective means, within the meaning of Article 7(1) of Directive 93/13, of preventing the continued use of the clause, found to be unfair,

in the instrument that contains a pledge by way of mortgage against a property on the basis of which enforcement proceedings were brought against that property (see, to that effect, Aziz, EU:C:2013:164, point 60).
44 In the second place, having regard once again to the role played by Article 695(4) of the LEC within the scheme of mortgage enforcement proceedings as a whole under Spanish law, it should be noted that that provision gives the seller or supplier, as a creditor seeking enforcement, the right to bring an appeal against a decision ordering a stay of enforcement or declaring an unfair clause inapplicable, but does not permit, by contrast, the consumer to exercise a right of appeal against a decision dismissing an objection to enforcement.
45 Therefore, it is clear that the procedure for objecting to enforcement, laid down by Article 695 of the LEC, before the national court places the consumer, as a debtor against whom mortgage enforcement proceedings are brought, in a weaker position compared with the seller or supplier, as a creditor bringing mortgage enforcement proceedings, as regards the judicial protection of the rights that he is entitled to rely on by virtue of Directive 93/13 against the use of unfair clauses.
46 In those circumstances, it must be stated that the procedural system at issue in the main proceedings places at risk the attainment of the objective pursued by Directive 93/13. The imbalance between the procedural rights available to the consumer, on the one hand, and to the seller or supplier on the other hand, simply accentuates the imbalance existing between the parties to the agreement, already mentioned at paragraph 22 of this judgment, and which is also echoed in the context of an individual action involving a consumer and the seller or supplier who is his co-contractor (see, by way of analogy, Asociación de Consumidores Independientes de Castilla y León, EU:C:2013:800, paragraph 50).

Can national judges adapt remedies on the basis of effectiveness?

The interpretative effort of the CJEU may have a prominent effect at national level: namely the so-called *hybridisation* of remedies. This process may be triggered by the decision of the CJEU, where the available national remedy is interpreted in the light of the EU standard, and then 'upgraded' via consistent interpretation. Otherwise, the hybridisation may emerge at national level, where the national courts, finding a conflict between EU law and national provisions, are required to adapt the procedural rule and/or the available remedies in order to comply with EU standard of effectiveness.

This could result in the availability of new remedies, which may already be available in the legal system but not for the specific case,[237] or may be previously non-existent; or vice versa, the expected remedies may no longer be available.[238] In these cases, the national courts will have the task to decide which judicial dialogue technique may help in avoiding further conflicts.[239]

For instance, a milder option is the use of consistent interpretation of national legislation, which was the choice of German judges in the aftermath of the *Heininger* case.[240] Nonetheless, the amendment

[237] See above *Factortame*.
[238] See Case *Pia Messner*.
[239] For an analysis of judicial dialogue techniques see Module 2.
[240] Case C-481/99, *Heininger*.Note that the CJEU affirmed in its decision that loan agreements are covered by the doorstep revocation directive, and that the exception in Art. 3(2) of the doorstep-selling directive was not relevant: "*Second, whilst a secured-credit agreement of the type in question in the main proceedings is linked to a right relating to immovable property, in that the loan must be secured by a charge on immovable property, that feature is not sufficient for the agreement to be regarded as concerning a right relating to immovable property for the purposes of Article 3(2)(a) of the doorstep-selling directive. Both for consumers, whom the doorstep-selling directive is designed to protect, and for lenders, the subject-matter of a credit agreement such as that in point in the present case is a grant of funds which is linked to a corresponding obligation of repayment together with interest. The fact that the credit agreement is secured by a charge on immovable property does not render any less necessary the protection which is accorded to the consumer who has entered into such an agreement away from the trader's business premises.*" Par. 32-34.

of national legislation triggered further preliminary references to the CJEU in the subsequent *Schulte* and *Crailsheimer Volksbank* cases.[241]

Otherwise, the national judge may be bound to disapply national legislation in order to resolve the conflict. This for instance was the choice of the UK Court of Appeal that disapplied primary, national legislation on the basis of incompatibility with an EU Directive and Articles 7, 8 and 47 CFREU, as EU law provided a remedy where English law did not.[242]

Can EU law impose on national judges the creation of new remedies?

Although the CJEU has always stated that the right to an effective remedy "*was not intended to create new remedies*",[243] in some cases the decisions of the CJEU lead national courts (as well as legislators) to question whether it was necessary to modify the national procedural system so as to include a new remedy in order to comply with EU principles, as interpreted in CJEU judgments.

It is important to note that the need to modify or create a new legal remedy is to be interpreted as a solution to be adopted only in exceptional cases. Under normal circumstances, the evaluation of the CJEU takes into account the remedies already existing at national level and the possibility to interpret the procedural provisions so as to fill the alleged gap in the enforcement of Union rights.

The boundary between interpretative analysis (which may lead to adaptation of existing remedies) and creation of new remedy is not a straightforward one, as exemplified by the well known case of *Factortame*.[244] Here, the CJEU affirmed that interim relief, available in principle but not for cases against the Crown, should be granted, as the principle of effectiveness justified the obligation for national courts to "*guarantee real and effective judicial protection*" even when no equivalent form of protection of rights under national law exists in that specific situation.[245] The same approach may be taken by national courts when evaluating the remedies available, for instance, national courts may provide as a justification for the adoption of a (previously inapplicable) interim relief the lack of effective remedies within a mortgage foreclosure, as the *Aziz* case shows.[246]

A more cautious approach was adopted by the CJEU in the *Inuit* case, where the Court had the opportunity to affirm that "*neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law*".[247] However, as mentioned above, an exception to this principle

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[241] See Case C-350/03, *Schulte*, and C-229/04, *Crailsheimer Volksbank*.

[242] The Court of Appeal affirmed in its decision that "*in so far as a provision of national law conflicts with the requirement for an effective remedy in article 47, the domestic courts can and must disapply the conflicting provision*".

[243] Case 158/80 Rewe II, summary para 6.

[244] Case C-213/89 *Factortame*. The case concerned the impossibility for the English courts to order, by way of interim relief against the Crown, that the application of certain national rules should be suspended, even if the conformity of those rules with EU law was being challenged in those proceedings and the parties concerned would suffer irreparable damage if the interim relief were not granted and they were successful in the main proceedings. See also case *Verholen*, where the CJEU stated that even though it was for the national rules to determine standing in the Member States' courts, these rules were not allowed to render the exercise of Union law rights virtually impossible. Consequently, if an individual's rights under EU law are at stake, national rules must provide for standing. Similarly, in Borelli, as national procedural restrictions were denied jurisdiction to review a preparatory administrative decision, which was binding on the Commission when it took the final decision, the CJEU affirmed that is the national courts' duty to allow individuals to challenge the legality of EU acts.

[245] Ibid. paras. 19, 20. The principle that a court seized of a dispute governed by rules of EU law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law has been confirmed in, inter alia, Case C-226/99, *Siples*, para 19.

[246] See Module 4 on consumer protection.

[247] See *Inuit*, Para 103.

may emerge if the domestic legal system does not provide for any direct or indirect remedy capable of ensuring respect for the rights, which individuals derive from European Union law.[248]

5. Effective remedies in different enforcement proceedings

As mentioned above, the right to effective remedies, as enshrined in Art. 47 CFREU, is applicable to civil, criminal and administrative enforcement.

As regards the administrative enforcement, an additional reference is Art 41 CFREU, which provides for the right to good administration. This right has a double feature: on the one hand, the explanation to the Charter as well as CJEU jurisprudence clarifies that, as indicated in the Charter, this right binds the EU institutions, bodies, offices and agencies.[249] On the other hand, as a general principle of EU law, this right has a wider scope and also binds the Member States when they act within the scope of EU law.[250]

Thus, when national authorities take measures which come within the scope of EU law, they are subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests. However, this is on the basis of the rights of defence qualified as general principle of EU law.

The defendant has a right to be sanctioned fairly and according to the principle of proportionality.

A partial overlap between Art. 41 and Art. 47 CFREU may emerge, for instance, as regards the right to be heard. On the one side Art. 41(2)(a) provides that the right of good administration includes "*the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*"; on the other Art. 47 includes the same right within the right to fair trial.[251]

Similarly, access to a file, guaranteed under Art. 41(2)(b), or the obligation of the administration to give reasons, laid down in Art. 41(2)(c), may both overlap with the protection provided under Art. 47[252] and, in so far as concerns the adversarial principle, which is inherent to Art 47, include the right to examine all the documents submitted to the court.[253]

Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration

Facts: In 2009, Mr Samba Diouf, a Mauritanian national, submitted to the competent department of the Luxembourg Ministry of Foreign Affairs and Immigration an application for international protection. Mr Samba Diouf asserted that he had left Mauritania in order to flee from slavery and that he wished to settle in Europe in order to live in better conditions and start a family. He also expressed the fear that his former employer would have him hunted down and killed.
The application for international protection submitted by Mr Samba Diouf was examined under an accelerated procedure, in accordance with Article 20(1) of the Luxembourg Law of 5 May 2006, and was rejected as unfounded by the Luxembourg Minister for Labour, Employment and Immigration.

[248] See *Inuit*, para 104, which adds the alternative case or "*if the sole means of access to a court was available to parties who were compelled to act unlawfully*".
[249] See CJEU in case *Cicala*, 28 and later on Case C-166/13 *Mukarubega*, para 43–50, with further references. Note that a different approach was taken in Case C- 277/11 *M.M.*, paras 81–84 where the CJEU decided the case on the assumption that Art 41 binds also Member States when they act within the scope of EU law.
[250] In Case C-604/12 *H.N.*, the Court held that the right to good administration reflects a general principle of EU law, which is indeed broader than the rights of defence.
[251] Case C-530/12 *National Lottery Commission*, paras 53–54.
[252] Settled case law ever since Case 222/86 Heylens EU:C:1987:442, para 15. Cf. more recently Case C-300/11 ZZ, EU:C:2013:363, para 53 with further references. Heylens case law', recently confirmed in relation to Article 47 in, for instance, Case C-437/13 Unitrading EU:C:2014:2318, para 20.
[253] Case C-300/11 ZZ EU:C:2013:363, paras 55 and 56.

Consequently, the Minister ordered Mr Samba Diouf to leave Luxembourg; the subsidiary protection claim was also rejected.
Mr Samba Diouf brought an action before the Tribunal Administratif, seeking annulment of the decision. The Tribunal Administratif held that Article 20(5) of the Law of 5 May 2006, which does not provide for any appeal against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure, gave rise to questions concerning the interpretation of Article 39 of Directive 2005/85, with respect to the application of the general principle of the right to an effective remedy.

Legal issues:

The Tribunal Administratif raised two questions:
•in its first question, it asked the ECJ to clarify whether Article 39 of Directive 2005/85/EC precludes national rules, pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision, to rule on the merits of the application for international protection under an accelerated procedure.
• in case the answer to the previous question was negative, the ECJ was requested to assess the compatibility of such an interpretation of Article 39 of Directive 2005/85/EC with Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR).

***Reasoning of the Court*:**

The ECJ observed, at the outset, that the right to an effective remedy is a general principle of EU law, which is now protected by Article 47 of the Charter.
It then recalled its jurisprudence on case C-13/01, Safalero, [2003] ECR I-8679, paragraphs 54 to 56, in which it held that such principle did not preclude national legislation under which an individual cannot bring court proceedings to challenge a decision taken by the public authorities, where there is available to that individual a legal remedy which ensures respect for the rights conferred on him by EU law and which enables him to obtain a judicial decision finding the provision in question to be incompatible with EU law.
Accordingly, the absence of a remedy against the decision relating to the procedure does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure may be the object of a thorough review by the national court, within the framework of an action against the decision rejecting the application.
What is important, therefore, is that the reasons justifying the use of an accelerated procedure may be effectively challenged at a later stage before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum.
In relation to the accelerated procedure, it will be for the national court assess, in relation to the circumstances at stake, whether such a right is duly respected. In particular, taking into account the procedural differences between the accelerated procedure and the ordinary procedure, it will be for the national court to determine whether the time-limit for bringing an action of 15 days in the case of an accelerated procedure is sufficient to prepare and bring an effective action. On the contrary, the fact that the applicant for asylum has the benefit of two levels of jurisdiction only in relation to a decision adopted under the ordinary procedure does not imply that Directive 2005/85 does require there to be two levels of jurisdiction. All that matters is that there should be a remedy before a judicial body, as is guaranteed by Article 39 of Directive 2005/85. The principle of effective judicial protection, in fact, affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.

Is art 47 CFREU applicable also to independent regulatory authorities?

The wording provided by Art. 47 CFREU is not limited to administrative, civil and criminal judicial courts, as the wording of the article use the term of "tribunal", however the CJEU never provided a specific definition of such term. In order to define which type of courts may fall into the concept of "tribunal", a useful point of reference is art. 267 TFEU concerning the preliminary ruling jurisdiction, where the definition of court and/or tribunal is a wide one. The CJEU case law on this point identified a set of elements that allowed several bodies that may not be formally part of the judiciaries of the Member States to be included within the notion of court or tribunal.[254] The elements are the following:

1. the body is established by law;
2. it is a permanent body;
3. has compulsory jurisdiction;
4. its procedures are inter parties;
5. it applies rule of law;
6. it is independent.[255]

This excludes from the application of Art. 267 TFEU cases presented by arbitral bodies, as they are established on the basis of an agreement between the parties; but it does not exclude the situations of national bar councils[256] or of independent authorities, if they comply with the above mentioned elements, and in particular those of independence and impartiality.[257]

The jurisprudence of the ECtHR on the definition of "authority", which is the terminology used in art. 6 ECHR, is another useful point of reference.

A similar reasoning may be applicable to art. 47 CFREU.

For instance, in *Manfredi* the CJEU, as regards the liability for breach of competition and the possibility for individual to exercise their right to seek compensation, affirmed that "*In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules and to prescribe the detailed procedural rules governing those actions, provided that the provisions concerned are not less favourable than those governing actions for damages based on an infringement of national competition rules and that those national provisions do not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 EC.*"[258]

6. Comparative analysis of the CJEU approach towards remedies within the different fields

The effectiveness of remedies is a matter that was analysed by the CJEU in different fields. Although a direct comparison is a not feasible as the number of cases available in some areas is limited, and the factual circumstance are not always comparable, the comparative analysis will take as a proxy the specific aspect that the cases have dealt with.[259]

[254] Case De Coster;
[255] Case Dorsch (23)
[256] Case Torrisi (20-25)
[257] See Wilson, and RTL 517/09 on broadcasting authorities.
[258] Manfredi, para 72.
[259] Note that the cases included in the table will be updated throughout the project ACTIONES.

	Consumer protection	Migration	Asylum	Non-discrimination	Criminal law
Ex officio power	Banif Plus Bank	Benallal (only Opinion)			
Right to be heard		Mukarubega			
Right to fair trial					
Right to an effective remedy	Kusionova	Abdida		H.I.D.	
Right to defence		Boudjlidia			
Right to appeal	Sanchez Morcillo I Sanchez Morcillo II ACICL	Samba Diouf			
Collective redress	Pohotovost				
Out-of-court settlement	Alassini				

From the analysis of the reasoning used by the CJEU in its own case law related to Art. 47 CFREU to justify the conclusions in different areas of law. For instance, both decisions related to *Sanchez Morcillo* case mention expressly the migration law case of *Samba Diouf* on the right of appeal. Similarly, in the migration law case of *Boudjlida* the CJEU expressly mentions the *Alassini* case as regards the balancing exercise between rights of the defence and possible national limitations.[260]

The CJEU not only mentions cases that emerge in different areas of law, but in comparable cases, it shows a similar approach in the application of Art. 47 CFREU. This can be demonstrated through the following comparison between the analysis provided in consumer law and in migration law. The two cases address the existence (in the Slovakian case) or the lack (in the Belgian case) of interim measure having suspensive effect.

KUSIONOVA	ABDIDA
Facts: Extrajudicial enforcement of a debt Auction sale of the immovable property given as security Opposition to auction sale without suspensive effect Risk of loss of the family home for the claimant	**Facts:** Refusal of a third country national for leave to remain Appeal but without suspensive effect Real risk for life or physical integrity of the claimant
Legal issues: **Analysis of the overall procedural system** **Effectiveness and dissuasiveness of remedies (penalty)**	**Legal issues:** EU law requires a right of appeal but does not require the appeal to have suspensive effect (Art. 13(1) Return directive)
Reasoning of the Court:	**Reasoning of the Court:**

[260] See para 43.

Interim measures are justified to protect the consumer's fundamental right to a house (Art. 7 CFREU) **Reference to ECHR jurisprudence on loss of house**	Balance between Arts. 47 and 19(2) CFREU with Art. 3 ECHR (non-refoulement principle in exceptional cases) Interim measures are justified to protect fundamental right to health If non-existent they should be made *ipso jure* available (ECtHR decision in *Gebremedhin*)
	Subsequent decision: **TALL**
	If no risk of ill-treatment, there is no need to provide suspensive effect on appeal Coordination between Art. 13 ECHR and Art. 47 CFREU

The comparison show a similar reasoning structure. First of all, the CJEU address the overall procedural system at national level and the effects of the lack of interim relief available at national level. In both cases the CJEU then clarifies that the national procedural system provides for effective judicial protection, as the measures available for the claimants are sufficient and compliant with EU law. Thus, no interim relief should be introduced, as it is neither required by secondary EU law nor provided for in national implementing measures. Additionally, the cases involve other fundamental rights that relate to the claimants, respectively the right to a house and the right to health. Here the CJEU does not limit the references to the Charter to Art. 47 but expressly mentions Art. 7 and Art. 19(2), as well as relevant ECtHR case law. Given the specificities of the cases, the CJEU came to the conclusion that the concurring fundamental rights support the view that interim relief must be available.