# *FINAL HANDBOOK*

# *JUDICIAL INTERACTION TECHNIQUES - THEIR POTENTIAL AND USE IN EUROPEAN FUNDAMENTAL RIGHTS ADJUDICATION*

**PREPARATION OF THE HANDBOOK HAS TAKEN PLACE IN THE FRAMEWORK OF THE PROJECT "EUROPEAN JUDICIAL COOPERATION IN FUNDAMENTAL RIGHTS PRACTICE OF NATIONAL COURTS" (JUST/2012/FRAC/AG/2755) – THE PROJECT FUNDED BY THE EUROPEAN COMMISSION FUNDAMENTAL RIGHTS&CITIZENSHIP PROGRAMME**

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# Foreword[1]

It is our great pleasure to present to you this fourth and final Handbook elaborated under the framework of the Project "*European Judicial Cooperation in the fundamental rights practice of national courts – the unexplored potential of judicial dialogue methodology*" (JUDCOOP), undertaken between January 2013 and June 2014.

The structure of the Handbook reflects the convictions that judicial cooperation is necessary in the current day Europe. When initially drafting the Project, we believed that judicial cooperation is even more necessary in the field of application of European Fundamental Rights, an area of law with impact on each and every European citizen. Adjudicating within this field is particularly difficult exactly because of the basic promise that fundamental rights hold, meaning that they should be easily and effectively available to every individual within the EU. Moreover, fundamental rights pose very specific problems. Conflicts between rights, their sensitive position within constitutional systems and specific legal construction – all these features are enhanced in a multi-level legal system binding within and across states. At the same time, the freedom of movement easily exercised by citizens between European states requires that the fundamental rights guaranteed across borders are comparable. If this is not the case, the mere concept of fundamental rights common to the peoples of Europe is threatened, as is the very identity of the European Union. It is essential, therefore, that the standards of protection of the European Fundamental Rights *converge* across the EU countries, and that they are progressively *enhanced.*

It has to be observed that *Convergence* and *Enhancement* generate obligations stemming from EU law and binding on the European judges. Fulfillment of these obligations, however, has repeatedly required that judges look for solutions to cases involving fundamental rights issues, whose elements or effects go beyond the borders of the legal order where they adjudicate. This requires better skills (both linguistically and analytically), appropriate tools (both databases[2] and adjudicatory techniques), and increased contacts with judges from other legal systems.

The Project "*European Judicial Cooperation in the fundamental rights practice of national courts – the unexplored potential of judicial dialogue methodology*" has sought to contribute to the solution of the above mentioned problems, by focusing on three fundamental rights: the *principle of non-discrimination*, the *right to a fair trial* and *the freedom of expression*. It has attempted to create an environment where at least basic problems such as the lack of access to judgments of courts from other jurisdictions or linguistic obstacles are mitigated. Thus the database was created to serve this end.

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[1] *Madalina Moraru* and *Karolina Podstawa* have prepared the final Handbook in collaboration with the Expert team under the supervision of *Director Prof. Cafaggi*. We aknowledge the contribution of Dr. *Cesare Pitea* and Dr. *Kirsteen Shields* and the comments made by the partners and the participants to the dissemination workshops held in Warsaw, Bucharest, Rome and Naples. Annex I was elaborated by Dr. *Filippo Fontanelli*, Dr. *Nicole Lazzerini* and *Madalina Moraru* with contribution by the Expert team and the supervision of *Director Prof. Cafaggi*. We are very grateful for the comments and suggestions made by several judges to both the English version and the adapted versions.

[2] For this reason, the Project expert team set up a Database collecting all the (national and supranational) case-law gathered during the Project. The database was elaborated in such a way as to contribute to the leading purpose of providing national judges with practical examples on the benefits of using Judicial Interaction Techniques, which can effectively assist them in the process of adjudication on European Fundamental Rights.

The Project offered possibilities for direct contact between judges both personally – in the course of the Project workshops organized in Florence and within the partner states (Croatia, Italy, Poland, and Romania), and online – database and forum[3].

The Project also focused on knowledge sharing on the range of tools and methodologies used by adjudicators. We termed the tools "Judicial Interaction Techniques". Understanding their potential and impact in the field of European Fundamental Rights could effectively contribute to the ultimate goals of *convergence* and *enhancement of European Fundamental Rights*. This Handbook was compiled precisely to help judges become familiar with these tools.

From the methodological perspective, the structure of the Final Handbook combines the two training approaches endorsed by the Project. These are the two training modules compiled and tested in the three thematic handbooks that served as basis for the Project's activities. This included three workshops held at the European University Institute and a series of national dissemination events. The first approach aimed to explore the use of Judicial Interaction Techniques in the field of the principle of non-discrimination and the right to a fair trial (the first two Handbooks). It focused on the case-by-case analysis of the use of Judicial Interaction Techniques that involves interaction among national courts from the same Member States and different Member States, and between the national and European supranational courts (CJEU and ECtHR). A second approach was chosen for the Handbook on freedom of expression and provided a more nuanced insight in the manner through which judicial interactions contributed to the ultimate shape of a fundamental right development whenever a conflict occurs or a balancing exercise is needed. Both approaches are merged in the Final Handbook, with a view to offer a presentation of Judicial Interaction Techniques which would render the advantages of their use more visible.

The structure of the Handbook was dictated by the objective of providing national trainers and judges with a ready-to-use manual on the use of Judicial Interaction Techniques as solutions to different types of conflicts related to European fundamental rights. The techniques are presented in a comparative perspective in order to enhance mutual learning and exchange of legal experience. The presentation of the use of techniques is based on very thorough academic research and is designed to serve best practices of adjudication and training of judges. As such, it builds on the experience gathered during the three workshops and on successful methodologies identified by the workshop's participants.

Each of the workshops was an experiment in itself, testing not only the draft Handbooks, but also the forms of interaction with and among judges. The experience, requests and suggestions gathered throughout the 3 Workshops has inspired the "*Guidelines on the Use of Judicial Interaction Techniques*" that accompany this volume and are meant to offer guidance in situations where EU and ECHR provisions are applicable or when only one of these instruments is applicable. The Guidelines concisely provide the logical sequence a national judge could follow when handling legal questions in ensuring the convergence and enhancement of European Fundamental Rights. The ultimate purpose of the Project and the solutions it offers is to trigger a process of cross-state and cross-discipline mutual learning on judicial cooperation. Our efforts have attempted to go beyond a mere exchange of information through conferences in search of more effective ways to foster judicial dialogue in practice. This would have not been possible without our partners (the *Romanian Superior Council of Magistracy* together with the *National Institute for Magistracy*, the *Polish Supreme Administrative Court*), and our associate partners: the *Croatian Judicial Academy*, the *Italian Consiglio Superiore della Magistratura*, the *Spanish Escuela*

[3] For the purpose of helping judges in their daily problems on adjudication on the specific fundamental rights that are object of the Project, the Expert Team set up also a Discussion forum accessible to the Project's participants from the Project's webpage: http://judcoop.eui.eu/data/?p=data.

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*Judicial del Consejo General del Poder Judicial* and the *Association of European Administrative Judges*). As a final note, we would like to thank them for the continuous collaboration and support. Their patience and willingness to participate in our experiment only confirms the importance of Judicial Interaction Techniques for the protection of fundamental rights in Europe.

# I. Setting the Scene: Problems in Fundamental Rights Adjudication and European Judicial Interactions

## *1. Introduction*

The entry into force of the Lisbon Treaty has expanded the competences of the EU both internally and externally.[4] The EU's growing internal legislation and the enlarged treaty making power have enhanced (and will continue to enhance) the role of national courts in the enforcement of EU law.[5]

At the same time, the areas where national courts can formally interact with the Court of Justice of the European Union (CJEU) have increased.[6] Following the elimination of the pillars structure, national courts can refer preliminary questions to the CJEU in all the matters now gathered under the Area of Freedom, Security and Justice (AFSJ).[7] Thus, national courts of all the Member States (and of levels) gained the power to refer preliminary questions on asylum matters − a new power that has proven of enormous benefit for national courts.[8] Moreover, the temporal limitation placed on the power of national courts to refer preliminary questions on matters related to the Police and Judicial Cooperation in Criminal Matters will end on 1st of December 2014.[9]

As a general rule, due to the elimination of the pillars structure, the CJEU has general jurisdiction to interpret the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The unification of EU category of acts (regulations, directives and decisions) regardless of whether adopted by the EU institutions, bodies, offices or agencies of the Union, and of the area of law, fall as a general rule under the exclusive judicial review of the CJEU.[10]

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[4] P. Craig, "Competence and Member State Autonomy: Causality, Consequence and Legitimacy", Oxford Legal Studies Research Paper No. 57/2009.

[5] M. Cremona, "External Relations and External Competence: The Emergence of an Integrated Policy", in *The Evolution of EU Law*, edited by G. de Búrca and P. Craig, 2nd ed., OUP 2011.

[6] For reasons of coherence and readability, we will always refer to the EU, even when referring to acts, actions, and practices of the European Community and/or pre-Lisbon Treaty European Union; for the same reasons we will refer only to the CJEU.

[7] Matters such as immigration, asylum, visas, police and judicial cooperation the latter two matters were part of the third pillar before the entry into force of the Lisbon Treaty.

[8] See the high number of preliminary references sent by courts on asylum proceedings since 2009, some of which raised issues of violation of non-derogable human rights, such as prohibition of torture and inhuman and degrading treatment, as in Joined cases C-411/10 and C-493/10 *NS and ME*, judgment of 21 December 2011. For more details on preliminary references in the area of asylum law, see FRA Handbook on European law relating to asylum, borders and immigration., available at http://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf; see also E. Guild and V. Moreno-Lax, Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR, No. 59 / September 2013, available at http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDwQFjAC&url=http%3A%2F%2Fwww.ceps.be%2Fceps%2Fdld%2F8382%2Fpdf&ei=iEddU53uNMS0ywOP54KICg&usg=AFQjCNFRieXUseYZQG-puPS3nLdLGLjnhQ&sig2=RaFmnzU4EOjm177wEzVoQg&bvm=bv.65397613,d.bGQ

[9] Despite the fact that the current Treaties do not reiterate former Art. 35 TEU, Article 10, paragraph 1, of Protocol No. 36 on transitional provisions prescribes that the limitations existent in certain Member States on the power of national courts to refer preliminary questions on matters related to Police and Judicial Cooperation in Criminal Matters (PJCCM) will continue to apply to acts adopted before the entry into force of the Lisbon Treaty for a transitional period of five years, unless those acts are amended.

[10] With the exceptions provided by Arts. 275 and 276 TFEU, and the temporal limitations foreseen in Protocol No. 36 on transitional provisions.

The recognition of the legally binding value of the Charter of Fundamental Rights of the European Union (EU Charter), which enjoys the same status as the Treaties (Article 6(1) TEU) has similarly contributed to the increase in cooperation between national courts and CJEU. A new wave of preliminary questions on the scope of application of the Charter, its effects, and its relationships with the ECHR and domestic instruments of fundamental rights protection has arrived before the Court of Justice.[11] In other words, the legal upgrading of the EU Charter has led to a significant increase of the incidence of human rights adjudication before the CJEU.[12] Inevitably, the potential of conflict with the main European supranational court adjudicating on human rights, the European Court of Human Rights (ECtHR), has also augmented.[13] In reality, the Charter contains a provision (Article 52(3) CFR) which elevates the ECHR to a minimum floor of protection. Nevertheless, since the CJEU has repeatedly stated that fundamental rights must be protected "within the framework of [EU] law",[14] divergences between the respective case law of the two supranational courts are not a remote possibility. At the same time, the prospected accession of the Union to the ECHR, which will subject the Union acts to the control of an external body, apparently provides an incentive to consistency.

These changes brought by the Lisbon Treaty directly impacted on the judicial interaction at vertical and horizontal levels in areas touching on European Fundamental Rights (EFRs) issues. The resulting new framework, coupled with the peculiar cross-sectorial nature of EFRs adjudication, makes it even more important to analyse and trace the benefits of judicial interaction in this field. Accordingly, by means of introduction, this Part will start with a section dedicated to showing the relevance of fundamental rights protection for a national judge as an arena where judicial interactions occur frequently. In this area it is possible, therefore, to trace and analyse specific instances of judicial interaction techniques from the point of view of the reasons for their occurrence, procedural aspects of their use, and consequences they lead to. Part I will then highlight the problems and legal issues regarding the application of EFRs in general, and, in particular, of the 3 fundamental rights selected by the JUDCOOP Project: *principle of non-discrimination, right to a fair trial and freedom of expression*. The focus is on the *conflicts* that can arise in cases involving EFRs adjudication. After explaining the reasons behind the choice of the concept of "conflict", the different types and sources of conflicts that are relevant in this field are subsequently presented. In this section we present the conflicts by referencing to Judicial Interaction Techniques that have been used in practice or can be used as well as the results of their use.

While offering an overview of the existing common problems within the field of EFRs adjudication in the EU countries, which we refer to as *conflicts*, **Part I** will also offer preliminary insights into the use of judicial interaction techniques and their assistance to national judges in solving these conflicts. **Part II** will then provide a detailed analysis of the tool box of Judicial Interaction Techniques available to all European judges. Each section dedicated to these techniques includes examples drawn from the practice of European supranational and national courts as regards the three fundamental

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[11] See Case C-571/*10 Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES), Giunta della Provincia autonoma di Bolzano, Provincia autonoma di Bolzano*. Similarly, judgment of 24 April 2012, Case C-617/10 *Åkerberg Fransson;* C-206/13 *Cruciano Siragusa v Regione Sicilia*, 6 March 2014; Case C-396/11 *Ciprian Vasile Radu* [2013] judgment of 29 January 2013, ECR-0000. See more details on the application of the EU Charter in the European Commission Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of the EU Charter of Fundamental Rights COM/2014/0224 final.

[12] See G. de Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", (2013) MJ, 169; and more up-dated data can be found in the 2013 Report of the Commission on the application of the Charter, available online at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1399031014350&uri=CELEX:52014DC0224

[13] On the conflicting CJEU and ECtHR judgments in the field of the EFRs adjudication selected for this Project, please see pp.33-35.

[14] Case C-44/79 *Hauer* [1979], para. 3.

rights specifically addressed by the Project. References will also be made to cases concerning other fundamental rights, which present similar problems. To complete the report, **Part III** reverses the focus of the investigation by scrutinising the results that can be obtained through conscious use of Judicial Interaction Techniques. In the final part of the Handbook, we chart the analysis a national judge normally makes. This entails the first step of the identification of conflict(s), the second step, of identification of tools of resolution of such conflicts, (for the purpose of fulfilling the requirements of the multi-level system of EFRs protection,) and the third step of fulfilling the objectives inherent to a EFRs system. These objectives involve the convergence of EFRs interpretation and application, while at the same time enhancing their protection throughout the EU countries. Before proceeding further in deconstructing the analysis of adjudication in this Handbook, it needs to be noted that a sample of problematic national jurisprudence collected by the national legal experts over a period of almost 18 months formed the starting point for the case law excerpts used as references below. Therefore **Part II** on Judicial Interaction Techniques as solutions to conflicts is not offering legal guidance in abstract, it is rather modelled on the specific problems identified in the field of the 3 EFRs within each of the partner countries.[15] More case law and Judicial Interaction Techniques on the relevant EFRs are to be found in the previous 3 thematic Handbooks.[16] The Handbook ends with 2 Annexes, first one includes Guidelines on the step by step use of judicial interaction techniques by a national judge when confronted with conflicts of norms, judicial interpretation or rights, while the second Annex groups all the case law collected for the 3 thematic Handbooks by conflict and judicial interaction technique.

## *2. Fundamental Rights - a concern for all national judges*

Due to the natural application of individual fundamental rights across state borders, and equally to individuals or a community, controversies regarding these rights are universal, by nature, and concern national judges from across all national jurisdictions of the EU, and legal fields. European Fundamental rights issues are applicable in all areas of law, i.e. civil, criminal, administrative, disciplinary, and regardless of the level of jurisdiction of the national court, and are therefore one of the most universal claims invoked in judicial litigations.

Furthermore, due to the wide scope of application, the European system of fundamental rights protection renders European Fundamental Rights (EFRs) a concern for all national judges within European states. Since 1st of December 2009, the EU Charter is an integral part of EU primary law, assisted by the principle of primacy over national law. National judges of all levels of jurisdiction are therefore called to apply the Charter in all litigations falling within its scope of application. In fact, some of the seminal judgments of the CJEU on EU derived rights of individuals originate from first instance courts: *Van Gend en Loos*[17] (reference from the Tariefcommissie, Amsterdam), *Costa v. ENEL*[18] (reference by the Giudice Conciliatore di Milano), *Francovich and Bonifaci v. Italy*[19] (references by the Pretura di Vicenza and the Pretura di Bassano del Grappa) and *Faccini Dori*[20] (reference by the Giudice

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[15] Considerable jurisprudence has been left outside of the present Handbook in order to limit the word count and present concise information. According to the Project requirements as approved by the European Commission, the maximum number of pages allocated to the Final Handbook is 150 pages, however the partner countries, Polish Administrative Court and the Romanian National Institute of Magistracy and the Superior Council of Magistracy, agreed to a translation of a approximately 190 pages.

[16] *JUDCOOP Handbook on Judicial Interaction in the field of the principle of non-discrimination, JUDCOOP Handbook on Judicial Interaction in the field of the right to a fair trial, JUDCOOP Handbook in the field of freedom of expression* and in the Project database, http://judcoop.eui.eu/data/?p=data Throughout this Handbook we will make extensive references to these 3 thematic Handbooks.

[17] Case 26/62, *Van Gend en Loos*.

[18] Case 6/64,*Costa v. ENEL*

[19] Joined Cases C-6 and C-9/90, *Francovich and Bonifaci*.

Conciliatore di Firenze). In addition, the ECHR has been incorporated by all EU countries and it was placed within the hierarchy of national legal sources in positions ranging from supra-constitutional[21] to supra-legislative positions[22], and with application in various areas of law.

The potential of Judicial Interaction Techniques in the field of the EFRs can be traced back as early as the 1960s in the European Union. The very incorporation of fundamental rights within EU law has been the result of the late 1960s preliminary references to the CJEU from German courts which were concerned that European legislation might infringe upon fundamental rights entrenched in the German Basic Law.[23] The resulting (gradual) framing of FRs as general principles of EU law *via* the use of the preliminary reference procedure as a judicial interaction technique is only one example of the advances that a certain type of judicial interaction technique can bring to a legal system and to the level of protection of fundamental rights granted therein. As the CJEU itself stated: *"(t)he development of the Community legal order has been to a large extent the fruit of the dialogue which has built up between the national courts and the Court of Justice through the preliminary ruling procedure*."[24]

Widespread use of judicial interaction techniques, including those made available by supranational norms[25] to the national judges residing in courts from all levels of jurisdiction therefore holds great potential to significantly contribute to building a coherent application of the EFRs. At the same time, the use of Judicial Interaction Techniques also contributes to guaranteeing high levels of rights' protection in all Member States

### *3. The extent of the active role of the national judge in European Fundamental Rights adjudication – the ex officio application of EU law*

As a general rule of EU law, national courts apply EU law within the framework of the national procedural and remedial laws: this is known as the principle of procedural autonomy.[26] A similar approach is taken in the context of the ECHR, within the broader context of the principle of subsidiarity.[27] However, the CJEU established limitations to the freedom of national judges to rely on

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[20] Case C-91/92, *Faccini Dori*, [1994] ECR I -3325.

[21] See, for instance, Romania: Art. 20(2) Romanian Constitution as interpreted by the Romanian Constitutional Court in Decision no. 146/2000.

[22] See, for instance, Italy and Spain, and for more details: G. Martinico and O. Pollicino, *The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar, 2012). A similar relation exists in Croatia, see Art. 141 of the Croatian Constitution, the Convention has direct applicability in the Croatian legal order. There are also some procedural mechanisms for using ECtHR judgments, e.g. a special remedy allowing a final judgment of a Croatian court to be changed if the ECtHR decided on a violation in that case. Similarly as in Romania, use of the Convention by ordinary courts (i.e. anyone except the Constitutional Court and the Supreme Court), especially directly against a conflicting rule of national law, is scarce. This practice is not the result of internal procedural law, but because of the specific judicial culture.

[23] Case C-29/69, *Stauder v Ulm*, 1969 E.C.R. 419, 419.

[24] Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union (Weekly Proceedings No. 15/95), para. 11

[25] For the complete list of judicial interaction made available by supranational norms (ECHR and EU) please see Part II section 2.

[26] D. Murray, EU law rights and national remedies: an uneasy partnership? available at http://atp.uclan.ac.uk/buddypress/diffusion/?p=1523

[27] According to the ECtHR Interlaken Notes: "[…] *in the specific context of the European Court of Human Rights, [the principle of subsidiarity] means that the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task.*" available at http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf. The principle of subsidiarity, a concept emerging from the ECtHR's jurisprudence, will be explicitly mentioned in the new recital of the ECHR's Preamble,

national procedural rules when EU law is applicable. The principles of equivalence and effectiveness require national judges to set aside national procedural rules that make impossible or excessively difficult to protect rights derived from EU law.[28] Whether a national procedural provision causes the impossibility or excessive difficulty to enjoy EU law rights is determined "*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*."[29]

As regards the application of EU fundamental rights, three preliminary comments need to be made. Although parties in the proceedings usually advance arguments based on compliance with fundamental rights obligations, judges can also consider them on their own motion, since respect of fundamental rights standards is an integral part of the principle of legality, a general principle of Union law. Furthermore, additional legal basis for the application of EU FRs could be implied from the EU principle of sincere cooperation which requires national judges to ensure effective and uniform application of EU law (Art. 4(3) TEU), which clearly includes the EU Charter (Art. 6 TEU).

The CJEU itself raises of its own motion the issue of conformity with fundamental rights,[30] even when the national referring court did not include such an issue in the preliminary question.[31] However, the CJEU has not singled out in its jurisprudence a general obligation for the national courts to consider of their own motion issues concerning the protection of EU-derived rights, nor for fundamental rights specifically.[32] It has though exceptionally delivered a string of judgments in the fields of competition,[33] administrative[34] and consumer law[35] on the right/duty of the national judge to consider *ex officio* the application of EU law or national law implementing EU secondary legislation.

Against this background, the task of national judges is two-fold. On the one hand, it is up to them to evaluate EFRs arguments brought forward by the parties. This is possibly an obvious

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once Protocol no. 15 to the Convention will enter into force (Art. 1, Protocol no. 1, not yet in force, available at http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf).

[28] Case C- 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 353595. On the application of the principle of equivalence, see *Close Up 12* of the present Handbook. This principle has a direct application also when national judges decide on the applicable national remedy for violation of an EU derived individual right. In *Heylens*, the CJEU stated 'the existence of a remedy […] is essential in order to secure an individual's right' (Case C- 222/86, *Heylens*, ECR [1987] paragraph 14), highlighting the point that EU rights would be of no significance if there was no remedy available for the claimant's loss or damage (which needs to be equivalent to the national remedy available for a similar right derived from national law).

[29] Joined cases C-43430-431431431/93 *Van Schijndel* [1995] ECR I-4736, para 19, Case C-312/93 *Peterbroeck* [1995] ECR I-454599, para 14, Case C-276/01 *Joachim Steffensen* [2003] ECR I-373535, para 66, Case C-125125125/01 *Peter Pflücke and Bundesanstalt für Arbeit* [2003] ECR I-9375, para 3333, C-63/01 *Samuel Sidney Evans and The Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau* [2003] ECR I-1417, para 46. For more details on the precise question of the power and obligation of national courts to raise EU norms *ex officio* for the purpose of ensuring respect of European Fundamental Rights, please see Part II section 2 within the preliminary reference technique.

[30] For more details, please see Part II section 2.

[31] See the Case 368/95, *Familiapress*, [1997] ECR I-3689 and C-360/06, *Heinrich Bauer Verlag*, Judgment of 4 December 2008.

[32] On raising EU law issues ex officio, see J. Engström, "National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?", (2008) Review of European Administrative Law, Vol. 1, no. 1, 67-89.

[33] See e.g. Joined Cases C-430 & 431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis vanVeen v. Stichting pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4705.

[34] See e.g. Joined Cases C-222–225/05, *J. van der Weerd and Others v. Minister van Landbouw, Natuur enVoedselkwaliteit*, [2007] I-4233.

[35] Case C-488/11, *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV*, judgment 30 May 2013, par. 41; Case C-618/10 *Banco Español de Crédito* [2012] ECR I-0000; Case C-472/11 *Banif Plus Bank* [2013] ECR I-0000*;* Case C-397/11 *Erika Jőrös v Aegon Magyarország Hitel Zrt,* judgment of 30 May 2013; Case C-32/12, *Soledad Duarte Hueros v. Autociba SA, Automóviles España SA*, Judgment of 3 October2013, nyr; see comment of the latter judgment in "Price reduction as a consumer sales remedy and the powers of national courts: Duarte Hueros" (2014) Common Market Law Review, 975–992.

statement; it is important to emphasise that a balanced choice needs to be made between judicial economy, in the sense of deciding on the basis of specific provisions and discussing EFRs. The openness on the part of the judge to rely on FRs is a necessary pre-requisite for their effectiveness. Secondly, and as a consequence of the previous thesis, judges need to be ready to consider EFRs implications even when they are missing from the reasoning of the parties, assessing whether their application could benefit the protection granted to the parties.

The role of first instance courts in considering EFRs of their own motion is of outmost importance. This is more evident in cases where an individual invoking a Union right requires legal aid (particularly in cases concerning immigration/free movement of persons, or discrimination issues).[36] The legal aid aspect might be an element limiting the interest of the lawyer in following the case until the last judicial resort; sometimes there is limited knowledge of the possibility and strict conditions of appealing to higher courts on the basis of arguments related to EFRs protection. The effective protection of European Fundamental Rights would be significantly endangered if EFRs review and application of supranational norms were left entirely to the appellate and supreme courts.

### *4. Conflicts in the field of European Fundamental Rights adjudication*

The previous sections have highlighted that the area of European Fundamental Rights (EFRs) is the perfect arena for demonstrating the benefits of the use of judicial interaction techniques. At this point, attention must be paid to most common problems faced by national judges from all EU countries when engaging with EFRs. After briefly mentioning what is meant by "conflict" in this Handbook, we will outline the main common sources of conflicts in the European multilevel system of fundamental rights protection. Then, the different types of conflicts involving European Fundamental Rights will be mapped, together with their sources. Particular attention will be paid to the 3 fundamental rights specifically addressed by the Project: principle of non-discrimination, right to a fair trial and freedom of expression.

#### a) The definition of the notion of "conflict"

For the purpose of the present Handbook, we are departing from the classical definition of "conflict" assumed in public international law according to which:

"[a] conflict in the strict sense of direct incompatibility aris[es] only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties."[37]

This definition does not take into account the situations where multiple obligations overlap and the conflict is of a more delicate nature, as it is sometimes necessary to decide which of these multiple obligations to fulfil. For this reason we need to endorse a broader definition, which includes Kelsen's definition of conflict of norms: *"[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated*."[38]

We also consider as part of our notion of "conflict" divergences stemming from different judicial interpretations of the same norm(s) by different national and supranational courts, or by judges within the same court, and conflict stemming from competing exercises of different fundamental rights (a good example is provided by cases where the exercise of the freedom of expression affects that of the right to privacy, data protection, intellectual property rights, etc.).

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[36] See C. Barnard and E. Sharpston, "The Changing Face of Article 177 References" (1997) Common Market Law Review, 30 1113–1171, at 1161-3.

[37] Jenks, "The Conflict of Law-Making Treaties",(1953) BYIL 401, at 426.

[38] Kelsen, 'Derogation', in H. Klecatsky, R. Marcic, and H. Schambeck (eds), Die Wiener Rechtstheoretische Schule (1968), ii, at 1429.

### b) The main features of the European system of fundamental rights protection

National judges across the EU countries have a complex and difficult mandate to fulfil.[39] Every national judge is bound to apply fundamental rights which are simultaneously provided by **a plurality of legal regimes, with at least partially overlapping scopes of application**: national constitutions/charters or statutory law, the EU (which includes the EU Charter and a steadily growing number of EU legislative measures), the ECHR, and a significant number of international treaties in force in the Member States. The number of legal acts ensuring the protection of EFRs has further increased due to prolific activity of the EU legislator in areas of law touching on fundamental rights.[40] At the same time, **each system of fundamental rights protection (national, supranational, international) has its own court,** empowered with exclusive jurisdiction to exercise judicial review of the specific legal act providing protection to fundamental rights. Moreover, each legal system imposes its own specific legal language and tools, potentially requiring the judge to prioritize one legal system over the other, or to assess which norms and judicial interpretation tools from one legal system might better protect individual's rights. This state of affairs can be (*rectius*, has been already)[41] the source of divergences in the judicial interpretation of the same fundamental right, especially as regards the standard of protection,[42] and the balancing with other interests of the society or conflicting fundamental rights.[43]

This multiplicity of applicable sources implies that judges have to resolve a number of questions whenever called to adjudicate cases involving fundamental rights issues. They must determine: (i) the scope of application of the fundamental right(s) involved; (ii) its/their interpretation by the supranational court(s) that is the ultimate interpreter within the legal system that affords protection to it/them; (iii) the consequences of assuming a particular mode of protection in relation to other rights or policy objectives, and the scale of protection of a certain right with restricting impact on another right. The last issue is commonly referred to as an operation of balancing between rights and/or other general interests. Clearly, if the case falls within the scope of more than one source of protection, these steps are correspondingly multiplied.

After following these logical steps in the application of EFRs, the national judge might arrive at the conclusion that a national legal act (or practice) affecting the case at hand is not in line with the supranational norm(s) as interpreted by the CJEU and/or ECtHR. In this case, the conflict must usually be dealt with (and solved) by national judges.

In a context of growing legal complexity, where national judges act as natural judges (*juges naturels*) for EU and ECHR law, the possibility of conflicts between legal systems is increasingly high.

### c) Types and sources of conflicts

It is possible to single out the following typologies of conflicts:

**1.** *conflicts of norms*: conflicts which occur as a result of an openly conflicting formulation of norms – in certain circumstances, reconciliation between the two provisions is impossible;[44]

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[39] M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford, 2006.

[40] See more details on this issue in section 3.c i.2 *Problems stemming from the common multiple legal layers in the field of the principle of non-discrimination, right to a fair trial and freedom of expression*.

[41] See section *CJEU vis-a-vis ECtHR* in this Part at p.21

[42] See at length the JUDCOOP Handbook on Judicial Interaction in the field of the Freedom of Expression

[43] See at length the JUDCOOP Handbook on Judicial Interaction in the field of the Freedom of Expression.

[44] An example of conflict of norms can be found in the field of application of the 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

**2.** *conflicts of interpretation: these arise as the result of different interpretation of the same fundamental right provided by*: different European supranational courts (*horizontal supranational level* ), or by different national courts within the same Member State or between national courts from different Member States (*horizontal national level*). A third scenario, which is particularly complex, is the situation when the supranational standard of protection diverges from that established domestically. Clearly, national courts seek to maintain their own standards as opposed to these imposed by supranational courts (*conflict of interpretation within the vertical type of judicial interaction*).

**3**. *conflicts of rights*: the exercise of a certain fundamental right might enter in conflict with the manifestation of another fundamental right. This occurs frequently when the fundamental rights at issue are relative. Within the Project we have explored this typology of conflicts particularly with regard to freedom of expression and other (fundamental) rights, such as the right to privacy, data protection, and intellectual property rights. What complicates things even further is that the legal orders of the Member States might have different understandings of what the fundamental rights at issue are supposed to protect; sometimes, they might adopt different substantive standards for the protection of these rights, use different conceptualizations to frame similar conflicts between interests and values, or have different sanctioning regimes.[45] Such national specificities further accentuate the conflict between the fundamental rights as framed by separate case laws stemming from the two courts.

There are similar reasons for these conflicts, notably the fact that both the scopes of the sources providing protection of FRs in Europe **(i)** and the jurisdiction of national and supranational courts in the field of EFRs adjudication **(ii)** are partially overlapping.

In the following paragraphs we will discuss the main reasons for conflict.

### i. Common multiple legal sources prescribing European Fundamental Rights

Within the EU Member States, the same fundamental right is protected under different legal sources, all legally binding on the judges of the EU countries. Thus, national judges have to ensure concomitant respect of these legal norms, whose scope of application is partially overlapping:

**National sources**: constitutions/charters;

**EU sources**: Article 6 TEU refers to three sources providing protection to fundamental rights: the EU Charter (Art. 6(1) TEU), the ECHR (Art. 6(2) TEU), and the general principles of EU law, as derived by the CJEU from the ECHR and the constitutional traditions common to the Member States. More precisely, Art. 6(2) TEU requires the EU to seek accession to the ECHR; after the accession, the EU will therefore be formally bound to respect the ECHR, and the Member States – which are already parties to the ECHR – will be bound by the ECHR also *via* the EU law (though only within the limits of the latter's scope, given that the accession will not modify the allocation of competences between the Union and the Member States). In April 2013, the draft agreement on the EU's accession to the ECHR was finalised, which is a milestone in the accession process. As a next step, the Commission has asked the Court to give

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principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (hereinafter EAW FD). The EAW FD required the surrender of nationals to another Member States, while the Constitution of certain Member States included at the moment of the EAW FD entry into force provision prohibiting the extradition of citizens (Cyprus, Poland, Czech Republic, and Germany).

[45] See JUDCOOP Handbook on Judicial Interaction in the field of freedom of expression, p.7ff.

its opinion on the draft agreement.[46]

Until the accession, the role of the ECHR in the EU system of fundamental rights protection stems from two provisions: Article 6(3) TEU and Article 52(3) CFR. The former provision, which basically reiterates what could already be found in the pre-Lisbon version of the TEU (notably, in its Article 6(2)), acknowledges that the ECHR is one of the main sources of inspiration of the EU general principles, together with the common constitutional traditions. Article 52(3) CFR has for the first time introduced a duty to ensure that the provisions of the Charter which grant fundamental rights corresponding to rights protected under the ECHR are assigned the same meaning and scope as the latter, including with respect to limitations (duty of parallel interpretation). The same provision nonetheless safeguards the possibility to provide these rights with broader protection under EU law (cf. the last sentence of Article 52(3) CFR). In its judgment in *Kamberaj*, decided in 2012, the CJEU pointed out that neither Article 6(3) TEU nor Article 52(3) CFR have altered the status of the ECHR in the EU Member States:

"*62. Article 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States, nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law. 63. […]the reference made by Article 6(3) TEU to the ECHR does not require the national court, in case of conflict between a provision of national law and the ECHR, to apply the provisions of that convention directly, disapplying the provision of national law incompatible with the convention."*[47]

It follows that, at present, in additional to the national legal sources, the protection of fundamental rights within the EU stems from two legal sources: the EU Charter and the general principles of Union law.

The Charter recognizes "rights, freedoms and principles" (see the last recital of its Preamble). However, in terms of legal force, the EU Charter (and the same applies to the ECHR) does not distinguish between "rights" and "freedoms". The situation is different as regards "principles" set out in the EU Charter. Art. 51(1) CFR that the Union and the Member States "shall ...*respect* the *rights*, *observe* the *principles* and promote the application thereof in accordance with their respective powers and respecting the limits of the powers as conferred on it in the Treaties" (emphasis added). Art. 52(5) CFR then stipulates that

> *"[t]he provisions of [the] 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."*

Therefore, unlike "rights", Charter "principles" cannot have direct effect (hence, they cannot be the legal basis for disapplication), nor can act as parameter for consistent interpretation.[48] Their legal force is only of normative justiciability (*justiciabilité normative*).[49] This also means that there is no coincidence between the "principles" of the Charter and the category of "general principles"

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[46] See European Commission 2014 Report on the application of the EU Charter, available at http://ec.europa.eu/justice/fundamental-rights/files/com_2014_224_en.pdf

[47] Case C-571/*10 Servet Kamberaj*, cit..

[48] Lenaerts, « La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne », Revue trimestrielle des droits de l'homme, 2010, point 28, p. 220 et seq. See on the legal force and effects of an EU Charter provision entitled right but not enjoying direct effect, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail* (*AMS*), Judgment 15 January 2014, nyr.

[49] Lenaerts, ibid. p.224.

of EU law, which, by contrast, can have direct effect (sometimes, also horizontal) and act as parameter for disapplication and consistent interpretation.
Although there is no specific Title, or section in the EU Charter dedicated only to principles, they are said to be mostly located in Title IV Solidarity.[50] In any event, it can be inferred from the explanation of Art. 52(5) CFR that the formal label or wording of a provision as a "right" or a "principle" is not a decisive criterion.

In addition to this EU primary law sources, the EU has legislative competence in numerous fields that are closely related to the protection of fundamental rights, and can therefore seek to protect them – or to promote their application – by adopting secondary legislation (see the non-discrimination directives, or the directives on minimum procedural rights[51]);

**ECHR:** all EU Member States are contracting parties to the ECHR, and thus bound by it;

**International sources**: the Member States of the EU are bound by additional international treaties that create human rights obligations on the contracting parties (either universal or multilateral), e.g. UN Charter[52], ICCPR, New York Convention for the protection of children rights, UN Convention on the rights of disabled persons, Convention on the elimination of racial discrimination, etc.

The personal, territorial and substantive scopes of application of these instruments do not completely overlap. In particular, there exists a major difference between the scope of application of the EU Charter and the scope of application of the ECHR. Whilst the protection afforded by the latter can be invoked by anyone within the jurisdiction of a contracting party (cf. Art. 1 ECHR), the EU Charter is only applicable in situations that fall within the scope of Union law (see the box below). Thus, whilst not all national acts can be reviewed for compliance with the Charter, as a rule all acts adopted by the contracting parties to the ECHR need to comply with the fundamental rights therein.

The fact that some fundamental rights are afforded protection under EU law, the ECHR, and national law does not mean that the content of this protection/meaning of the entitlement concerned is the same under the three levels of adjudication. The supranational sources leave some space for differentiation, but this could not be enough to prevent that conflicts arise.

The systems for the protection of fundamental rights both in the European Union and in the Council of Europe recognise a certain margin of discretion to the States in the protection and

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[50] Lenaerts, ibid. while, according to the Explanations, "[*f*]*or illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. 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.*"

[51] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ, L 294, of 6.11.2013); Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2012 on the right to interpretation and translation in criminal proceedings (OJ L 280 of 26.10.2010); Directives in the field of asylum law whose renewed version will enter into force on 21st July 2015: Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; Directive2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

[52] Even though the extent to which the UN Charter creates substantive obligations is debated.

enhancement of human rights (Art. 4(2) TEU).[53] The ECHR and the EU require that at least the minimum standard is observed, while the Contracting Parties, in their domestic law or through other international agreements, can provide a higher standard of protection of fundamental rights. In accordance with the subsidiarity principle, States may enjoy a margin of appreciation in applying this minimum standard nationally[54], which, however, has to follow the general principle of respecting the ECHR and EU fundamental rights; the normative consensus (or lack thereof) may be relevant in determining the width of such a margin. The lack of European consensus on values thus may have as a consequence that certain rights are protected in some states but not in others,[55] or that states opt for different standards of protection of the same EFRs.[56] One should not think, however, that fundamental rights are always better protected at the local level when there is a large margin of discretion for the state concerned. For instance, the cases on the recognition of same-sex relationships show that the absence of a European consensus does not always work in favour of the protection of the right to non-discrimination.[57] In the case law of the ECtHR the lack of consensus between European states also results in states having a large 'margin of appreciation' with regard to limitations that may be imposed on fundamental rights. These situations raise another question related to fundamental rights and values: that of the maximum standard, which will be detailed in Part III of this Handbook.

The CJEU has so far admitted that local and national values may justify certain limitations to the exercise of fundamental rights.[58] Under the Charter there exists some space for national standards of protection. This is what follows from the interpretation of Article 53 CFR provided by the CJEU in *Melloni* and *Akerberg Fransson*. There the Court emphasised that, when the situation at issue is *"not completely determined by EU law",* then the Member States can provide, at the domestic level, for a higher protection than that resulting from the Charter, but the principles of primacy, effectiveness and uniformity of EU law must not be compromised (for more details on this, see the blue-box on "Interpretation of the Charter and requirements for compatibility of the domestic provision with the Charter" in Annex I).

**ii. Partially overlapping scopes of application of the relevant legal sources**

Art.1 of the ECHR provides that the public authorities of the Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention.

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[53] On the meaning and role of Art. 4(2) TEU in judicial cooperation, see M. Claes *Negotiating Constitutional Identity or Whose Identity is it Anyway* (Chapter 8), in M. Claes, M. de Visser, P. Popelier and C. van de Heyning (eds.) Constitutional Conversations in Europe, Actors, Topics and Procedures, (2013), Intersentia, 205-235.

[54] Protocol No. 15 amending the Convention introduces a reference to the principle of subsidiarity and the doctrine of the margin of appreciation, Art. 1, Protocol no. 15 reads as follows: At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention." The Protocol has not yet entered into force.

[55] The Irish Constitution protects the life of the unborn baby, unlike other national Constitutions.

[56] See for example, in the field of the principle of non-discrimination on the basis of sexual orientation, recognition of marriages between same sex couples, for more details see the case law in the JUDCOOP Handbook on Judicial Interaction in the field of the Principle of Non-Discrimination.

[57] See the section *Change in Interpretation of national legal norms within the boundaries established by the CJEU/ECtHR (within a pre-determined margin of discretion/appreciation)* in this Handbook, and JUDCOOP Handbook on Judicial Interaction in the field of the principle of non-discrimination, pp.47-52.

[58] See the C-36/02, *Omega*, [2004] ECR I-9609.

The same applies to rights set forth in additional protocols for those States that are bound to them, by virtue of specific provisions, see e.g. Art. 5 of Protocol no. 1.

Unlike the ECHR, the Charter has no general scope of application insofar as Member States' action is concerned.

**When are European Fundamental Rights enshrined in the Charter applicable to national laws?**

EU action is premised on the principle of conferred powers, and EU law can only operate within the attributed competences (Arts. 4 TFEU, 6(1), second paragraph, TEU, 51(2) of the Charter). This peculiar feature of EU law has a specific impact also on the scope of application of EU fundamental rights, which are binding on the Member States only when they act within the scope of EU law. This means that a national measure or provision must be reviewed in light of EU fundamental rights when there is another EU rule (i.e., an EU rule other than the provision of the Charter allegedly violated) that is applicable *in concreto* to the case. The limited scope of application of EU FRs is now 'codified' in a specific provision of the Charter: Article 51 (1), titled "Field of application" (but the remarks that follow also apply to fundamental rights granted as general principles of EU law). According to this, the rights and principles granted by the Charter are binding on the Member States "only when they are implementing Union law". In its 26 February 2013 *Åkerberg Fransson* judgment[59], the CJEU interpreted this provision and clarified "*the fundamental rights granted by the Charter must […] be complied with where national legislation falls within the scope of European Union law*" (para. 21, emphasis added). Judge Allan Rosas, writing extra-judicially, explained that:

"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."[60]

In two more recent judgments (respectively, 6 March 2014, Case C-206/13, *Cruciano Siragusa* [2014], nyr., and 27 March 2014, Case C-265/13, *Emiliano Torralbo Marcos*, nyr.), the CJEU pointed out that "the concept of «implementation» in Article 51 of the Charter requires a certain degree of connection [with EU law]" (para. 24), and that, "[w]here 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" (para. 30).

As a corollary of the limited scope of application of EU FRs, national judges need to understand, preliminarily, whether the case pending before them falls within that scope. This operation might sometimes prove difficult. For instance, the difficulty of establishing the scope of EU law in the field of non-discrimination is the core of the case *Agafitei*,[61] (referred by a Romanian court of appeal). Several judges alleged to have suffered discrimination because they were paid less than prosecutors. The CJEU rejected the preliminary questions raised by referring judge because the grounds of discrimination invoked – notably, socio-professional category and place of work – fell outside the scope of EU law. It also pointed out that the provision of these grounds in the Romanian anti-discrimination legislation was not enough to trigger the application of the EU Charter and the jurisdiction of the CJEU.

**Annex I Guidelines on the Use of Judicial Interaction Techniques charts the substantive situations where the Charter is applicable.**

[59] Case C-617/10 *Åkerberg Fransson*, cit.

[60] https://www.mruni.eu/lt/mokslo.../st/.../dwn.php?...%E2%80%8E

[61] C-310/10, *Agafiței and others*, Judgment of the CJEU of 07 July 2011, nyr.

As regards the personal scope of application of the EU Charter, it must be determined entitlement-by-entitlement, by having regard to the wording of the relevant provision. Some fundamental rights therein are granted to anyone, whereas others only apply to limited categories of persons (for example, children – Art. 24, asylum seekers – Art. 18, EU citizens – some Chapter V rights).

Therefore, the scope of application of the EU Charter, whatever it might be, has to be linked with an EU rule, which might itself be construed in the light of an unwritten general principle of EU law.[62]

Notwithstanding the requirement necessary for the EU Charter application, in practice, the application of the Charter is fairly broad. This emerges from the list of different categories of national measures to which the Court has applied the Charter.[63] This, coupled with the fact that all fundamental rights granted by the ECHR are also granted in the Charter, implies that very often these two legal sources will be both applicable. This also means that usually there will be at least two relevant sources of fundamental rights applicable (national law and Charter or ECHR), if not three (national law and Charter and ECHR).

*The role of national courts in litigation between private individuals (Horizontal application of European fundamental rights)*

If there is a(nother) EU law provision that applies to the case, then the fundamental rights granted by the Charter might be invoked – in order to set aside conflicting legislation - also in litigations between private parties, and not only in disputes between private and public parties. It must be recalled, however, that since the *Marshall* judgment,[64] the provisions of directives cannot be relied on against private parties. What if a Member State did not implement a Directive and a claim alleging the incompatibility of a national norm with the said Directive arose in the context of a proceedings *inter privatos*? The technique of consistent interpretation can be relied on in order to ensure, in the context of a dispute between private parties, the conformity of national law with a Directive.

The application of a Charter right is dependent on the application of another EU rule. However, as the CJEU has pointed out in the recent *AMS* judgment,[65] not all the provisions of the Charter might be invoked in the context of horizontal disputes. This is only possible if the provision of the EU act detailing the Charter rights confers, of itself, a right that can be invoked by an individual, without the need for further implementation by the national legislator. On the same occasion, the CJEU – confirming its previous findings in *Mangold*,[66]and *Kücükdeveci*[67] - held that the prohibition of discrimination on grounds of age as protected by Article 21(1) CFR can have horizontal effect, whereas Article 27 on the right of workers to information and consultation within the undertaking cannot. The Court's judgment in *Römer* seemingly suggests that also the prohibition of discrimination on grounds of sexual orientation might be invoked vis-à-vis private parties, of course if it is applied jointly with an EU "triggering" act. Both in *Mangold* and in *Kücükdeveci* the provision that acted as trigger was Directive 2000/78. The *AMS* judgment has clarified that the *Marshall* rule of prohibition of Directive's application in private parties litigation still stands, and that the application of Directive 2000/78 was possible in *Mangold*, *Kücükdeveci*, and potentially *Römer* due to the fact that what was primarily applied in

[62] See C-555/07 *Kücükdeveci* [2010] ECR I-365 and P. Craig, The ECJ and ultra vires action: A conceptual analysis, 48 CMLRev (2011), 395-437 at 435.

[63] See more details in Annex I.

[64] Case 152/84 *Marshall* [1986] ECR 723.

[65] Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail* (*AMS*), Judgment 15 January 2014, nyr.

[66] Case C-144/04, *Mangold v Helm*, [2005] ECR I-9981.

[67] Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG*, ECJ, Grand Chamber, Judgment of 19th January 2010.

those cases was a fundamental right/general principles substantiated by a specific provision of a Directive which fulfils the direct effect conditions.[68]

It is important to remember that the case law of the CJEU on the scope of application of the EU Charter in the Member States is in evolution, and likely to be continuously refined.

*European Fundamental Rights as established by the ECHR*

Art.1 of the ECHR provides that the public authorities of the Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. The same applies to rights set forth in additional protocols for those States that are bound to them, by virtue of specific provisions, see e.g. Art. 5 of Protocol no. 1.Thus, the Convention can be invoked usually only against State authorities. Protection against violations of the Convention that derive from acts or omissions of private parties can be addressed by invoking the duty to protect of the Contracting Parties. In line with the approach of the Strasbourg Court to the Convention as "a living instrument", rights enshrined therein have received an evolutionary interpretation. Accordingly, their substantive scope has been expanded and re-shaped over the years by the ECtHR, so as to ensure that the interpretation of the Convention reflects societal change and remains in line with present day conditions.[69] When a case concerns a right granted by the ECHR but the EU Charter is not applicable (because the case does not fall within the scope of Union law: cf. supra), then individuals must seek to activate, first of all, the remedies provided at the domestic level. If, after having exhausted those remedies, they think that they are victims of a violation of a Convention right, they can lodge an application to the European Court of Human Rights (Art. 35(1) ECHR).[70]

### ii. Problems stemming from the existence of multiple, partially overlapping legal sources in the field of the principle of non-discrimination, right to a fair trial and freedom of expression

The Project chose to focus on three fundamental rights in particular: **the principle of non-discrimination, the right to a fair trial, and the freedom of expression**.

The choice was inspired by the following considerations:

- By the different scope of application: see below;
- High impact on other FRs: e.g. Non-discrimination is a meta-right, which ensures the equal enjoyment of some other rights and/or benefits: pay and work-related treatment, access to welfare and public services, access to goods and services available on the market, right to family life and freedom of expression: these are just some of the entitlements to which non-discrimination can apply. Fair trial considerations, on the other hand, appear in every single type of proceedings before courts. Finally freedom of expression frequently comes into conflict with other rights requiring thus extensive balancing which is not always easy to perform. The interpretation of these rights or benefits, therefore, is a necessary precondition for the

[68] On the horizontal application of the EU Charter please see pp.166-168 of this Handbook.

[69] See ECtHR, *Cossey v UK*, Appl. No. 10843/84, Judgment Plenary 27 September 1990, Series A, Vol.184. See more on the doctrine of evolutive interpretation in G. Letsas, "The ECHR as a living instrument: its meaning and legitimacy", in *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, A. Follesdal, B. Peters, G.Ulfstein (eds.), Cambridge University Press, 106-142.

[70] To be noticed that the Treaty of Lisbon imposed an obligation on the EU to accede to the ECHR (Art. 6 TEU).

application of non-discrimination, and often hinges upon – as non-discrimination itself – on a diverse set of legal obligations; the same argument applies also to the field of the freedom of expression;

- Lack of European consensus triggering different standards of protection of FRs: e.g. non-discrimination, the notion of effective judicial guarantees in the field of asylum and EAW matters (e.g. different number of appeal possibilities);
- High likelihood of interplay or tension with other fundamental rights (which are in their turn protected under different sources), which requires a careful balancing activity, particularly as regards the assessment of the proportionality and necessity of limitations;
- Different cultural traditions and/or constitutional identities within the application of these fundamental rights, such as: the different legal qualification of asylum proceedings as administrative or criminal, the procedure under the EU Return Directive falling under different legal fields among the Member States: administrative or criminal; this having high impact on the nature and level of national remedies;
- Particular issues characteristic for specific rights i.e. notions of direct and indirect discrimination; the direct application of non-discrimination directives in horizontal relations, development of a broad proportionality test applicable to limitations of freedom of expression, various facets of the fair trial right (see below for a more in-depth analysis).

In addition to these criteria, the FRs were chosen also on the basis of the Partner's communicated specific interests and needs regarding adjudication in the field of ERFs.

### *Principle of non-discrimination – differences and similarities in the extent of protection*

The principle of non-discrimination is protected under the Charter, the ECHR, and national law. However, there are differences in the protection afforded by each of these legal instruments. As a meta-right: it ensures the equal enjoyment of some other right(s) or benefit(s). Pay and work-related treatment, access to welfare and public services, access to goods and services available on the market, right to family life and freedom of expression: these are just some of the entitlements to which non-discrimination can apply. The interpretation of these rights or benefits, therefore, is a necessary precondition for the application of non-discrimination, and often hinges upon – as non-discrimination itself – on a diverse set of legal obligations.

**(Universal) international instruments**

In addition to the Universal Declaration of Human Rights, there are multiple UN human rights treaties on the specific topics on the principle of non-discrimination on grounds of sex,[71] disability[72], race[73] and ethnic origin which would need to be observed.

**ECHR** (Art. 14):

- *Application dependent on another ECHR right*: Non-discrimination under Art. 14 does not provide an independent ground for invoking the Convention, as it has effect solely in relation to *"the enjoyment of the rights and freedoms"* safeguarded by a substantive ECHR rights (e.g. right to privacy, fair trial, freedom

[71] UN Convention on the elimination of all forms of discrimination against women.

[72] UN Convention on the rights of persons with disability, to which also the EU is a party. The Convention has obvious repercussion on discrimination, see Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge*.

[73] UN Convention on the Elimination of All Forms of Racial Discrimination.

of assembly). According to a well-established principle in the Court's case-law, the application of Art. 14 does not necessarily presuppose the violation of one of the latter. It is sufficient for the facts of the case to fall *"within the ambit"* of the substantive right invoked. Moreover, the prohibition of discrimination enshrined in Art. 14 applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide in its domestic law. Several States, including the Project's partners (Croatia, Romania and Spain) have ratified Protocol No. 12 to the ECHR, which guarantees a general right to non-discrimination also in relation to "the enjoyment of any right set forth by law" at the domestic level, even to those not falling within the scope of another substantive provision of the ECHR.[74]

- *Wider protected grounds compared to the EU law*: Art. 14 ECHR expands on the protected grounds recognised by EU *secondary law* (i.e., gender, age, sexual orientation, race, ethnic origin, disability and sex) to: colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, and this list is not exhaustive, as it can be further developed by the ECtHR. These grounds appear also in Art. 21(2) EU CFR, which nevertheless suffers from a different limitation than Article 14 ECHR, as it can only be invoked in cases falling within the scope of Union law (see supra), that is there needs to be a secondary instrument of EU law applicable to the case.

- *Scope ratione personae*: Art. 14 ECHR applies normally to acts and omissions of public bodies, which might include the failure to prevent or punish discrimination committed by private individuals.[75]

**EU** (Art. 157 TFEU, Art. 21 EU CFR, EU secondary legislation[76]), The rights recognized by the Charter have the status of fundamental rights and are hierarchically superior to those recognized by secondary law (even though the CJEU sees the secondary law prohibitions of discrimination as a « specific expression » of fundamental rights as general principles of law).

- *Scope ratione materiae*: Some non-discrimination rights are directly bestowed on EU citizens under Art. 157 TFEU (in particular, non-discrimination between men and women with respect to pay), and also under EU secondary legislation.[77] Article 21 CFR mentions several different grounds, whilst at the same time leaving space for recognition of other prohibited grounds. By contrast, Article 19 TFEU does not confer any subjective right on individuals, rather empowering the EU legislator to pass

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[74] For a good example of how the non-discrimination principle works under Article 8 ECHR, see case: *E.B. v. France* [GC], appl. no. 43546/02, judgment of 22 January 2008. Art. 8 ECHR does not guarantee a "right to adopt a child" *per se*, but if the domestic law of a State, as it is the case in France, provides for such a right to a single person, Art. 14 ECHR, in conjunction with Art. 8, may be invoked. If adoption is refused solely because of the sexual orientation of the parent pursuing adoption, then the ECtHR found that national measure to be in violation of Arts 8 in conjunction with Art. 14 of the ECHR.

[75] Se Judge Bratza in case *Pla and Puncernau v Andorra* (App. No 69498/01) noting that States should not tolerate private conduct entailing discrimination which "may be said to be repugnant to the fundamental ideas of the Convention or to aim at the destruction of the rights and freedoms set forth therein."

[76] Directives relating to sex discrimination cover the field of employment. They include Council Directives on equal pay (75/117), equal treatment in employment (76/207), social security (79/7), the burden of proof in cases of sex discrimination (97/80), part-time work (97/81) and parental leave (96/34); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[77] Case C-617/10 *Åkerberg Fransson*, cit. In this judgment, "the CJEU confirmed that what matters under Art. 51(1) EU CFR is not the subjective nature of domestic act but its objective contribution towards the implementation of EU law" see F. Fontanelli, Case note: The elusive Limits of the EU Charter and the German Constitutional Watchdog in European Constitutional Law Review, Vol.9, Issue 2, p.327.

legislation aimed to combat certain forms of discrimination; however Art. 21 CFR cannot apply in isolation, its application needs to be triggered by a secondary EU law instrument (in the field of non-discrimination it is usually the case that the Anti-discrimination Directives trigger the application of Art. 21 EU Charter)[78]

- *Scope ratione personae:* Unlike under the ECHR, the principle of non-discrimination might have horizontal effect, however this has been expressly established only in relation to the principle of non-discrimination on grounds of age (*Mangold*)[79], and sex (*Defrenne*)[80]. This may be of particular significance to national courts, where EU fundamental rights may be applicable in a dispute between individuals and the Convention might not apply (for instance, there is no right to work under the Convention, making Art. 14 difficult to trigger). It is still unclear whether Art. 21 of the Charter has horizontal direct effect and, if so, whether that is true only with respect to discrimination on grounds of age and gender, or to any grounds. In any event, it is not granted that Charter rights in general have direct effect, not even when read in conjunction with a (badly transposed) directive.[81] In similar proceedings, it would also be open to the national court to address the CJEU with a preliminary reference on whether all grounds enumerated under Art. 21 CFR benefit of the potential horizontal effect when falling under the scope of EU law.

**National**

The right to non-discrimination enjoys protection – often, under the Constitution - in all the Member States. Moreover, they are under a duty to implement EU secondary legislation, which so far includes a significant number of acts aimed to combat discrimination. Some Member States provide for additional grounds of protection against discriminatory conduct than those provided under the EU legislation. For example, both Romania and France ensure protection against discrimination based on socio-professional category, a ground that is not mentioned either in Art. 21(1) CFR or in the EU anti-discrimination legislation.[82] Italy has also granted wide protection under Art. 3 of its Constitution,

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[78] See footnote 87.

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

[80] Case C-80/70 *Defrenne v Belgium*, [1971] ECR 445; Case 43/75, *Defrenne* v. Sabena, 1976 *E.C.R.* 455; Case C-149/77 *Drefenne v SABENA* [1978] ECR 1365.

[81] It was stated for instance that Art. 27 of the Charter does not have direct effect. Case C-176/12, *AMS*, cit., para. 51: "It follows from the foregoing that 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 cannot be invoked in a dispute between individuals in order to disapply that national provision." On the practical difference between rights and principles, see Article 51(1) which states that principles can only be observed and furthered. Article 52(5) asserts: "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."

[82] In Romania, see the Ordinance 137/2000 which implements the EU anti-discrimination Directives. Article 2(1) of Legislative Decree No 137/2000 is worded as follows: "For the purposes of this Legislative Decree, discrimination shall mean any distinction, exclusion, restriction or preference applied on grounds of race, nationality, ethnic origin, language, religion, social class, belief, gender, sexual orientation, age, disability, non-contagious chronic illness, HIV-positive status, membership of a disadvantaged group and any other criterion the purpose or effect of which is to restrict or refuse the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms or the rights recognised by law in the political, economic, social and cultural sphere or in any other area of public life." See also the rulings of the French Supreme Court reported in EELC 2009/50, 2010/10 and 2010/51, requiring for instance managers (*cadre*) and workers (*non-cadre*) to be remunerated equally in the absence of an objective justification. Protection against discrimination, on other grounds than those recognised by EU law, exist also under the Dutch judicial practice. See the Dutch Supreme Court in the *Parallel Entry* case.

referring to "political and social conditions".

### *Right to a fair trial – differences and similarities in the scope of protection*[83]

The right to a fair trial is protected by international, regional, and national legal systems. While traditionally protected under the ECHR, over time it has gained significance in the EU legal order as well, transforming itself from a guarantee of effective judicial protection of EU law-granted subjective rights into an even more fundamental principle, now outlined also in the Charter. It is also traditionally an important constitutional right in the domestic legal orders of the Member States. The right to a fair trial encompasses a number of more specific entitlements (access to a court, judicial independence and impartiality, trial in a reasonable time, defence rights, equality of arms, publicity, duty to state reasons, etc.) that are sometimes included in its general meaning, and sometimes (as in the ECHR) differentiated into different legal provisions.

### ECHR

Art. 6 ECHR is the fundamental provision protecting the right to a fair trial. It has several elements, guaranteeing most notably a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, as well as the publicity of a trial. This is, however, only required in the *"determination of civil rights and obligations or of any criminal charge*".[84] The autonomous definition of 'civil' and 'criminal' under Art 6(1) leads to a limited substantive scope for the fair trial right of the individual under the ECHR, which means that certain administrative and public law proceedings may not be fully covered by Art. 6. This could in some cases be relevant for proceedings relating to the entry and expulsion of aliens, including asylum seekers.[85]

Art. 6 also provides for the presumption of innocence and specific defence rights in criminal proceedings (e.g. right to be informed of accusations, time and facilities for preparing a defence, legal assistance, examination of witnesses, and access to an interpreter). Even though it is seen as a separate right under the ECHR, it is also relevant to mention Art. 13, the right to an effective remedy before national authorities.

The ECtHR established that the right to a fair trial as guaranteed by Art. 6 ECHR requires national courts which have an obligation to address preliminary questions to the CJEU to give reasons for their refusal to refer.[86] Accordingly, national courts are required to state the reasons why they refused the

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[83] For more details on the specific scope of application of the right to a fair trial, see JUDCOOP Handbook on Judicial Interaction in the field of the right to a fair trial.

[84] Both the notions of "civil right and obligation" and of "criminal charge" have an autonomous meaning, i.e. the "civil" or "criminal" nature of a set of proceedings is in large part independent on their characterisation under domestic law. For more details and references to the case-law, see Practical Guide on Admissibility Criteria, Council of Europe, 2011, available at www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf, at 45 ff. and 52 ff. respectively.

[85] See, e.g., *Maaouia v. France* [GC], Appl. no. 39652/98, 05/10/200l. Procedural guarantees for these proceedings may, however, derive from other provisions such as the right to an effective remedy (art. 13 ECHR, see *M.S.S. v. Belgium and Greece* [GC], Appl. no. 30696/09, 21/01/2011) and the specific safeguards relating to the expulsion of aliens (Art. 1 of Protocol No. 7).

[86] See *Dhahbi v Italy*, Appl. 17120/09, ECtHR judgment of 8.04.2014, where the Italian Court of Cassation was found in breach of Art. 6 (1) ECHR due to its un-motivated refusal to address a preliminary reference to the CJEU at the request of the parties. This judgment is the first where the ECtHR has found a violation of Art. 6 ECHR due to a national court's failure to address a preliminary reference to the CJEU. The liability of a Member State under Art. 6 for the failure of one of its national courts to address preliminary reference has been previously raised before the ECtHR but this Court has never found a violation, see *Ullens de Schooten e Rezabek v Belgium*, Appl. No. 3989/07 and 38353/07 judgment of 20.09.2011 and *Canela Santiago v Spain*, Appl. 60350/00 judgment of 4.10.2001. See also the Michaud judgment

referral of a preliminary reference to the CJEU following the CILFIT criteria: why the question was not relevant, or whether the provision had already been interpreted by the CJEU, or whether the correct application of EU law was so obvious as to leave no scope for reasonable doubt.[87] The consequence of not complying with this obligation is that the national court will engage the liability of its State before the ECtHR under Art. 6 ECHR. In conclusion, the right to a fair trial under the ECHR requires national courts to refrain from arbitrary decision of not referring preliminary questions to the CJEU.[88]

**EU**

Their right to fair trial is protected *via* the EU Charter - Arts. 47, 48 and in certain circumstance also by Art. 41.[89] Art. 47 of the Charter covers, in a single provision, both the right to an effective remedy and the right to a fair trial. The scope *ratione personae* of the right to an effective remedy ("Everyone whose rights and freedoms guaranteed by the law of the Union are violated") is formulated so as to cover not only violations of other Charter entitlements, but also violations of rights granted by the Treaties or EU legislation. Likewise, according to Art. 6 ECHR, the right to a fair trial encompasses the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law, as well as the possibility to be advised, defended and represented. Article 47(3) CFR also refers explicitly to legal aid, which shall be made available to those who lack sufficient resources, when such an aid is necessary to ensure effective access to justice. Unlike under the ECHR, the presumption of innocence and the rights of defence are contained in a separate provision (Art. 48). Although the CJEU stated on numerous occasions that "*Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR*"[90] this refers only to several guarantees that are recognised under this right,[91] **while the scope of application of the right to a fair trial is different under the EU and the ECHR**.

In EU law, both administrative proceedings[92] and their judicial review are covered by the right to fair trial when an EU law piece of legislation applies. This can have great practical significance, for example, when the EU courts scrutinize the Commission's antitrust investigations in light of the right to fair trial; **from the point of view of EU law, it is not necessary to classify those investigations as being civil, criminal or administrative** as a condition for the applicability of the fundamental right (e.g. the *Orkem* judgment[93]). Similarly, the fair trial rights of migrants are protected via the EU Charter,

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[87] See *Ullens de Schooten e Rezabek*, Appl. No. 3989/07 and 38353/07 judgment of 20.09.2011, para. 62; *Maurice Vergauwen et autres contre la Belgique*, Appl. No. 4832/04, judgment of 10.04.2012, paras. 89-90; and *Dhahbi v Italy*, Appl. 17120/09, ECtHR judgment of 8.04.2014, para. 31.

[88] For more case law on this issue, please see *Societe Divagsa v Spain*, Appl. 20631/92, judgment of 12 May 1993; *Peter Moosbrugger v. Austria*, Appl. 44861/98, Jugdment of 25 January 2000; *Canela Santiago v. Spain*, Appl. 60350/00, Judgment of 4 October 2001; *Pedersen and Pedersen v. Denmark*, Appl. 68693/01, Judgment of 12 June 2003; *Coëme and Others v.Belgium*, Appl. 32492/96, 32547/96, 33209/96 and 33210/96, Judgment of 22 June 2000.

[89] Case C- 277/11 *M. M. v Minister for Justice, Equality and Law Reform, Ireland and Attorney General, reference for a preliminary ruling from the High Court of Ireland*, Judgment of the CJEU of 22 November 2012.

[90] Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-0000, para. 51; Case C-199/11 *Europese Gemeenschapv Otis NV, General Technic-Otis Sàrl, Kone Belgium NV, Kone Luxembourg Sàrl, Schindler NV, Schindler Sàrl, ThyssenKrupp Liften Ascenseurs NV, ThyssenKrupp Ascenseurs Luxembourg Sàrl*, Judgment of 6 November 2012, para. 47.

[91] According to CJEU in the *Ottis* case, see fn 78, para.48: "The principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented."

[92] In addition to Art. 47 EU Charter, also Art. 41 can apply in certain administrative proceedings.

[93] C-347/87, *Orkem v Commission*, [1989] ECR.

assuming that EU law otherwise applies, in administrative as well as criminal proceedings.

Various provisions of the EU Treaties also impose specific fair trial duties on the Member States and the Union. Thus, the Member States are required to ensure effective judicial protection in the fields covered by Union law (Art. 19(2) TEU), and to respect the principle of mutual recognition as the cornerstone of the judicial cooperation in criminal law matters (Art. 82 TFEU); the Union, for its part, is required to "facilitate access to justice" (Art. 67(4) TFEU). Moreover, the preliminary reference procedure is not only a tool of judicial cooperation, but also an important element of the definition of the right to a fair trial on both the European and national level (see e.g. the *Metropole* judgment of the Spanish Constitutional Tribunal[94]).

Furthermore migration issues (second JUDCOOP Handbook on Judicial Interaction Techniques tackled asylum matters and the Return Directive) might also create difficulties for national judges as the right to a fair trial in the field of migration has different scopes of protection under the EU and ECHR legal systems. Additionally, there is a high likelihood of interplay or tension with other fundamental rights, themselves stemming from various sources and subject to differing interpretations. For example, in the field of application of the Return Directive, the application of the right to a fair trial involves problems of ensuring respect of several other fundamental rights, such as the right to liberty and security, the right not to be expelled to third countries where a third country national might be subject to torture or inhuman and degrading treatment etc.

**National**

Finally, the Constitutions of the Member States provide extensive protection of the right to a fair trial and of the right to an effective remedy (see e.g. Art. 111 of the Italian Constitution, Art 24 of the Spanish Constitution)[95]. In many cases, fair trial rights receive a more detailed elaboration in criminal proceedings (see e.g. Art. 29 of the Croatian Constitution).

***Freedom of expression – differences and similarities in the extent of protection[96]***

The freedom of expression includes the following rights:

1. the right to freely express oneself;
2. the right to use any available means to disclose (one's) own thought;
3. the right to be informed;
4. the right to be silent

**ECHR**

- Art. 10 - Article 10(1) ECHR confers a broad protection to the freedom of expression. However, this protection is granted under three different levels by the ECHR, which need to be distinguished. These are the protection of: commercial, artistic, and political expressions. In other

[94] See case commented in JUDCOOP Handbook on Judicial Interaction Techniques in the field of the right to a fair trial, p. 101ff.

[95] The Romanian Constitution has a provision on the right to free access to justice, Art. 21, and right to defence, Art. 24.

[96] The conflicts that were addressed in the JUDCOOP Handbook on Judicial Interaction in the field of freedom of expression focus on four areas of conflict: between different guarantees of the freedom of expression; between freedom of expression and different aspects of the right to privacy (classic fundamental right); between freedom of expression and data protection (as overlapping but not completely converging with the right to privacy), and between freedom of expression and intellectual property rights.

words, "*the shocking as well as the acceptable deserve protection*"[97]. However, political speech or statement when conflicting with other rights tends to benefit from a higher protection under the freedom of expression right. Protection is afforded through negative as well as positive obligations.[98] On the one hand, States have a negative obligation to abstain from interference towards the exercise of freedom of expression; on the other hand, there may be positive obligations to protect such right, even against the interference by private persons.

- Moreover, the protection offered through Article 10 ECHR is constantly progressing thanks to the prolific ECtHR's jurisprudence. When there is an interference with the freedom of expression, the ECtHR relies on a three-stage test in order to establish whether the restriction is legitimate under the Convention, namely the restriction must: 1) be prescribed by law; 2) pursue a legitimate aim as stated in Article 10; and 3) be necessary in a democratic society, which implies verifying whether the national intervention corresponds to a "pressing social need". If it meets these three requirements, the interference has to pass the proportionality (*stricto sensu*) test. In cases where the freedom of expression enters into conflict with the right to privacy, the ECtHR established a very precise and detailed proportionality test which needs to be followed by national courts (see Chapter II section g Proportionality in the field of freedom of expression).

**EU**

- *EU Charter* – Art. 11 of the EU Charter is entitled "Freedom of expression". Its first paragraph reiterates the formulation of Art. 10(1) ECHR, including the reference to the rights to 'impart' and to 'receive' ideas and information. Additionally, Art. 11(2) provides that freedom and pluralism of the media shall be respected. Moreover, unlike Art. 10 ECHR, Art. 11 of the Charter does not refer to grounds for restrictions to the freedom of expression. Nevertheless, since Art. 11(1) CFR corresponds to Art. 10(1) ECHR (cf. the Explanations to the Charter), then Article 52(3) CFR should be interpreted as applying the Art. 10 limitations to the freedom of expression as stipulated by Art. 11 CFR. It must also be noted that, before the recognition of the legally binding value of the Charter, the CJEU had protected the freedom of expression as a general principle of Union law.[99] The relevant case law should now be taken into account in order to determine the protection afforded by Article 11 of the Charter.

- *EU secondary legislation* − Freedom of expression is nowadays not only protected but also promoted through directives, Council decisions and resolutions. For instance, Directive 2007/65/EC aims at regulating television broadcasting, based on the recognition of the 'growing importance' of audio-visual media for democratic societies, regarding also education and society.[100] Paragraphs 12 and 45 point out that the Directive complies with the freedom of expression as enshrined in Article 11 EU Charter. Similarly, Directive 1995/46/EC on data protection contains a specific exemption aimed at striking a proper balance between the right to privacy and the rules governing freedom of expression.[101] Another example is provided by Council Decision 2006/515/EC, which promotes cultural diversity

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[97] See e.g. *The Observer and Guardian v. UK*, ECHR judgment 26 November 1991, Series A No. 216, (1992) 14 EHRR 153 at p. 30.

[98] See, for example, ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000, Appl. No. 23144/93.

[99] *Kabel Deutschland* judgment of the CJEU, at para. 37: "*It should be noted that the maintenance of the pluralism which the legislation in question seeks to guarantee is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which freedom is one of the fundamental rights guaranteed by the Community legal framework*".

[100] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, pp. 27-45.

[101] See Article 8 of the Directive.

and expression (as defined in its Art. 4), and recalls human rights.[102] This Council Decision followed the **UNESCO Convention** on the Protection and Promotion of the Diversity of Cultural Expressions.

**National**

Although differently framed in each country, freedom of expression is legally protected in almost all European countries[103], where it constitutes the cornerstone principle shaping regulatory strategies in the media sector. Most national constitutions include this freedom amongst the general principles associated with citizens' rights. Its essential content includes the possibility to have and express opinions, either directly or indirectly related to the role of the media in disseminating information and providing the citizen with a range of different views and opinions. Only in few countries the relevant constitutional provisions make a clear distinction between freedom of expression and freedom of the press, and devote specific provisions to the latter.[104]

***The partially overlapping jurisdiction of courts, national and supranational, in the field of Fundamental Rights adjudication***

The division of competences between courts is not always clear. This is a consequence of several factors, among which are, in particular, the blurry boundaries of EU law, the partially overlapping scopes of application of EU law and the ECHR, and the deep integration between national and supranational regimes. Therefore, it is sometimes unclear, for instance, which judicial body is competent to review the compatibility between a national provision and EU law[105]. The entry into force of the Lisbon Treaty and of the Charter of Fundamental Rights has further increased the complexity, given the difficulties in determining the scope of application of the Charter rights to the States, and thus the competence of the CJEU. Other factors that add to this complexity also need to be taken into account, such as the spread of EU legislation (and the national legislation transposing or related to it), and the growing importance of the ECHR for national legal systems. These imply an extension of the respective interpretive domains of the two European Courts: the CJEU and the ECtHR.

Against this background, **interpretative isolation is not an option** and national judges have to interact with the two supranational courts.

The ECtHR and the CJEU have different tasks and mandates. The ECtHR is a human right court, which receives mainly complaints brought by individuals[106] against the contracting states' violation of

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[102] Council Decision No 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, OJ L 201, 25.7.2006, p. 15.

[103] National constitutional clauses on freedom of expression are provided in the Constitution of all our Project partner states (Croatia - Art.3, Italy -Art.21, Poland -Art. 54, Romania – Art.30 and Spain – Art.20) as well as of several other Member States. Some other Member States apply directly Art. 10 ECHR via implementing national legislation, see e.g. UK.

[104] Note that UK adopted the Human Rights Act in order to implement ECHR at national level.

[105] See, for example *Kamberaj* and *Radu*, where the CJEU was asked to pronounce on the interpretation and application of the ECHR, in regard to a fundamental right that is provided both in the ECHR and the CJEU.

[106] After the exhaustion of effective national remedies and provided that the other admissibility conditions set out by Article 35 ECHR are fulfilled, namely: the application must be lodged within 6 months (4 months after the entry into force of Protocol no. 15) from the final domestic decision; not be anonymous; not be substantially the same as a matter already

rights included in the ECHR and its Protocols. By contrast, the CJEU was established as the court of an international organization originally created to establish an economic area based on a common market. However, over the years things have changed: it has developed a jurisprudence of rights (also thanks to a long confrontation with national constitutional courts), new provisions concerning the protection of human rights have been added to the original Treaties (for instance Art. 6 TEU) and, recently, the Charter was incorporated into EU primary law. The EU legal system offers to the national courts a mechanism of direct interaction – the preliminary reference procedure – which at present does not exist under the ECHR. Protocol No. 16 to the ECHR foresees the possibility to seek advisory opinions on the interpretation of the Convention, but it has not entered in force yet.[107] Once it will, also the ECtHR will enjoy a procedural mechanism of direct dialogue with the national courts. This formal channel of communication will however be more restricted, only the highest national courts will be able to refer questions to the ECtHR. Moreover, the advisory opinions will have no binding force.

As regards individual complaints, the ECHR establishes criteria which might be less cumbersome to be fulfilled by individuals than under the EU legal system, where Art. 263(4) TFEU requires individuals to demonstrate a direct and individual concern if they want to challenge the validity of an act of the EU other than a decision of which they are the addressees.[108] By contrast, similar *locus standi conditions* are not provided under the ECHR system.[109]

However, despite these differences, the CJEU and ECtHR also face similar challenges. In particular, they have to respect national constitutional identities and traditions, while at the same time shaping common standards of protection of FRs for all the Member States.

European courts have crossed their paths over the years. The recognition of the legally binding value of the Charter has widened the room and potential for such intersections, and it is also likely that judicial interactions will become more and more frequent after the EU's accession to the ECHR.

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decided by the Court or submitted to an equivalent international procedure of settlement (*ne bis in idem*); not be incompatible with the Convention or its Protocol, *ratione loci* (the alleged victim has to fall within the responding State's jurisdiction, according to art. 1 ECHR), *ratione personae* (the applicant is a victim of the alleged violation and the respondent is a contracting party to the Convention or the protocol allegedly violated), *ratione materiae* (the alleged violation has to concern a right protected by the Convention or its protocols), and *ratione temporis* (the alleged violation took place or continued to take place after the entry into force of the Convention or the relevant protocol for the responding State); not constitute an abuse of the right of individual application; not be manifestly ill-founded. In addition, the Court shall declare inadmissible any (potentially well-founded) application not disclosing a significant disadvantage for the applicant, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. For an overview of the application of these criteria by the ECtHR, see *Practical Guide on Admissibility Criteria*, op. cit.

[107] On 3rd of October 2013, Protocol No. 16 to the ECHR was opened for signature.

[108] If the applicant wants to challenge a regulatory act which that does not entail implementing measures (Art. 234(4) TFEU, he/she needs to demonstrate only that the act is of direct concern to him/her: see Case T-18/10 *Inuit Tapiirit Kanatami* [2012] All E.R. (EC) 183 on the definition of this type of regulatory acts).

[109] The so-called "victim requirement", found in Art. 34 ECHR, excludes the use of the right of individual application for the purpose of bringing an *actio popularis*. In fact, the applicant must be the direct victim of the act or omission complained of. However, contrary to what is required by the *Plaumann* test for non-privileged applicants before the CJEU, the applicant must not necessarily be affected "individually", in that she does not have to be in a position different from any other person in order to have standing. For references to the application of the "victim requirement", see *Pratical Guide on Admissibility Criteria*, cit., p. 12 ff.

***The standard of protection of European Fundamental Rights***

According to Art. 53 ECHR,[110] the Convention sets a minimum floor of protection that Member States need to respect. At the same time, they are free to grant a higher level of protection to the respective constitutional rights.

Prima facie, the text of Art. 53 of the EU Charter[111] is very similar to that of Art. 53 ECHR. Nevertheless, in its judgment in *Melloni*, the CJEU has marked the distance between these two provisions. In effect, if Article 53 of the Charter had the same purpose of Art. 53 ECHR, then the principle of the primacy of EU law would suffer from derogation when national or international sources provide for broader protection than the Charter. The Court has radically excluded this, rather regarding Article 53 CFR as a confirmation *"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"*[112]

Thus, state courts may only apply better standards of fundamental rights protection if *primacy*, *unity* and *effectiveness* of EU law are not undermined. Furthermore, in *Melloni* (decided on the same date as *Akerberg Fransson*), the CJEU also pointed out that the possibility to apply – under the conditions just mentioned – national standards providing for higher protection only exists in cases that are not completely determined by EU law (on this point, see also Annex I, in particular the blue-box on "Interpretation of the Charter and requirements for compatibility of the domestic provision with the Charter"). In sum, it follows from the combined reading of *Melloni* and *Akerberg Fransson* that, when the case falls within the scope of Union law, the national judge needs to understand whether the situation at issue is 'completely governed by EU law', or rather 'not completely governed by EU law'. Whilst in the former case s/he should apply the standard determined by EU law *tout court*, in the latter case national judges potentially need to take into account three different systems of norms and standards of protection.[113]

As regards, in particular, the relationship between the Charter and the ECHR, however, one needs to take into account another provision: Art. 52(3) CFR. This recites 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 said Convention. This provision shall not prevent Union law from providing a more extensive protection*".

The explanation of Art. 52(3) CFR clarifies that the duty of parallel interpretation laid down by the first sentence of this provision also extends to admitted limitations and to the interpretation of the relevant fundamental right provided by the ECtHR (cf., for instance, Case C-400/10 PPU *J McB v LE*,

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[110] Art. 53 ECHR, under the heading "Safeguard for existing human rights", reads as follows: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".

[111] Article 53 CFR "Level of Protection" reads as follows: "Nothing 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 Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

[112] Case C-617/10 *Åkerberg Fransson*, nyr, judgment 26 February 2013.

[113] C-206/13 *Cruciano Siragusa v Regione Sicilia*, 6 March 2014, where the Chamber pointed out that 'the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires a certain degree of connection [with the scope of EU law] beyond the matters covered being closely related or one of those matters having an indirect impact on the other' (para. 24). In short, unlike the Grand Chamber in *Fransson*, the Fourth Chamber in *Cruciano Siragusa* points out explicitly that there must be a sufficiently strong connection between the case and another provision of EU law (not the Charter), in order for the Charter to apply.

5 October 2010). At the same time, the explanation provides some assistance for the application of the duty of parallel interpretation laid down by the first sentence of Art. 52(3) CFR. In particular, it encompasses two lists of rights: one containing the "articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR", and the other listing the "articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider". This second list is connected to the last sentence of Art. 52(3) CFR, which points out that the duty of parallel protection does not prevent broader protection being provided under the Charter. **For example, Art. 47 EU Charter on the right to a fair trial is not limited to civil rights and obligations or criminal charges as in Art. 6 ECHR**. Some Charter provisions also specifically extend the protection afforded: for example, Art. 5 CFR goes beyond the wording of Art. 4 ECHR, expressly prohibiting trafficking in human beings[114].

Whilst Art. 52(3) CFR aims to ensure that the two European Courts do not develop conflicting case law, it does not seem able to prevent all risks of divergences. These might emerge in the interpretation of novel or less developed aspects (for instance, a novel issue might arise for the first before the CJEU, which the ECtHR might subsequently decide differently). However, more problematic seems the possibility that the CJEU deliberately endorses a different interpretation than that provided by the ECtHR, for instance by relying on the broader protection clause in the second part of Art. 52(3) CFR. This risk is connected to the fact that the "more extensive" character of the protection afforded is dependent on the values and objectives that inspire the legal system within which the decision is taken. There is little doubt that, from this point of view, significant differences exist between the system of the convention and the EU legal order. The accession of the Union to the ECHR, which is required by new Art. 6(2) TEU and will subject the activity of the Union to an external control, should act as an incentive for the CJEU to avoid divergences from the case law of the ECtHR.

### *The judicial interaction between the CJEU and ECtHR*

Even though in most of their case law the CJEU and the ECtHR coordinate their standards, there have been cases when the respective interpretation diverged.

*Focus 1: Right to non-discrimination*

In *Griesmar*,[115] a case decided by the CJEU in 2001, and *Andrle*,[116] a case decided by the ECtHR in 2011, both concerning differences between men and women in the field of pension schemes where child raising was taken into consideration in the calculation of the years of work and pension quantum, the two supranational courts interpreted differently the notion of gender equality. The CJEU considered the pension scheme as being in contrast with the principle of equal pay insofar as it excluded male civil servants - who were able to prove that they assumed the task of bringing up their children - from obtaining the points which the national legislation introduced for the calculation of retirement pensions. Thus, the national measure was held to be *directly* discriminatory, and ultimately an unjustified measure. On the other hand, the ECtHR qualified the different pension scheme as being *indirectly* discriminatory; hence, it evaluated this last step of the proportionality test. At that stage, the ECtHR held that the preferential treatment of women is legitimate until the social and economic changes will remove the need for it; accordingly, unlike the CJEU, it found that the respondent State had not

[114] Despite the fact that human trafficking is not mentioned in Art. 4 ECHR, this provision has been interpreted by the Court as encompassing a protection against this practice, see e.g. *Rantsev v. Cyprus and Russia*, no. 25965/04, 07/01/2010.

[115] The case is commented in *Close Up 5*.

[116] ECtHR, *Andrle v the Czech Republic*, Appl. No. 6268/08 Judgment of 17 February 2011.

exceeded the wide margin of appreciation allowed in this field.[117]

*Focus 2: the right to fair trial*

The two courts have embraced different approaches as regards, for instance, the role of advocates generals within the national judicial proceedings. In *Vermeulen v. Belgium* [118], the ECHR found that the impossibility to question the opinion of the procureur général violated Art. 6 ECHR (right to adversarial proceedings). By contrast, in *Emesa Sugar*[119], the CJEU rejected the argument that the impossibility for the parties to reply to the opinions of Advocates General violates fair trial guarantees. The CJEU pointed at the impartiality and independence of the AG, which is not accountable to any outside institution, being part of the Court itself. Later on, in *Kress v France*[120], the ECtHR held that the role of the French commissaire du gouvernement before the Conseil d'Etat violated the Convention for a different reason, notably because the commissaire participates in judicial deliberations. Despite analogies between the commissaire du gouvernement and the AG at the CJEU, the latter upheld its decision in *Emesa Sugar* in the subsequent *Waddenvereiniging* case.[121] There the CJEU also referred to the possibility to reopen the oral procedure after the AG has delivered his opinion. In *Kokkelvisserji v the Netherlands* (appl. no. 13645/05, 2009), the ECtHR accepted the two arguments previously advanced by the CJEU to upheld the compatibility with Art. 6 ECHR of the AG's role, and considered that the *Bosphorus*[122] presumption could not be rebutted. If this seemingly suggests that there is no incompatibility between the two case law, it must be noted that, because of the *Bosphorus* presumption, in the latter case the ECHR had to establish, preliminary, whether the protection within the EU was manifestly deficient. It cannot be excluded that, after the accession, when there is the possibility of a complete scrutiny of applications alleging violations by the EU institutions, the ECHR will embrace a different stance.

*Focus 3: freedom of expression*

Example: The *Satamedia* case is illustrative of the different approaches of the CJEU and the ECtHR as regards the balancing of the right to data protection with the freedom of expression. At the same time, it shows the attempt of a national court to ensure compliance with both the Strasbourg and Luxembourg courts' standards when they express different levels of protection of the same fundamental right.[123] The Finnish Supreme Administrative Court referred a preliminary reference to the CJEU, asking the interpretation of the clause "solely for journalistic purpose" in Article 9 of Directive 95/46/EC. According to this provision, "*Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression*." In *Satamedia* the CJEU ended up in a broad interpretation of the concept of "journalism", whereby Article 9's exemptions and derogations can

[117] Possible solution for the different interpretation to be reconciled by the national judge: Art. 52(3) second sentence and 53 EU Charter requires national courts to endorse the higher standard of protection of the equivalent fundamental right and the judicial interaction technique of consistent interpretation with the CJEU higher standard of protection.

[118] ECtHR, *Vermeulen v. Belgium* Appl. no. 19075/91, 1996.

[119] Case C-17/98, 2000 *Emesa Sugar.*

[120] ECtHR, *Kress v France*, Appl. No. 39594/98, 2001.

[121] Case C-127/02, *Waddenvereiniging.*

[122] ECtHR, *Bosphorus,* Appl. no. 45036/98, 2005.

[123] Case commented in JUDCOOP Handbook on Judicial Interaction in the field of freedom of expression, pp.83-89.

apply not only to media organisations but to every person engaged in journalism. The test of the CJEU, then, resulted in the fact that the activities in question are to be considered as being "solely for journalistic purposes" within Article 9, Directive 95/46/EC "*if the sole object of those activities is the disclosure to the public of information, opinions or ideas"* leaving completely to the national courts to verify whether this is the case. On the other hand, the ECtHR in the *Hannover* and *Axel Springer* cases set out seven criteria relevant to balancing competing rights under Arts. 8 and 10 ECHR: **1.** The contribution of the information to a debate of general interest; **2.** The notoriety of the person concerned; **3.** The prior conduct of the person concerned; **4.** The content, form and consequences of the publication; **5.** The circumstances in which the photograph was taken. **6.** The reliability of the published story and 7. The level of severity of the court sanction.

In the follow-up of the CJEU preliminary ruling, the Finnish Supreme Administrative Court developed a proportionality test mixing the maximum standards of protecting freedom of expression as resulting from the CJEU preliminary ruling with the maximum standard of protection of the other fundamental right at issue - right to privacy, as developed by the ECtHR in the *Hannover* and *Axel Springer* cases. The solution reached by the national court is thus an example of how to ensure both coherent application of EU law and higher standards of application of fundamental rights in a case of conflicting fundamental rights.

### *5. Conclusion*

The present Part has offered an outline of the sources of problems and conflicts that are common to national judges across the EU countries when adjudicating on EFRs. In line with the specific focus of the Project, particular attention was devoted to the principle of non-discrimination, the right to a fair trial, and right to freedom of expression. In addition to the legal conflicts described, there are further, more mundane problems that national judges must face in this field, such as those resulting from limited human and freely accessible electronic resources, and organisation of the national judiciary.

This Handbook, the three particular rights focused handbooks devised in the Project, and more generally the Project in its entirety seeks to provide tools and methodologies aimed to address, and hopefully solve, both the orders of difficulties highlighted above. Combining these two orders of difficulties, we further bring to the light somewhat controversial issues, faced by national judges in FRs adjudication, to which this Handbook and the Project as a whole propose several solutions. These solutions are as follows:

- *Problem of the overwhelmed judge* – Cases presented to legal adjudication touching upon fundamental rights are commonly not only legally but also morally complex. When faced with solving a conflict between two different fundamental rights, national judges will inevitably have to weigh conflicting moral values or society's interests. In order to help national judges to distance themselves from morally complex debates, and try to simplify as much as possible complex issues and debates, the Handbook proposes a concrete step-by-step legal reasoning in cases involving fundamental rights adjudication (see also the more concise Annex –*Guidelines on the Use of Judicial Interaction Techniques*). In **Part II** we offer a toolbox of possible judicial interaction techniques made available under supranational sources which complete the list of judicial interaction techniques that might be already available to the national judge as a matter of domestic law. A selection of national and European cases illustrates, for each of those techniques, their potential to be "strategically" used in order to achieve results such as legitimacy in the face of diverging approaches of the higher national courts or legislature; or the amendment of national case-law when diverging strings of cases exists; or challenging the interpretation of the CJEU/ECtHR in order to ensure and accommodate higher standards of protection of Fundamental Rights. The style of the analysis of the judicial interaction techniques and the selected cases is meant to offer inspiration to national judges that must adjudicate disputes involving the fundamental rights addressed by the Project. Concrete legal guidance offers the advantage

of limiting the discretion inherent in fundamental rights adjudication. It also offers national judges the possibility to distance him/herself from the value, morals and interests at stake, and to decide on the basis of legal considerations only.

- *Problem of influencing the judge towards a solution desired by the parties* – Parties, especially if guided by experienced lawyers, will push for a certain solution, legal interpretation, method, which will normally be advantageous to their interests - regardless of the desirable outcome from the perspective of public interests. This is even more the case for fundamental rights and the subsidiary role they play in adjudication. However, their proposed interpretation or method might not necessarily be the only (or more correct) option available. **Part II** of this Handbook includes, within the analysis of each of the judicial interaction techniques, all the conflicts and/or legal situations to which each of these techniques could be applied, whilst at the same time suggesting solutions. **Part III** of the Handbook presents the functional approach of the use of judicial interaction techniques, meaning their use as a "means" to achieve a pre-determined objective, notably the convergence and enhancement of the level of fundamental rights protection across and within the EU. It presents, therefore, possible ways to achieve it in 5 types of "conflict scenarios".

- *Problem of emotionally engaging issues* – Fundamental Rights cases raise some of the most emotionally engaging issues. This is particularly evident when dealing with the 3 fundamental rights targeted by the Project (e.g. recognition of same-sex unions, marriages; the importance of the freedom of expression in a society and the extent of its limitation so as to preserve democracy and rule of law; protection of the right to a fair trial and effective remedy in criminal proceedings where the individual may face long years of deprivation of liberty and other FRs). **Part III** of the Handbook[124] with the attached *Guidelines on the Use of Judicial Interaction Techniques* raises awareness and offers concrete legal guidance for situations which apparently place the national judge before impossible solutions: where ensuring respect of a certain norm, and/or maximising a certain right, interest, value will lead to violating another norm, and/or minimising another right, value/interest.

- *Problem of the vagueness of the guidance sometimes provided by the CJEU/ECtHR in cases involving balancing of competing Fundamental Rights, Fundamental Right(s) and national public interest(s).* Very often national judges are left with the sensitive task of doing the test of proportionality in relation to a national act or practice, while very general guidance is given by these supranational courts. Such hands-off attitude is justifiable. Indeed, regardless of how much precision they can inject into making the steps of proportionality tests as clear as possible, ultimately, they cannot answer the last sub-question of the proportionality test – weighing of conflicting values. The supranational court will be able to help until the point of identification of the values, rights, interests at issues and certain general guidelines that need to be followed by national judges (legitimate aim, adequacy and necessity), the legal justification for these moral intuitions will be left to a national judge. His choices and argumentation will be very much dependent on the history, legal tradition and culture of the Member States and thus makes legal transplantation of the legal basis/interpretation of the judge's choice very difficult and prone to rejection if not shared by the hierarchical superior courts (see here the case of the recognition of same sex marriages in Spain compared to Italy and France, or the justification of the limitation of freedom of expression for the purpose of maintaining the independence of justice).[125]

In spite of the specifics of choosing the appropriate legal basis and explanations in weighing of conflicts between fundamental rights or between a fundamental right and a public interest, there still is a benefit in presenting different national judgments dealing with such issues, as you will find in **Part II** (see, in particular, the section dedicated to the judicial interaction technique of proportionality and

[124] Additional guidelines are to be found also in **Part II**.

[125] ECtHR, *Krisztián Ungváry v. Hungary*, Appl. no. 64520/10, Judgment 3 December 2013.

margin of appreciation), as the logical flow of arguments and the legal method employed by a national court from a specific EU country can still serve as useful inspirational sources for other national judges.

# II. Solving Conflicts with the Use of Judicial Interaction Techniques

Having mapped the different types and sources of conflicts which national judges confront in their daily adjudication practice in relation to European Fundamental Rights and more specifically, in relation to the principle of non-discrimination, right to a fair trial and freedom of expression, we shall move to instruments that facilitate conflict resolution or accommodation. Part II of the Handbook introduces, therefore, the judicial interaction techniques as developed and made available by supranational norms (EU and ECHR). In the first section we provide a short definition of the "Judicial Interaction Technique" and our understanding of this specific term. The chapter then continues in section two with a comparative analysis of the use of each of the Judicial Interaction Techniques within each of the 3 fundamental rights that is a subject of the European Judicial Cooperation Project. Subsequently, Part III will review the process from the inverse perspective by focusing on objectives and results of the use of such techniques; in other words, it provides a perspective that could be taken into consideration before putting the techniques to use for the benefit of an individual and his case.

### *1. Choice of terms – Judicial "Interaction" technique or Judicial "Dialogue" technique*

Before proceeding to the comparative analysis of the judicial interaction techniques in the fields of the principle of non-discrimination, right to a fair trial and freedom of expression, we will first clarify the meaning of "judicial interaction" and the choice of this term as a guiding concept of this Handbook.

For the purposes of this handbook, the term "judicial interaction" has been devised in order to propose a category that would reflect the ***episodes of contacts (either intentional or casual) between courts[126] within the same Member State, or between different member States, between national and the European supranational courts as well as between the two European supranational courts – CJEU and ECtHR*** in the most comprehensive manner. The single instances of interaction may differ in intensity, outcome, and typology. More broadly, "**judicial interaction**" can be understood as a set of techniques used by courts and judges to promote coherence and coordination (or, at least, minimize the risk of conflicts) among different legal and judicial systems in the safeguard of some constitutional goods – such as human rights – that are protected by various levels of governance (the national, international and supranational normative layers).

There are a large number of articles documenting how judicial interactions take place between the CJEU and the European Court of Human Rights,[127] between national courts from different jurisdictions and the CJEU,[128] between national courts and the ECtHR,[129] between European and

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[126] G. Martinico, "Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order" International Journal of Constitutional Law, 2012, p.886.

[127] See e.g. L. Scheeck, "Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks", GARNET Working Paper 23/07; S. Douglas Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis" (2006) 43 CMLRev 3; K. Dzehtsiarou, T. Konstadinides, T. Lock, N. O'Meara, Human Rights in Europe, The Influence, Overlaps and Contradictions of the EU and the ECHR, Routledge, (2014).

[128] On interaction between Constitutional Courts and the CJEU, see G. Martinico, "Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden Dialogue", (2010) King's Law Journal, 257-281.

[129] A. Føllesdal, B. Peters, and G. Ulfstein, Constituting Europe: the Court of Human Rights in a national, European, and global context, (Cambridge University Press), 2013.

international courts,[130] between national supreme or constitutional courts across Europe and the world.[131] However there is no general agreement among academics and legal practitioners on how to name these types of interaction, nor a uniform theory or definition. Academics use different terms for referring to the different forms of exchanges that occur between judges and courts around the globe. The term "dialogue"[132] has so far been the most common term used by legal academia to refer to this phenomenon, in addition, terms such as "transnational judicial dialogue"[133], "conversation"[134], and "judicial interaction" have also been employed. Art. 81(1), 82 and 86 TFEU refer to "judicial cooperation" in the field of civil and criminal matters, which are defined as a sort of interaction whose foundational basis but also objective is the principle of mutual recognition.[135] The CJEU Advocates General refer also to "judicial dialogue" in addition to cooperation in relation to the role of national courts in the preliminary reference procedure. For instance AG Bot opined that: "61.*The preliminary ruling procedure under Article 267 TFEU establishes a genuine dialogue and real cooperation between national courts and tribunals and the Court. That cooperation is essential in order to ensure the uniform application of EU law in the national legal orders. "*[136] While AG Léger wrote: *"the Court confers on the national courts an essential role in the implementation of Community law and in the protection of the rights derived from it for individuals. Indeed people like to call the national courts, according to an expression commonly employed, "Community courts of ordinary jurisdiction"*"[137]

The "judicial dialogue" is a more restrained category than other terms. Judicial dialogue entails an ongoing exchange of arguments in order to reach common understandings.[138] Thus, dialogue requires some sort of reciprocity among the judicial actors involved[139] and it develops on a case by case basis over time.[140]

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130 Consider e.g. N. Lavranos, 'The CJEU's Relationship with Other International Courts and Tribunals', 6 September 2010, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672727> (last visited 8 March 2012); Y. Shany Regulating Jurisdictional relations between National and International Courts.

131 M. Bobek, S. Muller and S. Richards, Highest Courts and Globalisation, T. Groppi & M. Ponthoreau, "The Use of Foreign Precedents by Constitutional Judges, J. Mendez, Constitutionalism and Transitional Justice", in The Oxford Handbook of Comparative Constitutional Law (OUP) 2012.

132 A. Rosas, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue" (2007) 1(2) EJLS; L.B. Tremblay, "The legitimacy of judicial review: The limits of dialogue between courts and legislatures" (2005) International Journal of Constitutional Law 617-648; F. Jacobs, Judicial Dialogue and the cross-fertilization of legal systems: the European Court of Justice, (2003) Texas International Law Journal, Issue 3, 54-87.

133 See M. Bobek, Comparative Reasoning in European Supreme Courts, Oxford University Press (2013); A. Slaughter, A New World Order, Princeton University Press, (2009).

134 M. Claes, M. de Visser, P. Popelier and C. van de Heyning (eds.) Constitutional Conversations in Europe, Actors, Topics and Procedures, (2013), 1-13.

135 Art. 81(1) TFEU 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." While Art. 82(1) 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."

136 Opinion of AG Bot delivered on 14 May 2014 in Case C‑244/13 *Ewaen Fred Ogieriakhi v Minister for Justice and Equality, Ireland, Attorney General.*

137 See point 66 of his Opinion in *Köbler*, C 224/01, EU:C:2003:207.

138 See A. Torres Perez, *Conflicts of Rights in the European Union*, OUP, 2009, 112-113 and 118-130.

139 A. Rosas, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue" (2007) 1(2) *EJLS*.

140 A. Torres Perez, Conflicts of Rights in the European Union (Oxford University Press) 2009, and M. Claes, M. de Visser, P. Popelier, C. Van de Heyning, "Introduction", in *Constitutional Conversations in European Actors, Topics and Procedures* Intersentia, (2013).

"Conversation" is a wider category than "dialogue" as it includes also instances where more than two actors are involved and include interactions that have a more informal character or are not geared towards achieving a particular aim.[141]

Against this background, "dialogue" can be conceived as a *species* of the *genus* "judicial interaction."

In addition to judicial interactions which take place via courts' cross-referencing, or comparative reasoning whether explicit or implicit, over the last decades, judges and courts around the world, and especially within the European Union, have increased interaction[142] also directly through meetings, exchanges in workshops and conferences, delegations from one court to another, within institutional forms of cooperation[143] or indirectly *via* online platforms, such as e-platforms, and blogs. [144] The judicial networks existing within the EU have contributed immensely to the increase of judicial interactions. The great value of these informal meetings 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 EFRs.

### *2. Judicial interactions techniques as tool(s) for resolving conflicts concerning EFRs*

*"[..] law cannot be separated from context.*

*It is context and not text that provides answers to legal questions."*[145]

The toolbox of judicial interaction techniques at the disposal of a national judge consists of two sets of techniques. The first one is firmly rooted in a national legal order and involves, for instance: questions addressed to the Constitutional Court, or Supreme Court, consistent interpretation with the judgments of the hierarchical superior national courts. The second set comprises tools derived from EU law or ECHR and aims to help solve conflicts in the application of EFRs. The following tools belong to the second set of judicial interaction techniques:

- **EU based tools**: consistent interpretation of national law with EU law; the power/duty to make a reference for a preliminary ruling; proportionality within the margin of deference afforded by the CJEU; mutual recognition of foreign judgments; comparative reasoning with national legislation and jurisprudence from another Member State; disapplication of national law for violation of EU norms. The principles of primacy and direct effect of EU law can be ensured *via* all the above mentioned judicial interaction techniques, however they are not considered in themselves judicial interaction techniques.

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[141] For more details on "conversations" as a form of judicial interaction, see M. Claes, M de Visser, P. Popelier and C van de Heyning, Introduction: On Constitutional conversations, in Constitutional Conversations in Europe, Actors, Topics and Procedures, by the same authors (eds), Intersentia 2012, at 1-8.

[142] Literature uses different types of classifications for the ways courts interact with each other: Frishman refers to 3 categories: *face to face interactions*, *IT-based communication* and *cross-citations*; see, O. Frishman, Transnational Judicial Dialogue as an Organisation Field, European Law Journal, Vol. 19, No. 6, November 2013, pp. 739–758, at 747; different types of classification have been used by A. Slaughter (n 1 supra), at 192; A. Slaughter, 'Judicial Globalization', (1999–2000) 40 Virginia Journal of International Law 1103, 1104; E. Lazega, 'Mapping Judicial Dialogue Across National Borders: An Exploratory Network Study of Learning From Lobbying Among European Intellectual Property Judges', (2012) 8 Utrecht Law Review 115, 118.

[143] For instance, European Judicial Training Network, Association of European Administrative Judges, Consultative Councils of European Judges, European Network of Councils for the Judiciary, Network of the Presidents of the Supreme Courts, European Network of Councils for the Judiciary.

[144] This method of judicial cooperation is more developed in EU countries that recognise precedent as legally binding, for e.g. UK, Ireland, while civil law systems (e.g. France, Romania), do not recognize legal precedent as *stare decisis* and thus use of national foreign judgments is less common.

[145] S. Rodin*, In the Classroom and the Courtroom*, Maastricht Journal of European and Comparative Law, 2013(4), editorial.

- **ECHR based tools**: The effect of the ECHR in domestic legal systems varies among EU countries, depending on the status it is recognised in the national constitutional systems, as interpreted in the constitutional/supreme courts jurisprudence.[146] In general, all judges can use the following techniques to reconcile domestic law with the Convention: consistent interpretation; acting within margin of appreciation; proportionality test. **Tools based on the multitude of the national legal systems**: comparative analysis (use of foreign legislation and/or foreign national judgements).

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. 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 and EU 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 (*juges naturels*) of both EU law and the ECHR. Therefore, whenever they are called to adjudicate on fundamental rights, it is essential that the judge:

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

**(ii) determines 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);**

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

**(iv) carries 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 judges may use different techniques to solve conflicts between domestic, European and international sources related to EFRs. The techniques available to national judges in a specific case and their order of use are conditioned by factors such as the *number of applicable sources*, and the *existence (or not) of a veritable conflict between a national provision and a supranational norm* (meaning, a conflict that cannot be solved by way of interpretation).

The order of using judicial interaction techniques is mostly conditioned by the *existence (or not) of a veritable conflict between a national provision and a supranational norm*. For instance, if a national judge does not doubt of the meaning of the applicable EU law provision, s/he will consider whether the national provision is clearly compatible, or, in any event, there is room for consistent interpretation. If this were not the case, (s)he might decide to refer a preliminary question to the CJEU (as a rule, national courts of last instance must make a reference[147]). Conversely, a preliminary question will be the first option when the meaning of the EU law provision is unclear, thus making it difficult to assess the EU-lawfulness of the national provision.

Part **II** introduces the Judicial Interaction Techniques (JITs) in an order that flows naturally from the legal reasoning a national judge would usually perform in EFRs adjudication: (a) consistent interpretation; (b) consistent interpretation and/or preliminary reference; (c) preliminary referencing – as a power and obligation; (d) disapplication in the context of EU and ECHR; (e) disapplication versus

[146] In the Guidelines on the use of Judicial Interaction Techniques translated and adapted to the national legal context (Croatian, Italian, Polish, Romanian and Spanish) the relation between the ECHR and the national law is provided.

[147] Art. 267(3) TFEU.

preliminary reference; (f) proportionality; (g) comparative reasoning; (h) deferential approaches; (i) mutual recognition of foreign judgments. Although in certain circumstances the JITs starting from proportionality onwards will be resorted to before disapplication is actually applied, we chose this order since disapplication is part of the same category of JITs as the consistent interpretation and preliminary reference procedure, namely it can independently be applied by the national judge to solve the dispute before it, while proportionality, comparative reasoning, deferential approaches and mutual recognition are reasoning devices that usually presuppose the application of at least one of the previous other judicial interaction techniques. (the step-by-step logical reasoning of a national judge in adjudication on EFRs can be found in the *Guidelines on the Use of Judicial Interaction Techniques in the field of EFRs* annexed to this Handbook.)

Judicial interaction techniques *are* and *can* be used by European courts and judges in order to promote *convergence* and *coordination* (or at least minimize the risk of conflicts) in the field of fundamental rights protection, while possibly reducing the length of judicial proceedings. (*Part III*)

In the following paragraphs each of the judicial interaction techniques will be presented focusing on the following aspects: legal basis, possible functions/results (the type of conflicts they solve, with clear examples from all three JUDCOOP Handbooks); consequences in practice of the use of judicial interaction techniques on national and foreign jurisprudence/judicial interpretation/judicial hierarchy, on national legislation/policy, European policy; alternative Judicial Interaction Techniques; each Judicial Interaction Technique will have at least one Close Up[148] on a concrete case for each of the JUDCOOP selected fundamental rights: right to non-discrimination, right to a fair trial and freedom of expression.[149] The comparative analysis will show the differences and similarities between the use of each of the judicial interaction techniques in each of the fields of the principle of non-discrimination, right to a fair trial and freedom of expression.

### a) Consistent Interpretation CJEU/ECHR

Typically, national judges must strive to interpret national law in compliance with their constitution. In addition, they are under the obligation to interpret domestic laws in such manner so as not to breach EU and ECHR law obligations. This duty results from the principle of primacy of EU law over national law and the implementation of ECHR law into national law. It has been expressly discerned by the CJEU and ECtHR in their jurisprudence[150] and included in a multitude of forms by national legal systems or derived from more general constitutional provisions: either through constitutional provisions (e.g. Romania,[151] Spain[152]), legislative acts (UK Human Rights Act)[153], or constitutional courts' jurisprudence (e.g. Italy,[154] Germany[155] and Bulgaria[156]).[157]

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[148] The structure of the Close Up is the following: title of the judicial interaction technique in the specific fundamental right, and of the case to be presented; diagram of the use of judicial interaction techniques in the case at issue; facts of the casel highlighting the problem (conflict), the use of the judicial interaction technique as solution to that case, result, and alternatives, if applicable.

[149] These cases included in the Close Ups are selected from the case law included in the previous three thematic Handbooks.

[150] Case C -14/83 [1984] ECR 1891 and Case C-218/01, *Henkel v Deutsches Patent* [2004] ECR I-1725. *Scordino v. Italy* (dec.), no 36813/97, ECHR 2003‑IV.

[151] Arts. 11 and 20(1) of the Romanian Constitution recognise precedence to international human rights treaties (ECHR) over national law. The ECHR has direct effect while EU law is given effect by the Romanian Constitutional Court trough the European clause in the Constitution.

[152] Art. 10(2) in regard to the supra-legislative position of EU law in relation to national law.

[153] Section 3 of the UK Human Rights Act sets out the necessity to interpret domestic law 'so far as is possible' in conformity with the Convention.

[154] See the Constitutional Court, judgments nos. 348 and 349/2007 in regard to the duty of consistent interpretation with ECHR.

According to the doctrine of consistent interpretation, a national judge has to choose among the different possible interpretations of a domestic norm one that does not lead to a conflict with EU norms or the ECHR. When both national and EU law are relevant in a particular area, and especially in case of national laws that implement EU law, consistent interpretation is 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[158], the wording of EU rules is prone to "*[..] being adapted to the legal systems of all Member States.*" (para. 89)

When the meaning of an EU autonomous notion or of an EU legislative measure, or when there are doubts about the correct transposition of an EU legal provision into national law, the obligation of consistent interpretation as established by the CJEU would require the national court to first look at the English and French version of the EU legislative measure and then at the version in the other official languages. According to the CJEU settled case-law, "*the need for uniform application and, accordingly, for uniform interpretation of a European Union measure makes it impossible to consider one version of the text in isolation, but requires that that measure be interpreted on the basis of both the real intention of its author and the aim that the latter seeks to achieve, in the light, in particular, of the versions in all other official languages.*"[159]

On the other hand, consistent interpretation may be a useful tool for European courts as well. For example, the CJEU in *Melloni* referred to the Convention and ECtHR case law on Art. 6 ECHR in order to support an interpretation of the EU Charter that contradicts the reading advanced by the Spanish Constitutional Court.

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.

#### ***a.1 Results achieved with the use of consistent interpretation***

The national court may use the ECtHR and/or CJEU case law to support a certain desired outcome through consistent interpretation (e.g. the use of the *Kadi CJEU judgment* by the UK court in *Tariq*[160]), or when they want to distinguish a case before them from previous CJEU/ECtHR jurisprudence.[161] The relationship between different national courts may, however, hinder the use of this technique. Unless the highest domestic court 'internalizes' the supra-national approach and adapts its own accordingly (see e.g. the Croatian Constitutional Court judgments in *DAPT* and *AZ*, using the ECtHR test,[162] or of the Italian Constitutional and Supreme courts in the same sex unions examined

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155 See, for example, BVerfG 6. Mai 1997 – 1 BvR 711/96 NJW 1997, 2811-2812 or BVerfG 2.9.2009 1 BvR 3171/08 . 2 BvR 2365/09, 4 May 2011 in regard to the duty of consistent interpretation with ECHR.

156 See Constitutional Court Decision no. 2, of 18 Feb. 1998: Official journal no. 22, 24 Feb. 1998. The cases reported are quoted by Fartunova, 'Report on Bulgaria', in G. Martinico and O. Pollicino (eds), *The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar, 2012) at p. 101.

157 For a detailed analysis of the relationship between EU/ECHR law and national law in the EU countries as well as for a comparative analysis see G. Martinico and O. Pollicino, *The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar, 2012).

158 See Handbook Judicial Interactions in the field of the Right to a Fair Trial, p.87.

160 Case analysed in the Handbook on Judicial Interaction Techniques in the field of the Right to a Fair Trial, p.53.

160 Case analysed in the Handbook on Judicial Interaction Techniques in the field of the Right to a Fair Trial, p.53.

161 See the ACCEPT case where the national Romanian court differentiated the facts of the case from those of the CJEU in *Firma Feryn* or *Bosman* cases. The case is detailed in JUDCOOP Handbook on Judicial Interaction Technique in the field of the principle of non-discrimination.

162 Ibid, p.57.

below; see on the same issue also the case of the Polish Supreme Court[163] or of the Croatian Constitutional Court in *Jelušić*[164]) the national judge who attempts a consistent interpretation so as to give full effect to EU law and the Convention could see its decisions reversed.

In the following paragraphs we will first present two main results of the use of the consistent interpretation as a Judicial Interaction Technique: *change in the judicial interpretation of the national courts* and *induction of legislation intervention*.

Both of these results are fairly straight forward - consistent interpretation can either alter the standing line of the national case law (*Close Up 1 and 2*). On the other hand, it can reach beyond the power of the judiciary inducing the intervention on the part of the legislature. Yet, even when this intervention is complete, consistent interpretation continues to serve the purposes of adjusting imperfect solutions to meet the EU/ECHR standard in a fuller manner (*Close Up 3*). Obviously, it may turn out that none of the results can be achieved and that other judicial interaction techniques need to be used by a national judge. These considerations will be the focus of sections a2. and a3.

*i.1 Change in interpretation of national legal norms within the boundaries established by the CJEU/ECtHR (within a pre-determined margin of discretion/appreciation)*

Under the duty of consistent interpretation national courts have been required to adapt their jurisprudence to the EU norms and the ECHR provisions in line with the guidelines established by the CJEU and ECtHR. In other words, national courts need to resolve conflict between interpretations of the domestic and European Courts. Given the specific constraints resulting from the multi-level human rights protection in Europe, national courts should attempt to solve the conflict by bringing their own interpretations as consistent as possible to that of the European Court(s). In addition, often the problem arises because within a member State there are different interpretations given by national courts when some courts in their case law build on national constitutions whereas others refer to European Courts. Therefore, in certain circumstances the adaptation of national jurisprudence to the EU/ECHR law and jurisprudence would require that national courts change their established interpretation of national legal norms so as to ensure respect of EU law or the ECHR, as interpreted by the CJEU/ECtHR.

This was the case, for example, in the *Hannover* saga, where the German ordinary courts have adapted their interpretation of the limits of the right to privacy of figures of public life against the exercise of freedom of expression of tabloid magazines.[165] (see *Close Up 13*)

The ECtHR judgment in *Hannover I* case had a similar impact on national judicial interpretation also in other national jurisdictions such as the UK, where the freedom of expression was granted, similarly as in Germany, higher protection than the right to privacy. Spanish courts and the Constitutional Tribunal made extensive use of the new guidelines established by the ECtHR when assessing the competing exercises of freedom of expression of the press with the right to privacy of public figures resulting in adaptation of the national judicial interpretation of the said fundamental rights.[166] In the field of the freedom of expression, the CJEU preliminary ruling in *Satamedia*[167] has

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[163] See *Close Up* 1 and JUDCOOP Handbook on Judicial Interaction Technique in the field of the principle of non-discrimination, p. 91ff.

[164] JUDCOOP Handbook on Judicial Interaction Technique in the field of the principle of non-discrimination.

[165] For a detailed account of the Von Hannover saga and the impact of the ECtHR ruling on the interpretative approaches of German courts and national courts from other Member States, please see the Handbook on Judicial Interactions in the field of Freedom of Expression, pp. 37-53.

[166] Constitutional Court judgment 21 October 2013 (STC 176/2013). For a more detailed analysis of this case, please see Handbook on Judicial Interaction Techniques in the field of Freedom of expression, pp. 44, 45.

[167] C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, Judgment of 16 December 2008.

changed the Finish Supreme Administrative Court interpretation of journalistic activities.

A similar role was played by the CJEU jurisprudence in the field of the principle of non-discrimination. In the *Webb* case,[168] the UK Supreme Court changed its interpretation of the national law implementing the Equal Treatment Directive and recognised the dismissal of a woman due to pregnancy as discriminatory on ground of sex.

Given the high degree of integration between the substantive content of fundamental rights in the EU regime and the Convention, compliance with both is not often an issue. On the other hand, national judges from ordinary courts might face problems when a fundamental right, regulated by both the national constitution and EU/ECHR, is interpreted by the constitutional or supreme court at odds with the interpretation of that right given by the CJEU or the ECtHR. This has been the case, for example, in the Italian and Polish disputes on same-sex couples' rights,[169] where ordinary and supreme judges were often confronted with two different schools of thought: on the one hand, the domestic constitutional tradition whereby same-sex couples are not necessarily recognised the same rights of heterosexual couples and, on the other hand, the approach of the CJEU and ECtHR[170] that have condemned discrimination based on sexual orientation.

If we consider the impact consistent interpretation may have, sometimes the same judgment of the supranational court even though implemented by the national courts *via* the consistent interpretation technique, leads to different national results.

This has been the case when consistent interpretation following the *Schalke and Kopf* judgment of the ECtHR[171] was used by Italian,[172] Spanish,[173] Portuguese,[174] French,[175] German[176] and Polish courts.[177] While the **Italian, French and Polish Constitutional courts** interpreted the judgment as permitting the Contracting States a margin of discretion in whether to recognize or not a same sex marriage celebrated in other EU countries, and in the end decided not to recognize such unions and social benefit rights resulting from such unions, the **Spanish Constitutional Tribunal and the German Federal Constitutional Courts** interpreted the ECtHR judgment as a sign that the institution of heterosexual marriages is fading out and that domestic rules preventing registration of these union are discriminatory and unconstitutional. A more balanced position seems to have been adopted by the **Portuguese Constitutional Court** which interprets the Constitution as neither

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168 Case C-32/93 Webb v EMO Air Cargo (No 2), Judgment of the CJEU of 14 July 1994.

169 See the Handbook on Judicial Interaction Techniques in the field of the principle of non-discrimination on grounds of gender, age, race, disability, sexual orientation, pp. 46-50, 90-92.

170 *Vallianatos v. Greece* (violation for not extending to same-sex couples the recognition of registered partnerships), Appl. nos. 29381/09 and 32684/09).

171 ECtHR, *Schalk and Kopf v Austria*, Appl. No.30141/04, Judgment of 24 June 2010.

172 Milan Tribunal, judgment 9 August 2007; Corte di Cassazione, Sez lav. 3 March 2008, n. 5749; Corte Costituzionale, judgment no. 138/2010 of 14 April 2010, Tribunale Pisa, 6 May 2010, Corte di Cassazione, Criminal section (I), judgment no. 1328, 19 January 2011, Tribunal Reggio Emilia, judgment no. 1401, 13 February 2012 Corte di Cassazione, judgment no. 4184/12 of 15 March 2012, Corte d'Appello Milano, sez. lavoro, sentenza 31 August 2012 no. 7176

173 Constitutional Court, STC 198/2012, 6 November 2012, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106, Constitutional Court, STC 41/2006, 13 February 2006, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5643

174 See Portuguese Constitutional Court, Acórdão no. 359/2009 of 9 July 2009.

175 Décision n° 2010-92 QPC du 28 janvier 2011, M.me Corinne et autres.

176 Federal Constitutional Court of Germany, judgment of 11 January 2011, 1 BvR 3295/07.

177 Supreme Court, judgment IV CSK 301/07 of 6 December 2007; ECtHR, *Kozak v Poland* (no. 312102/02), 2 March 2010; Supreme Court, Civil Division, judgment no. III CZP 65/12 of 28 November 2012 (*A. K. And Helsinki Foundation of Human Rights. v. city W.*), available at http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III%20CZP%2065-12.pdf.

imposing nor prohibiting recognition of same sex relationships. It has to be pointed out that the interpretation of the CJEU or ECtHR judgment by a constitutional or supreme court is not legally binding on an ordinary court if that would lead the latter to violate EU law. Ordinary courts are free to exercise consistent interpretation with EU/ECHR according to the interpretation they see as being in line with the latter.[178] As for example it happened in relation to the Italian same sex union, when notwithstanding the judgment of the Corte di Cassazione of 2010, in 2012 the Court of Milan has referred to the *Schalke and Kopf* judgment to conclude that rights recognised to heterosexual *de facto* partner must be extended to same-sex partners.[179] As the example shows there might be conflicting perspectives between national courts within a domestic system. There traditional hierarchy might not apply when the interpretation of national law by the highest courts is considered not to be EU/ECHR conform by lower courts.

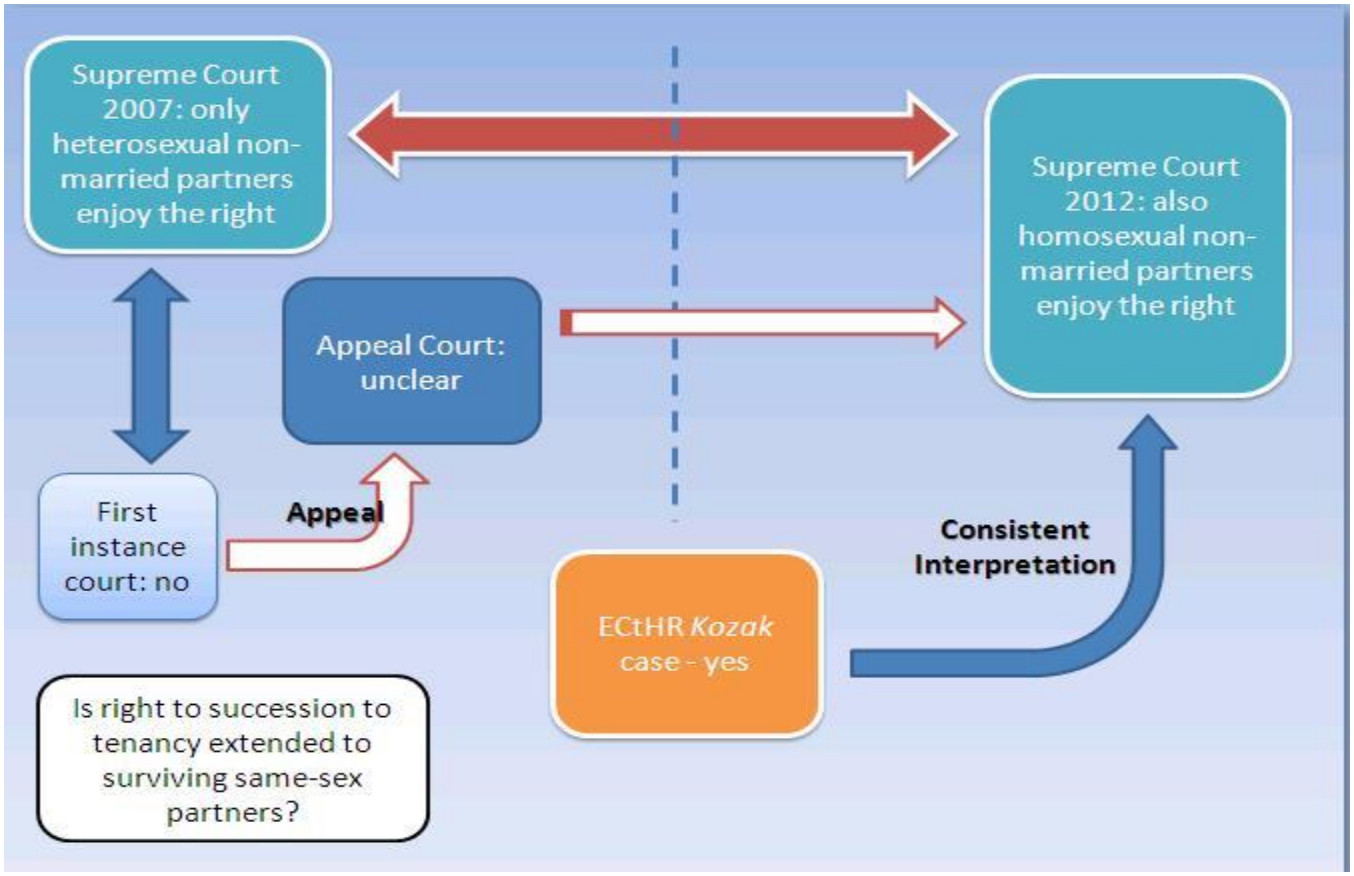
[178] See Case C- 416/10, *Križan and Others*, judgment of 15 January 2013.

[179] Corte d'Appello Milano, judgment of 31 August 2012, no. 7176. Please note that: a) "Partnerships" are not recognised in Italy (independently of the gender of partners); b) The case-law of domestic judges has recognised **some** rights to (unrecognised) couples **cohabiting** *more uxorio*. This decision of the Court of Appeal of Milano affirms that the latter accrue all cohabiting couples *more uxorio*, regardless of the sexual orientation. See Handbook on Judicial Interaction Techniques in the field of the principle of non-discrimination on grounds of gender, age, race, disability, sexual orientation, pp. 46-50.

***CLOSE UP 1: Kozak Case: Use of consistent interpretation in the field of the right to non-discrimination on grounds of sexual orientation***

***Type of Interaction: Vertical (Polish Supreme Court – ECtHR[180])***

***Non-Discrimination – Tenancy Succession Rights for Same-Sex Couples***




The case concerned the interpretation of the provision of Article 691(1) of the Civil Code laying down the conditions under which a person living together with a tenant can succeed him in the tenancy after his death. In this case, the claimant was a same-sex partner of the deceased tenant, who sought to exercise this privilege. The District Court rejected the request, stating that the relevant provision of the Civil Code did not apply to the hypothesis of same-sex couples.

On appeal, the Regional Court found that the provision was unclear and **referred the question of law to the Supreme Court.**[181]This problem of interpretation goes back to the historical evolution of the provision which initially literally referred expressly to the cohabitation of spouses. Subsequently, pursuant to an amendment in 2001, the reference to spouses was removed and the right to succeed to the tenancy was extended to persons who cohabited with the deceased (cohabitation *more uxorio*, *konkubinat*, *de facto* partnership, *concubinage*). After this amendment, the Polish Supreme Court has

[180] Appl. No. 312102/02, Judgment of 2 March 2010.

[181] In the Polish legal system, the question of law can be referred to the Constitutional Tribunal requesting the ruling on the compliance of a legal act with the Constitution. Such question of law can be filed before the Constitutional Tribunal by any court. Similar prerogative is attributed to the ordinary courts acting as courts of appeal in criminal (Art. 390 § 1 of the Penal Procedure Code) and civil (Art. 441 of Civil Procedure Code) matters which can refer similar request for interpretation of legal provisions to the Supreme Court. When referring the questions of law in both cases, the courts simultaneously issue a ruling staying the proceedings at stake.

interpreted this provision as referring to couples that lived together in the estate as if they were married, but had not yet pronounced on the rights of same-sex partners. In fact, the Supreme Court had already stated in 2007 that, in the absence of relevant provisions on same-sex couples, the norms developed in the case-law and applying to *de facto* marital unions of heterosexual couples ('konkubinat'), which were in part inspired by the rules applicable to marriages, could not be applied by analogy.[182]

The ECtHR, in 2010, had the opportunity to stress that the legitimate interest of one State to protect family life and the institution of marriage cannot justify discriminatory measures based on sexual orientation like the one at stake in the Polish proceedings. The ECtHR found that, unlike rights reserved to married couples, rights reserved to non-married partners must be extended to same-sex couples by analogy, in light of the narrow margin of appreciation left to States in establishing differential measures based on sex or sexual orientation.[183]

Subsequently, in 2012, the Supreme Court took due notice of the *Kozak* precedent, and adapted accordingly its interpretation of Art. 691(1) of the Civil Code, holding expressly that this construction was appropriate based on the duty of consistent interpretation expressed in Art. 91(1)(2) of the Constitution.[184]

A. **Conflict**: Principle of non-discrimination v national provisions granting rights to spouses only. The Polish Supreme Court was faced with the question of whether same sex non-married couples should enjoy equal right to succeed to the tenancy as the heterosexual non-married couples based on Art. 691 (1) of the Civil Code as amended in 2001.[185] Until the ECtHR judgment in the *Kozak* case, the Supreme Polish Court stated that, in the absence of relevant provisions on same-sex couples, the norms developed in the case-law and applying to *de facto* marital unions of heterosexual couples ('konkubinat'), which were in part inspired by the rules applicable to marriages, **could not be applied by analogy**. The ECtHR found that, unlike rights reserved to married couples, rights reserved to non-married partners must be extended to same-sex couples by analogy, in light of the narrow margin of appreciation left to States in establishing differential measures based on sex or sexual orientation.

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182 Supreme Court, judgment IV CSK 301/07 of 6 December 2007: 'The established tradition, including the semantic tradition, militates against including in the notion of *de facto* marital relationship unions of same-sex persons modelled on heterosexual unions.'

183 ECtHR, *Kozak v Poland* (no. 312102/02), 2 March 2010, see para. 99: "*Striking a balance between the protection of the traditional family and the Convention rights of sexual minorities is, by the nature of things, a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition. Nevertheless, having regard to the State's narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation (see paragraph 92 above),* ***a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense*** *(see Karner, cited above, § 41). Nor have any convincing or compelling reasons been advanced by the Polish Government to justify the distinction in treatment of heterosexual and homosexual partners at the material time. Moreover, the fact that the provision which shortly afterwards replaced section 8(1) removed the difference between "marital" and other forms of cohabitation (see paragraphs 40-41 above) confirms that no such reasons were found to maintain the previous regulation.* ***In view of the foregoing, the Court finds that the Polish authorities, in rejecting the applicant's claim on grounds related to the homosexual nature of his relationship with T.B. failed to maintain a reasonable relationship of proportionality between the aim sought and the means employed****. The impugned distinction was not, therefore, compatible with the standards under the Convention. The Court accordingly rejects the Government's objection regarding the applicant's victim status and holds that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention.*" The Court referred to its precedent in ECtHR, *Karner v Austria* (app. No. 40016/98) of 24 July 2003, see also *Burden v United Kingdom* (App. No. 13378/05) of 29 April 2008.

184 Supreme Court, Civil Division, judgment no. III CZP 65/12 of 28 November 2012 (*A. K. And Helsinki Foundation of Human Rights. v. city W.*), available at http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III%20CZP%2065-12.pdf.

185 Following this legislative amendment the right to succeed to the tenancy was extended to persons who cohabited with the deceased and not only reserved to the cohabitation of the spouses.

B. **Judicial Interaction Technique**: In this case the ECtHR's judgment, intervened before the last decision of the Supreme Court. The Polish Supreme Court adapted its previous jurisprudence to extend the right to tenancy succession to same sex unmarried couples equally to the heterosexual unmarried couples. The obligation of consistent interpretation was based on Art. 91(1)(2) of the Constitution. The finding contained in the judgments now available to all ordinary courts, which can replicate the **consistent interpretation** of Art. 691(1) to the ECHR obligations (as required by Art. 91(1)(2) of the Constitution) without needing to seek further intervention of the higher courts.

C. **Solution**: Guidelines given to national judges referring to the adaptation of previous judicial interpretation based directly on the ECtHR judgments delivered not only in a case against their own Member States but also delivered in other cases dealing with a similar legal questions and factual circumstances (*res interpretata)*. It is important to retain the principles established by the ECtHR and observe them, irrespective of the country of origin of the judgment. Furthermore ordinary courts do not need to wait for the judgment of their supreme courts, but they can use the judicial interpretation technique on the basis of by Art. 91(1)(2) of the Polish Constitution.

D. **Alternative(s)**: The solution of Judicial Interaction Technique adopted by the Polish Supreme Court in *A. K. And Helsinki Foundation of Human Rights. v. city W*. was successful in terms of obtaining both convergence and enhancement of the right to non-discrimination based on sexual orientation. It however came after the *Kozak* judgment of the ECtHR which found Poland in violation of Arts. 8 and 14 ECHR due to the restrictive judicial interpretation of the national legislative provision. In light of the already existent *Karner v Austria* and *Burden v United Kingdom*, ECtHR judgment finding Poland in infringement of its international ECHR obligations could have maybe been prevented if the consistent interpretation techniques had been used already in 2007.

***CLOSE UP 2: Use of consistent interpretation in the field of freedom of expression: Sallusti and Belpietro cases***

In the field of freedom of expression the technique of consistent interpretation technique is first used to ensure the identification of the ECHR standards on the proportionality test, followed by importation of the test and adaptation of the national case law standard to the supranational one.

The classical compliance potential was displayed by the *Croatian Constitutional Court in a case on defamation against judges.*[186] There it extensively referred to the jurisprudence of the ECtHR establishing duties and responsibilities connected to the freedom of expression[187] and followed them as its constitutional law requirements.

Within the EU law context when the exercise of freedom of expression entered in conflict with the manifestation of other fundamental rights which have found specific protection in the EU law such as data protection or intellectual property rights, the consistent interpretation was used to ensure also conformity with the relevant EU secondary legislation (Data Protection Directive and Copyright Protection Directive). As for example, the UK court approach in the *20th Century Fox v BT* case [188] referring directly to the CJEU preliminary ruling in their reasoning as regards the balance between freedom of expression and copyright. Even if not citing the CJEU relevant judgments, the EU norms and their interpretation are taken into consideration in the reasoning of national courts. For example, 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.[189]

Finally, as in the majority cases where freedom of expression opposes another right and balance must be struck (such as right to the protection of one's image derived from human dignity, or right to privacy), consistent interpretation can be a part of a broader body of case law formulating together the standard of protection resulting from the continuous dialogue between courts (for an equally good example, please refer to Close Up 13 offering an insight into the von Hannover saga).

The Italian case law similar in facts to *Belpietro v Italy* case constitutes a good example of consistent interpretation that involved embracing on the part of national judges of the proportionality of sanction for defamation test as developed by the ECtHR. Similarly to the case demonstrated in *Close Up 1*, national judges needed a direct impulse stemming from the confirmed infringement on their part delivered in the ECtHR judgment in order to adapt their interpretation to the ECtHR standard.

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[186] U-III/2858/2008, constitutional complaint submitted by B. d.o.o. See the analysis in the Handbook Judicial Interaction techniques in the field of Freedom of expression, pp.78-80.

[187] Inter alia, *Observer & Guardian vs UK*, *Prager and Oberschlick v Austria.*

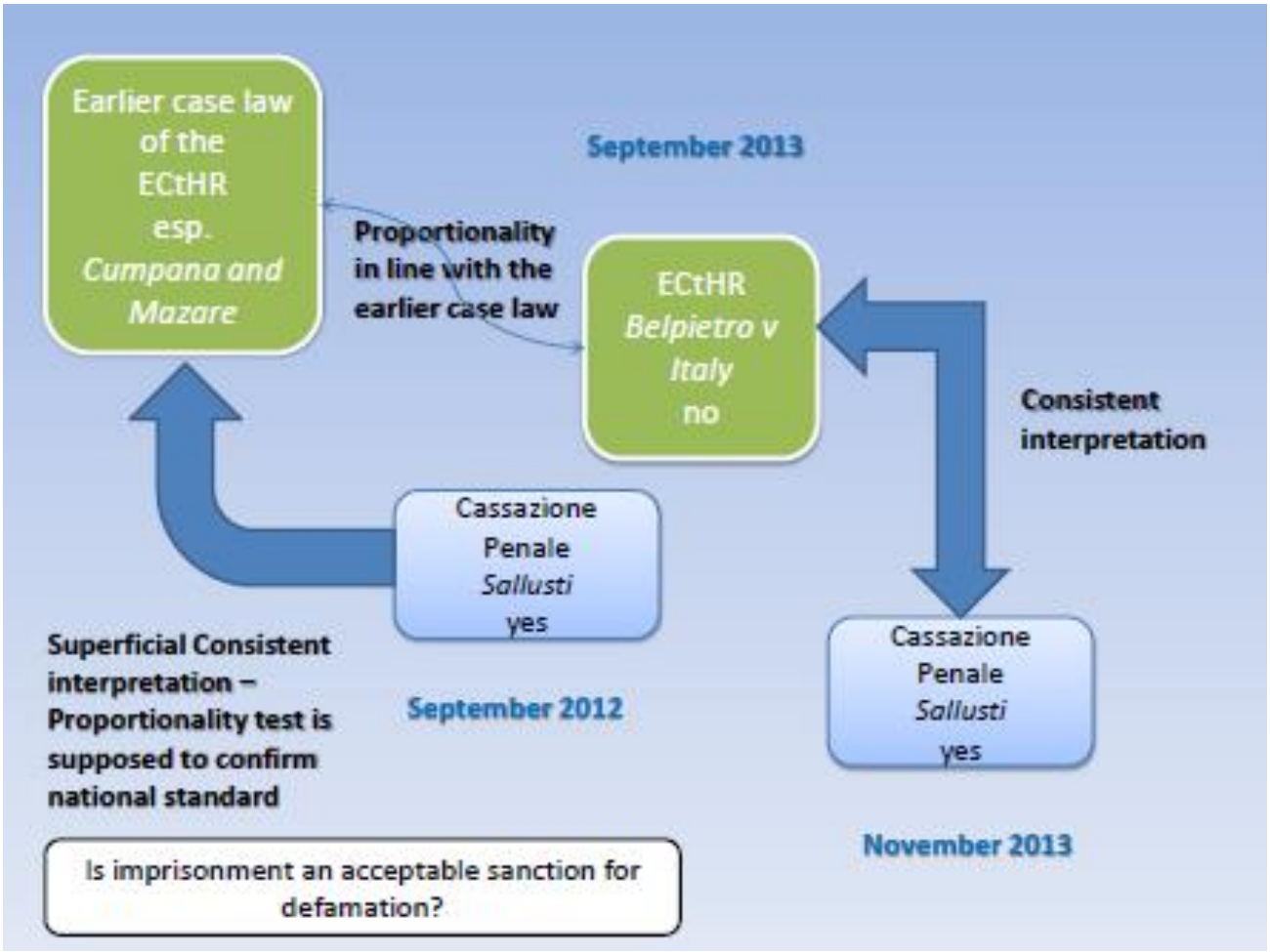
[188] *Twentieth Century Fox Film Corporation et al v British Telecommunications plc* [2011] EWHC 1981 (Ch), 28 July 2011.

[189] See Judgment of 12 July 2012 - I ZR 18/11 - *Alone in the dark*. 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" (being the latter 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, which after the appeal ended in front of the German Federal Supreme Court. See more on this judgment and the impact of the CJEU judgment in the Scarlet case (CJEU: C-70/10, *Scarlet Extended* (2011)) in the Handbook on Judicial Interaction in the field of the Freedom of Expression, pp.101-106.

***Pre- and Post- Belpietro cases, Type of interaction: Vertical (domestic – ECtHR and vice-versa)***

***Belpietro v Italy - Criminal sanctions for defamation in the Italian jurisprudence***

***Failure to manipulate the ECtHR precedents affects the results of the consistent interpretation technique***




**Prior to Belpietro: Sallusti Case (26 September 2012)**

The *Sallusti* case concerned an Italian journalist, Alessandro Sallusti who was convicted in 2001 to 14 months in prison for having expressed, under a pseudonym, outrageous comments towards a judge who had allowed a 13 year old to have an abortion and saying that the judge, the parents and the gynaecologist deserved the death penalty. The conviction was upheld by the Court of Cassation in September 2012 (26 September – 23 October).[190] Even though the sentence was in the end commuted by the President of the Republic on 21 December 2012, it is clear that the penalty could have been held as disproportionate by the Court of Cassation in 2012 – especially in the light of a very strict judgment passed by the ECtHR in 2009 *Cumpana v Mazare v Romania* judgment.

**Belpietro v Italy (24 September 2013)**

In the meantime the ECtHR addressed a similar issue whilst deciding in the *Belpietro v. Italy* case which was decided on 24 September 2013. In the *Belpietro* case, the editor of the Italian newspaper *Il Giornale,*

[190] Italian Court of Cassation, Judgment No. 41249/12. The sentence was in the end commuted by the President of the Republic on 21 December 2012.

Mr. Belpietro, was convicted for defamation since he had published an article written by a member of the Italian Senate, in which the author accused Italian magistrates and some members of the office of public prosecutor in Palermo of being negligent in or using political strategies in their fight against the mafia. Having considered this article defamatory, the prosecutors lodged a criminal complaint against the senator and Belpietro, in his capacity as newspaper's editor, since he was responsible for lack of control when publishing defamatory statements without sufficient factual basis.[191] In 2007, the Tribunal of Milan acquitted the editor, but in 2009 the Court of Appeal convicted the editor on appeal to a suspended four-months prison term, and ordered to pay substantial sums to each of the civil parties, totalling €110,000. Belpietro turned to the Strasbourg Court, alleging that his conviction for defamation had violated his freedom of expression under Article 10 ECHR. **Having performed the test of proportionality, the Strasbourg Court[192] considered the sanction of imprisonment and the high award of damages disproportionate to the aim pursued, and thus acknowledged a breach of Article 10.** The Court insisted on the fact that the sentence of imprisonment (even if suspended) can have a significant chilling effect, and that the conviction was essentially for not having executed sufficient control before publishing a defamatory article. Consequently Italy was found to have violated Article 10 ECHR.

**Post-Belpietro: Cassazione Penale, judgment no. 12203 of 2013**

A local newspaper published an article suggesting that two soldiers had been responsible for a theft occurred in the barracks. The news was false and gravely distorted the relevant facts (some items that could guide the investigation had been found in possession of the two soldiers).

The author of the article and the director of the newspaper were therefore condemned, respectively, for aggravated libel and failure of supervision, to a sentence of 6-months imprisonment. The judgment was upheld in appeal, and challenged before the Court of Cassation. The claimants alleged, among other things, that the imprisonment sanction, in light of the modest gravity of the crime, was disproportionate.

The Court of Cassation upheld this complaint, noting that only the gravest episodes of defamation through the press can entail the sanction of imprisonment, and that the crime at stake would not reach that threshold.[193] Moreover, the Court expressly referred to the ECtHR's judgment in *Belpietro v. Italy* and endorsed the guidelines set therein (namely, that imprisonment for defamation is a last-resort option, to be limited to the most serious cases, such as incitement to violent behaviour). The Italian Supreme Court therefore used the case-law of the ECtHR to interpret its criminal code and exclude the possibility of sanctioning defamation with imprisonment – a possibility formally granted by the applicable rules in force.

A. **Conflict**: ECHR v national standard as for the assessment of proportionality of imprisonment as sanction for defamatory statements; establishing the appropriate balance between the right to freedom of expression and the right to judicial independence and right to protection of one's image

B. **Judicial Interaction Technique used by the national court prior to Belpietro**:

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[191] Due to the parliamentary immunity provided by Art. 68(1) of the Italian Constitution, the proceedings brought against the senator ended in 2007 since the senator had expressed his views in his capacity as a member of the senate. The Italian senate accepted that the statements published were related to the exercise of his parliamentary functions.

[192] The ECtHR held that the duty Art. 57 of the Italian criminal code imposing on a newspaper editor the obligation to control what is published, in order to prevent breaches of the law and to prevent the publication of defamatory articles in particular, applies also towhen an article was written by a member of parliament

[193] See Court of Cassation, Criminal Section V, of 11 November 2013 (deposit 13 March 2014), no. 12203/13.

The Court of Cassation in 2012 relied first of all on the **consistent interpretation with national law, which in cases of defamation allowed for criminal penalties, including prison sentence. Secondly it used consistent interpretation with ECtHR standard**, comparing similar cases solved by the ECtHR to justify its decision in the *Sallusti* and *Belpietro* cases. After identifying the relevant cases of the ECtHR on the application of proportionality test in defamation cases (e.g. *Cumpana and Mazare v Romania*), it concluded that the ECtHR does not generally preclude criminal sanctions and prison sentence, and thus the Italian legislation providing such sanctions can be upheld.

C. **Solution provided by Belpietro:** In *Belpietro,* the **ECtHR took issue with the proportionality test** applied by the Italian courts with respect to the liability regime applicable to news editors. In carrying out test of proportionality between the protection of the prosecutors' reputation rights under Article 8 ECHR and the newspaper editor's right to freedom of expression under Article 10 ECHR, the Court found that the Italian authorities had not breached Article 10 ECHR in finding the editor liable. It, therefore issued **guidelines** as to which penalty is proportionate and, therefore, acceptable. The fact that some of the very serious allegations against the prosecutors lacked a sufficient objective basis was held as possibly justifying the criminal liability. However, the Court considered the sanction of imprisonment and the high award of damages as being disproportionate to the aim pursued. It therefore came to the conclusion that solely for that reason the restriction of the freedom of expression by the Italian courts amounted to a breach of Article 10. Based on the ECtHR's previous case law, which the Italian courts also referred to, however reaching a different conclusion than what was held in those judgments, the Court pointed at the fact that a sentence of imprisonment (even if suspended) can have "a significant chilling effect", and that the conviction was essentially for not having executed sufficient control before publishing a defamatory article. Therefore, there were no exceptional circumstances justifying a sanction as severe as that at stake, and the Second Section of the ECtHR concluded by unanimity that Italy had violated Article 10. It has to be noted that such a conviction before the ECtHR resulted due to the national judgments which failed to interpret the national legislation consistently with the ECtHR jurisprudence.

As the result of such reasoning of the ECtHR, the consistent interpretation technique which is to be employed by national courts need to take into consideration also the intricacies of proportionality test devised by the ECHR – test which dealt with proportionality of sanctions.

**D. Alternatives: Post-Belpietro Consistent Interpretation Spree**

**In 2013,** on the other hand, the relevant provisions of Italian law are read in light of Italy's commitment under Art. 10 of the Convention, as specified in the *Belpietro* judgment **offering thus the clear case of consistent interpretation**.[194]

It is noteworthy that the Supreme Court tries to temper the obligation to carry out the consistent interpretation and back-track on the previous approach (that led to the ruling of the ECtHR) with considerations based on domestic law. This is the function of the Italian court's remark that the possibility to sanction defamation alternatively with a pecuniary sanction or with imprisonment implies, *ipso facto*, that imprisonment is only possible to sanction episodes of utmost gravity.[195]

In other words, the Court tries to demonstrate that the consistent interpretation of Italian law is not an imposition of the Strasbourg court but the result of a keen application of domestic law. In light of the previous judgments of the same court, it is argued that this is mostly a matter of

[194] See ibid., para. 10.

[195] See ibid., para. 7.

embellishment, but it is understandable that the Court avoided advertising a blatant *revirement* mandated by the ECtHR.

Finally, it is worth noting that the Italian legislator has already set out to change the Criminal Code to codify the guidelines of *Belpietro v. Italy*.[196] In the meanwhile, the office of the prosecutor of Milan had circulated a document[197] calling on prosecutors to take into account the ECtHR's judgment, and in particular the proportionality of the imprisonment sentences, which could be justified only in exceptional circumstances. It is evident that the ruling of the ECtHR has **triggered a process of legislative reform** aimed at bringing the domestic law into line with the Convention, but it has also caused national prosecutors and judges, in the meanwhile, to exercise their duty of consistent interpretation so as to avoid an application of domestic law that could amount to a breach of the Convention.

*i.2 Induction of Legislative Intervention*

Sometimes the duty of consistent interpretation is not sufficient to solve the conflict between the EU/ECHR and national law, and further legislative amendments or enactments are required. As it could be observed in *Close Up 2: Belpietro v Italy*, systematic use of consistent interpretation by courts may lead to a legislative intervention codifying the practice. In other cases, as it is clear from below presented *Close Up 3: Kress v France,* legislative intervention may be of interpretative character whereby the hitherto performed consistent interpretation was so far reaching that it required aid on the part of the legislation. Nevertheless, often when such intervention takes place (especially in the areas that refer to some established traditional practices), it may prove to be still insufficient from the point of view of complying with the European standard of protection of a fundamental rights.

This was the case for example with the French offices of the *Avocat general* and of the *commissaire du gouvernment*: Even if they had been declared partially incompatible with Art. 6 ECHR by the ECtHR,[198] the jurisprudence of the French Cour de Cassation and the Conseil d'État has not changed until 2009 when the Decree modified the rules and allowed the parties to present their observations at the hearing after the submission of the aforementioned institutions.[199] The period between 2001 and 2006 when the first of the Decrees were issued offers an interesting example of judicial interaction and diplomacy leading to the ultimate, though not fully adequate change of law.

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[196] The bill, as of June 2014, is being examined in the Senate, see http://www.camera.it/leg17/126?idDocumento=0925.

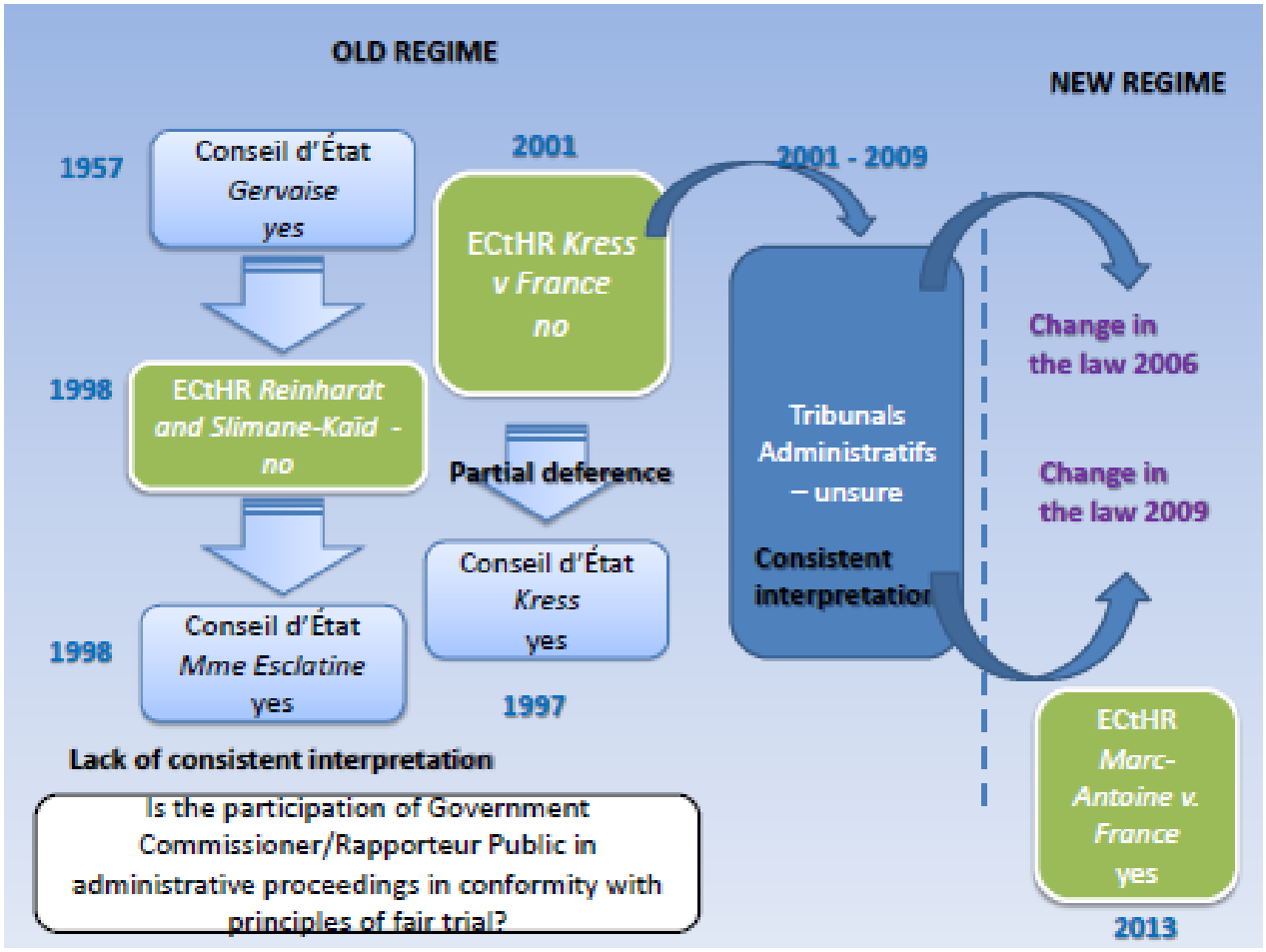
[197] Press release of 8 October 2013, available at http://www.penalecontemporaneo.it/upload/1381413637PROVVISORIO%20Diffamazione%20a%20mezzo%20stampa%2008%2010%202013.pdf.

[198] *Kress v France.*

[199] See more details of the case in Handbook Judicial Interactions in the field of the Right to a Fair Trial, pp. 96-99.

***CLOSE UP 3 Kress v France: Use of the consistent interpretation technique in the field of the Right to Fair Trial in Administrative Proceedings***

***Type of Cooperation: Vertical (domestic court v ECtHR[200])***




In the *Kress* case the applicant challenged the judgment of the French Conseil d'Etat for not recognizing liability of the Strasbourg Regional Hospital Centre. She based her claim on the violation of Article 6 ECHR. More specifically, she considered that the proceedings in French administrative courts violate Art. 6 due to the role the "Government Commissioner" played in the proceedings.

The *Kress* case created an opportunity for the ECtHR to examine the compliance of the rules of procedure in the French Conseil d'Etat with the ECHR. Before *Kress*, the Government Commissioner played a similar role to that of the Advocate General in the European Court of Justice. *Inter alia* the parties to the case could not speak after the Government Commissioner's submissions at the hearing. The Government Commissioner would communicate the general tenor of his submissions to the parties before the hearing if the parties asked so. The parties could submit to the trial bench a memorandum if they disagreed or if they wanted to highlight certain elements. The Government Commissioner attended the deliberations but could not vote.

[200] ECtHR, Appl. No. 39594/98, Judgment of 7 June 2001.

The argument that the Commissioner's connection with the government violates the rights of defence was dismissed by the Conseil d'Etat as early as in 1957 (*Gervaise*): the very name of "Commissaire du gouvernement" was misleading and does not correspond to the function.

In 2001 *Kress*, the applicant claimed that the role of the Government Commissioner played was not in accordance with Art. 6 ECHR, as the Commissioner can intervene in the case, which creates imbalance between the parties. This was similar to the prerogatives of the Advocate-General in the French Cour de Cassation which have been altered following cases *Reinhardt* and *Slimane-Kaïd*). Nevertheless, soon after *Reinhardt* and *Slimane-Kaïd*, the Conseil d'Etat confirmed, in *Mme Esclatine*, that it upholds its opinion as to the position of the Government Commissioner.[201]

The ECtHR in *Kress* found that there was no violation of Art. 6 as regards the principle that proceedings should be adversarial, because of the possibility to ask for the submissions before the hearing. But the participation of the Government Commissioner in the deliberations was considered to be a violation of Art. 6 ECHR.

The *Kress* case led to different interpretations: for some observers, the ECtHR validated almost all aspects of the French judicial proceedings in the administrative field and as a consequence, very limited adaptations were required (only to avoid participation of the Government Commissioner in the deliberations). For others, the case showed that there was a need for more substantial reforms in order to avoid potential further difficulties.

The judges found themselves in a very uncomfortable position of not knowing how to approach the unclear judgment of the ECtHR. Frequently, they would attempt judgment's application, but in an informal manner.[202] Before 2006, although no strict legal obligations were introduced in the code, French administrative courts complied with ECtHR judgment by excluding participation of the "Commissaire du government" to deliberations.

A Decree of 1 August 2006 and a Decree of 7 January 2009 modified the rules: *inter alia*, the Government Commissioner is now called "Rapporteur public" to clearly indicate the fact that it is not a government representative and the parties are presenting their observations at the hearing after the submissions of the "rapporteur public". The 2006 Decree creates two new articles in the administrative justice code: for first instance administrative courts and appeal courts, the "Rapporteur public" does not attend deliberations (article R. 732-2), for the Conseil d'Etat the "Rapporteur public" is present in deliberation but does not participate (R. 733-3). Although all these modifications were not absolutely required by the *Kress* case, the compliance with Art. 6 of judicial proceedings in the administrative field was considered of utmost priority. In particular, the debates in the ECtHR showed that it was difficult to explain the specificities of the French administrative court proceedings, and therefore, to adjudicate with reference to them in such a manner that the judgment is followed in a uniform manner.

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[201] Martinico and Pollicino, ibid. p. 215.

[202] See, for instance judgtment of CAA Marseille, 04MA00911, *Société S.A.S Union Hôtelière du Cap - Commune de Saint-Jean Cap Ferrat*, 23 November 2006: "*Considérant, en premier lieu, qu'à la date à laquelle le jugement contesté a été délibéré, les dispositions de l'article R.731-7 du code de justice administrative, introduites par le décret n° 2005-1586 du 19 décembre 2005, et depuis lors abrogé par un décret n° 2006-964 du 1er août 2006, selon lesquelles «le commissaire du gouvernement assiste au délibéré. Il n'y prend pas part» n'étaient pas en vigueur ; qu'il ne ressort pas des pièces du dossier, et notamment des mentions du jugement attaqué selon lesquelles le tribunal a entendu les conclusions du commissaire du gouvernement, que ce dernier ait participé ou assisté au délibéré ; que, par suite, le moyen tiré de l'irrégularité du jugement au regard des stipulations de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales doit être écarté*;", or: CAA Paris, 02PA04241, judgment of 28 November 2005: "*Considérant, en second lieu, que si le requérant soutient que le commissaire du gouvernement aurait participé au délibéré du tribunal sur ses demandes, il n'apporte aucun début de preuve à l'appui de cette allégation ; que de plus les mentions du jugement concernant le délibéré en cause établissent la non participation du commissaire du gouvernement au dit délibéré*".

A. **Conflict**: Due to the fact that the case dealt with Art. 6 ECHR, the ECtHR was forced to engage in detail with the features of the French procedural system; in this way, **judicial interaction was necessary in order to adjudicate the right to fair trial**.

B. **Judicial Interaction Techniques**: The ECtHR acknowledged that administrative court proceedings may differ from the criminal and civil courts and carefully analysed their specificities. In particular, the fact that the possibilities existent for the parties to ask for the general tenor of the submissions of the Government Commissioner before the hearing was considered to be sufficient. This was a form of granting the French system of judicial administrative proceedings a **margin of appreciation**.

   At the same time, as it seemed, the ECtHR judgment in *Kress* - partially deferring to *spécialité française* - was too much of an enigma to lower administrative courts. Whilst they made an effort to apply **consistent interpretation,** this usually happened in an indirect manner.[203] Hence, in order to ensure that judgements in such cases are subject to uniform **consistent interpretation**, two legislative interventions took place in 2006 and 2009. In 2013 their positive impact on the French standard, compatible with the Convention, was confirmed by the ECtHR in case *Marc Antoine v France.*

C. **Solution following the ECtHR judgment** – Consistent interpretation induced legislative Intervention: Following the case, **France adapted the procedural rules** by modifying the role of the Government Commissioner and the hearings order. A recent case (ECtHR 4 June 2013 *Marc-Antoine v. France*) **confirmed that the current proceedings in French administrative courts are compliant** with the Art 6 ECHR.

### ***a.2 Consistent interpretation v other Judicial Interaction Techniques***

As a conclusion, judges[204], national supreme courts[205] and academics[206] have emphasised the importance of consistent interpretation in EU law, which should be preferred against the more drastic technique of disapplication. The benefit of consistent interpretation *v* disapplication as established in the *Simmenthal* doctrine is that the latter is a rigid one which does not permit adaptation and dialogue in case of constitutional conflict (i.e., conflict between constitutional supremacy and the primacy of

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[203] See the above cited excerpts from the judgments where the compliance is ensured in an indirect manner - with a rather general reference to the ECHR standard.

[204] S. Rodin, now the Croatian judge at the CJEU, "Back to Square One. The Past, the Present and the Future of the Simmenthal Mandate", paper presented at the 8th European Constitutional Law Network, Madrid, 6–8 Oct. 2010.

[205] See the position of the Romanian High Court of Cassation and Justice explaining the mandate of the Romanian court as an EU court in cases where there is a conflict between national and EU law. Following the development of a divergent thread of national case law where some of the Romanian courts rejected an administrative limitation of free movement of certain Romanian citizens to other EU countries by using disapplication of national law, while other Romanian courts reached the same solution on the basis of consistent interpretation of the public security limitation of citizens' movement with the EU norms, the High Court of Cassation and Justice took a decision for the unification of the jurisprudence emphasising that national courts should not easily disapply national norms whenever there is a conflict between national and EU law. Instead, they should give precedence to consistent interpretation. See the Romanian High Court of Cassation and Justice Decision no. 2253 of 3rd April 2008, not published; Decision 4206 of 24 May 2007; Decision no. 4205, of 23 May 2007; Decision no. 1777 and 1780 of 17 March 2008, for more details on this issue, see D. Efrim, M. Moraru and G. Zanfir, *The Hesitating Steps of the Romanian Courts towards Judicial Dialogue on EU law matters*, paper available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261915 See also the position of the Czech Constitutional Court which found a way to interpret the national legislation implementing the EAW FD in conformity with Art. 14(2) Czech Constitution which provided a ban on forcing citizens to leave the country (US 66/04).

[206] G. Martinico, "Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts", (2012) EJIL (2012), No. 2, 401–424;

European law),[207] while the consistent interpretation makes it possible to neutralize or soften constitutional conflicts, to the extent that is possible without providing a meaning opposing to the literal wording of a provision.

### ***a.3 Failure of Consistent Interpretation and Available Antidotes***

Obviously, 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*). 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*, *Melloni*). If that construction is confirmed by the CJEU, its interpretation of the EU law will have to be taken into consideration by the other national courts, including the highest ones, which will have to ensure interpretation of national legislation consistent with that interpretation of EU law, or might even have the duty to set aside conflicting acts for which a consistent interpretation is not possible (see below).

**b) Consistent interpretation and/or Preliminary reference (deciding on the appropriate judicial interaction technique when dealing with similar cases)**

There are certain circumstances where the consistent interpretation technique might not be sufficient to ensure compliance with EU/ECHR law. One of these circumstances is the application of EU autonomous notions. The field of the freedom of expression *v* copyright included within the third Handbook on Judicial Interaction Technique in the Freedom of Expression field has provided such an example. The scope of application of "communication to the public" as provided by Art. 3(1) of the Copyright Directive (2001/29) has been subject to cases within the same year before the Romanian and the French supreme courts. In solving the case, the two supreme courts used different judicial interaction techniques, the Romanian High Court of Cassation and Justice (HCCJ) used both consistent interpretation of national law with EU law and the preliminary reference, while the French Supreme court only the consistent interpretation technique. The Romanian HCCJ had to assess whether public communication of musical works within circus and cabaret performances falls or not under the scope of "communication to the public" acts as provided by Art. 3(1) of the Copyright Directive. The French Court of Cassation had to decide whether distribution of artistic works in the bedrooms of a hotel falls within the same notion of "communication to the public".[208]

In order to reach a solution on the interpretation of national law in light of the EU norm, the Romanian High Court of Cassation and Justice decided to address preliminary questions to the CJEU on the correct interpretation of the notion of "communication to the public" act in the case referred before it. The Court further highlighted that due to its responsibility of being a last resort court it is bound to address such questions and there was no similar other precedent of the CJEU that could have clarified the matter before it.

In the *SACEM* case, the French Court of Cassation had to establish whether distribution of the musical works of SACEM by a hotel in its bedrooms constituted "communication to the public" in the sense of Art. 3 of Directive 2001/29. The French supreme court did not address a preliminary reference to the CJEU on the correct interpretation of the EU notion of "communication to the public", as it considered that the CJEU had already clarified this aspect in a previous case referred by the Audiencia Provincial de Barcelona. In a judgment of 2006, the CJEU held that "[…] *the private or*

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[207] The divergent Italian jurisprudence on the judicial interaction techniques used in the field of application of the Return Directive, *El Dridi* type of cases, where some of the Italian courts used the consistent interpretation, while others used disapplication.

[208] For this line of cases see the analysis in the Handbook Judicial Interaction techniques in the field of Freedom of expression, pp 109-111.

*public nature of a hotel's room where the communication takes place is immaterial*", both places falling under the scope of the notion "public" provided by Art. 3 Directive 2001/29 notion of "communication to the public" which establishes the exclusive control of the copyright owners.[209]

Based on this interpretation of the CJEU of the notion of "communication to the public", the French supreme court held that the distribution of a signal by means of television sets to hotel customers, whatever the technique used to transmit the signal, constitutes an act of communication to the public within the meaning of Article 3, paragraph 1, of this Directive.

Therefore in spite of the CJEU's existent jurisprudence interpreting a certain EU notion, the national courts will have to assess each time the relevance of these judgments by comparing the facts before the CJEU with the facts in the cases which they need to solve. The same notion (*in casu*, "communication to the public" as provided by Art. 3 of Directive 2001/29) might have been already clarified in a case with similar facts, as the *SACEM* case, thus it does not require further clarification by the CJEU. The national court will thus be able to correctly apply EU law based on the consistent interpretation of the national law in line with the meaning of the EU notion as established by the CJEU; while in other cases, as the *Circul Globus* one, the specificity of the facts before the national court differentiate the case from previous cases solved by the CJEU[210], and thus require referral of a preliminary ruling to further clarify the meaning of the EU notion within the context of the facts of that particular case.

**c) Preliminary Referencing – as a power and obligation**

The preliminary reference procedure (Art. 267 TFEU) is a mechanism of direct cooperation between a national court and the CJEU. The CJEU is entitled only to decide on the interpretation and validity of EU norms and cannot declare a domestic norm void. However, since the question is often raised to test the conformity of a domestic norm (as described in abstract terms) against the EU law, the ruling of the CJEU has often the straightforward effects of sanctioning the validity – or the unlawfulness – of domestic law under EU legal obligations.

Preliminary reference is an interaction technique that involves external assistance from the CJEU. The result of the preliminary reference may either state that the conflict is non-existent, give guidance for its resolution through offering the relevant tests, or state clearly the need to disapply the national law whenever it is applied in the context of the EU law. This section is an overview of the role of national judges in the preliminary reference proceedings and possibilities this technique offers in various contexts of adjudication. Whereas the ruling of the CJEU can indicate the harmonious interpretation of domestic law that prevents a conflict with EU law, that typically is not the object of the preliminary question: because the judge is expected to find a consistent interpretation between domestic law and EU law, s/he will raise a preliminary question only if, in her mind, such interpretation is not available. If the consistent interpretation were available to the national judge, this judicial interaction technique would have to be given precedence and thus it will not be necessary to question the validity of domestic law against the standard of review of EU law (on "necessity" see below). According to the case law of the CJEU the basic rules to be followed by national courts when raising a preliminary reference to the Luxembourg Court are the following: there must be a pending[211] and

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[209] Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) against Rafael Hoteles SA,* [2006] ECR1-11519, para.50.

[210] In this case the factual and legislative situation was different inasmuch as the license for life performance of specific pieces of music was obtained in fact directly from the authors, while the Romanian legislation required license from collective management organisation, whilst the French court needed to decide on a rather usual (and thus elaborated in the case law of the CJEU) situation of 'broadcasting' works.

[211] Case 338/85, *Pardini v. Ministero del commercio con l'estero* [1988] ECR 2041.

genuine dispute[212] 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[213]. 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.

### ***c)1 Option to address a preliminary reference to the CJEU***

When a national court has a question regarding the correct interpretation or application of provision(s) from the TFEU/TEU[214] or secondary EU acts[215] on which the effective resolution of the dispute before that court depends, it has the option to directly ask questions on EU law interpretation 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.[216] The accuracy of the legal and factual context is not a matter for the CJEU to determine, and it enjoys a presumption of relevance.[217] 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.[218]

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[212] Case 104/79, *Foglia v Novello* [1980] ECR 745.

[213] Case 238/81, *C.I.L.F.I.T. v. Ministry of Health* [1982] ECR 3415.

[214] After the entry into force of the Lisbon Treaty, as a general rule, national courts can refer preliminary references on provisions and matters from both the TFEU and TEU. However, the Lisbon Treaty has maintained certain exceptions in relation to the CFSP and ex-third pillar PCCJM. By virtue of the first paragraph of Article 275 TFEU, the Court of Justice does not have jurisdiction with respect to the provisions relating to CFSP, nor with respect to acts adopted on the basis of those provisions. However, the Court does have jurisdiction to monitor compliance with Article 40 TEU and to rule on appeals, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union (Art. 275 (2) TFEU). Furthermore, the Court of Justice does not have jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (Art. 276 TFEU, see former Art. 35 TEU).

[215] The term "acts" covers: regulation, directives, decisions and the international agreements concluded by the European Union (Case C-192/89, *Sevince* [1990] ECR I-3461, paras. 8-10).

[216] 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*, [1994] ECR I-5727, para 8; Case C-186/90, *Durighello v. INP*, [1991] ECR I-5773, para 8. In a case referred by an Italian court, Case C-386/92, *Monin Automobiles* (No. 1) [1993] ECR I-2049, 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 national court 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* [1996] ECR I-1385, 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.

[217] Case 166/84, *Thomasdunger v.Oberfinanzdirektion Frankfurt am Rhein* [1985] ECR 3001.

[218] See, for example, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, para. 22; Case C-420/12 *Pohotovost' s. r. o. v Miroslav Vašuta*, judgment of 27.02.2014, nyr, 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)* [1994] ECR I-4863) 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)* [1991] ECR I-36950). 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*

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.[219] However, indicative of the cooperation nature of the preliminary reference technique, is the fact that in certain circumstances, even if the preliminary questions were not correctly formulated by the national courts, the CJEU reformulated them to affirm its competence and thus offer an answer which the national court could use in the facts before it.[220] 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 point of EU law of her own motion.[221]

### ***c)2 Obligation (Art. 267(3) TFEU)***

If the domestic court is a last resort court, against whose decision there is no possibility to appeal, the power to refer a question to the CJEU turns into a duty, unless the EU provision is manifestly clear or has already been clarified by a ruling of the CJEU within a previous ruling.[222] For instance, the Romanian High Court of Cassation and Justice justified its referral of preliminary questions in the *Circul Globus case*[223] as necessary, being a court of last resort. The right to fair trial, in particular, can become relevant. In some national legal orders (e.g. Germany, Czech Republic, and Slovakia), the ability and necessity to refer preliminary questions to the CJEU is an aspect of the 'right to a lawful judge'. The Spanish Constitutional Tribunal concluded in *Metropole*[224] that a failure to refer when a referral is obligatory amounts to a violation of the right to a fair trial under the Spanish Constitution. The ECtHR has confirmed that an unreasoned refusal to raise the preliminary question under Art. 267(3) amounts to a breach of Art. 6 ECHR.[225] In addition, violating the duty to refer may also give rise to the liability of the Member State concerned for any damages that resulted to individual plaintiffs (*Köbler*[226]).

This does not mean that all national apical courts have been equally keen to refer to the CJEU. This is especially true of constitutional courts. In some cases, national constitutional courts have

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[1996] ECR I-161) 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.

[219] Order in Case C-307/95, *Max Mara* [1995] ECR I-5083.

[220] 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-402/2009, *Tatu v. Statul roman* [2011] ECR I-2711, para.30. Another situation of reformulation is the alteration of the preliminary questions dictated by reasons of offering a helpful answer to the national court, see Joined Cases C-171/94 and C-172/94, *Mercks and Neuhuys v. Ford Motors* [1996] ECR I-1253, 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.

[221] Case 126/80, *Salonia* [1981] ECR 1563, para. 5-10; Case 283/81, *CILFIT* [1982] ECR 3415, para. 9.

[222] See Joined Cases 28 to 30/62, *Da Costa v. Nederlandse Belastingadministratie* [1963] ECR 31 and Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

[223] See JUDCOOP Handbook on Judicial Interaction in the field of freedom of expression, case note sheet no.10.

[224] Case commented in JUDCOOP Handbook on Judicial Interaction in the field of the right to a fair trial, pp.100ff.

[225] ECtHR: *Dhahbi v Italy*, App. No. 17120/09.

[226] Case C-224/01, *Köbler* [2003] ECR I-10239.

abstained from direct dialogue with the CJEU until very recently, when the 'mood for dialogue'[227] reverberated also for those that had proved more reticent.[228]

### ***c)3 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 in the case of a person in custody. Currently there are two types of procedures that allow the CJEU to deliver its preliminary ruling more quickly than with the normal procedure for preliminary ruling[229]: the expedited and the urgent preliminary ruling procedures. According to the new CJEU Rules of Procedure, Article 105(1), a national court may ask of its own motion, or the President may decide to apply, the expedited procedure where the nature of the case requires so. The expedite 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 decision of approval of the expedite procedure, however the total duration of the procedure is shorter, namely between three and six months.[230]

Article 23a first paragraph of the CJEU Statute and Article 107(1) of the CJEU Rules of Procedure provide for the urgent preliminary ruling procedure for questions in the area covered by Title V of Part Three of the TFEU. 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

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[227] Metaphor used by G. Martinico, "Preliminary reference and constitutional courts: Are you in the mood for dialogue?", Tilburg Institute of Comparative and Transnational Law Working Paper, No. 2009/10.

[228] See the German Federal Constitutional Court with the OMT preliminary reference in 2014, see Press release no. 9/2014 of 7 February 2014, judgment available at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg14-009en.html ; or the first-ever referral by the French Constitutional Council in Jeremy F, see *Close Up 10*; Spanish Constitutional Court, Order 86/2011, 9 June 2011 in the *Melloni* case; for a commentary, see L. Arroyo, "On the first reference for a preliminary ruling made by the Spanish constitutional court: Bases, content and consequences", InDret Law Journal, Vol. 4, 2011 (Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954562; Last accessed on November 20, 2012). For a historical analysis of the reluctance of the Spanish court to admit that it is competent to analyze the validity relationship between national law and EU law provisions, as well as to send preliminary ruling questions, see A. Herrera Garcia, "Tribunal Constitucional y Unión Europea. El caso español a propósito de la sentencia 58/2004 y de la fase actual de la integración constitucional de Europa", (2007) Cuestiones Constitucionales, No. 16, 405-433; see also the preliminary reference sent in 2013 by the Italian Constitutional Court to the CJEU in an *incidenter* proceeding concerning the constitutionality of laws (Const. Court decision no. 207/2013) http://www.giurcost.org/decisioni/2013/0207o-13.html

[229] It has been noted that the average time taken by the CJEU to solve references for a preliminary ruling is decreasing by every year. 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.

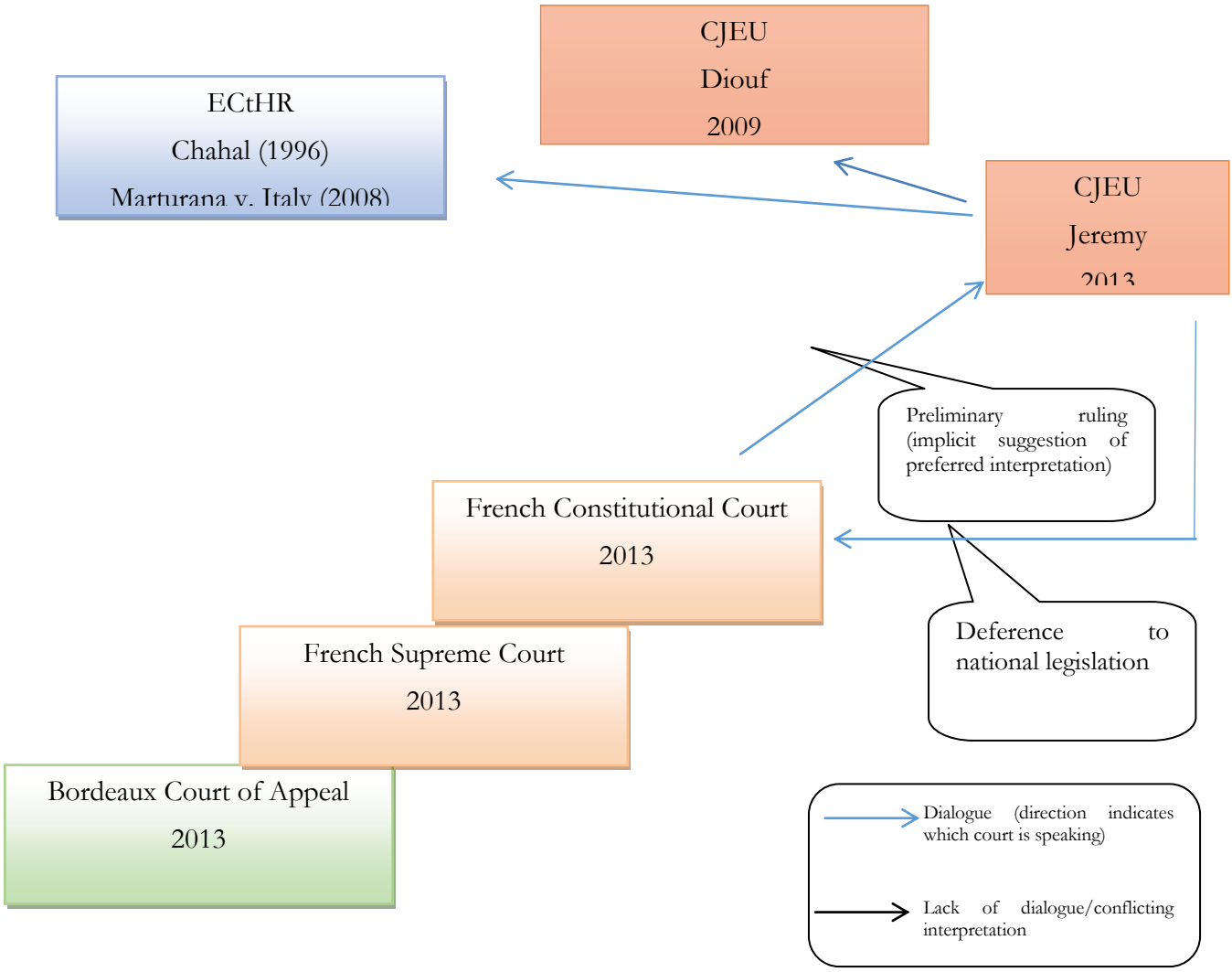
[230] Sometimes the procedure was concluded sooner than 3 months, see Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667 (2 months and 6 days).

***CLOSE UP 4: Jeremy F against Prime Minister – use of the proportionality in the field of the right to a fair trial***

***Type of Interaction: Vertical Direct (French Conseil Constitutionnel – CJEU)***

***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***



The applicant is a UK citizen who fled to France after being charged by 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 that would prohibit British officials from adding charges not included on the EAW. British authorities asked the appeal court for permission to prosecute for another offence, i.e. unlawful sexual conduct with a female minor, which was not included in the first EAW.

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 used Art. 267 TFEU, by way of the urgent preliminary reference. The FCC essentially asked whether the EAW FD precludes domestic provisions that do not provide for the possibility of an appeal with suspending effect against a decision to execute a European arrest warrant or a decision giving consent to an extension of the warrant. It seems that the FCC formulated the preliminary questions in a way that shows its preference for an interpretation whereby such a right of appeal should be recognized.

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[231] 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*[232] 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*[233] 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.

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.

A. **Conflict:** Conformity of the French legislation implementing the EAW FD, which did not provide for an appeal with suspensive effect against the 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.

**B. Judicial Interaction Technique**: In solving the aforementioned conflict, the French *Conseil Constitutionnel* (FCC) addressed its **first preliminary reference** to the CJEU. The **urgent**

[231] ECtHR: *Chahal v UK*, Application No: 22414/93.

[232] ECtHR: *Marturana v Italy*, Application No. 63154/00.

[233] Case C-69/10, *Samba Diouf* [2011] ECR I-7151.

**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 f**rom **t**he 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: 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 to set up a second level of jurisdiction for the examination of the lawfulness of detention[234] and based on Art. 51 EU Charter, neither will Art. 47 EU Charter required such an obligation.

CJEU showed respect of the national constitutional traditions by **recognising the possibility of the Member States to secure 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.

C. **Result**: 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..

D. **Alternative**: none

### ***c)4 Object and objectives of the preliminary reference:***

This procedure has two main objectives – ensuring the coherence of the EU legal order and the respect of the fundamental principles of EU law (primacy, and direct effect, etc.). 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.[235] As foreshadowed above, the CJEU is entitled only to decide on the interpretation and validity of EU law but, often, the ruling of the CJEU has *de facto* the straightforward effects 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 to EU law obligations, or determine instead the disapplication of the latter. One example where these tools are relevant is the use of the necessity and proportionality tests: the CJEU can shape them *ad hoc*, to provide guidance to the referring court with respect to specific factual and legal background of the main proceedings.

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[234] However, it has to be mentioned that the CJEU omitted a relevant part of the ECtHR jurisprudence on the interpretation and application of Art. 5(4) ECHR, whereby the Court held that in cases where the grounds justifying the person's deprivation of liberty are susceptible to change with the passage of time, the possibility of recourse to a body satisfying the requirements of Art. 5 § 4 of the Convention is required (*Kafkaris v. Cyprus* (no. 2) (dec.)).

[235] See *Da Costa* and *CILFIT* cit..

A condition for the admissibility of a preliminary question is the relevance of EU law for the resolution of the main proceedings. In other words, the doubt regarding the validity or interpretation of EU law must be decisive for the national court to decide the controversy – this also happens when the doubt regarding the exact scope of application of EU law is such as to raise a doubt whether it applies at all in the main proceedings. Whereas the application of EU law to the facts of a case can be determined objectively, national procedural rules can differ as to whether a national judge can consider issues of law that are not invoked by the parties, including those relating to EU law.

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.[236] In the *van der Weerd* case[237] 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.*"[238] 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.*"[239]

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 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.[240]

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*[241] 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 1 above.

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[236] Case C-72/95 *Aannemersbedriff PL Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

[237] C-222/05–225/05 *van der Weerd* [2007] ECR I-4233.

[238] Ibid., para. 41.

[239] Case C-312/93 *Peterbroeck* [1995] ECR I-454599, para. 19.

[240] Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel*, 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* [2007] ECR I-4233, at paras. 19-22.

[241] C-126/97, *Eco Swiss China Time v. Benetton* [1999] ECR I-3055.

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.[242] It thus spelled out the domestic courts' power first[243] and later the obligation[244] to examine whether a given term of a contract is unfair. If the national court considers a contractual term unfair, it shall not apply irrespective of whether the "unfairness" was raised or not by one of the parties in first or second instance proceedings,[245] unless the consumer insists on its application.[246]

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[247] 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*[248]). As a result, the parties that want 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, there is no requirement that the application of fundamental rights is specifically included in the parties' pleas. The judge can autonomously consider their application, since it might be relevant to a genuine question on the validity or 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.

Among the several aspects of interests of the preliminary ruling mechanism, also in terms of the interplay between national courts and the CJEU, the following section analyses three selected topics: i. *The power of national courts to raise the preliminary question and its procedural limits; ii. The obligation of national courts to raise the preliminary question; iii. The Consequences/outcomes of the preliminary rulings.*

### ***i. Power of national courts to raise preliminary question and its procedural limits;***

National judges may refer preliminary questions to the CJEU whenever they have doubts on a point of EU law (Article 267 TFEU). Therefore, judges of first instance and lower courts can use this

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[242] 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* [2000] ECR I-4941; C-473/00 *Cofidis SA v Jean-Luis Fredout* [2002] ECR I-1085; Case C 488/11, *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV*, judgment 30 May 2013; Case C-397/11 *Erika Jőrös v Aegon Magyarország Hitel Zrt,* 30 May 2013.

[243] Joined Cases 240/98 to 244/98 *Oceano*, cit.

[244] Case C-168/05 *Elisa Maria Mostaza Claro v Centro Movil Milenium SL* [2006] ECR I-10421. Case C-243/08 *Pannon GSM Zrt. V. Erzsebet Sustikne Gyofri* [2009] ECR I-04713.

[245] Case C 488/11 *Dirk Frederik Asbeek Brusse, Katarina de Man Garabito v Jahani BV*, judgment 30 May 2013.

[246] See, Case C-243/08 *Pannon,* op. cit.

[247] 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.

[248] Case C-390/12, *Pfleger*, nyr, judgment of 14 November 2013.

mechanism to challenge the case-law of their supreme and constitutional courts, seeking the support of the CJEU. Once the interpretation of EU law comes with the seal of the CJEU, through a preliminary ruling, the national judge has strong arguments to decide accordingly, for instance setting aside domestic measures, or subjecting them to a specific consistent interpretation. Of course, this still does not guarantee that the decision will not be reversed on appeal or that the constitutional tribunal will not take a different view on the same act, but such decisions would likely violate EU law.

Within this section we shall consider two situations. The first of issues reflects the power of national courts to raise preliminary questions which ultimately permits them to push for a satisfactory clear answer both home and abroad. In the second one, the power to raise the preliminary ruling is accompanied by the power to refer a question of law to a national supreme court. Interestingly, the two are not excluding one another as different – EU and national law - aspects of the same issue may be analysed.

***Exerting Pressure through Preliminary References (No Matter the Obstacles)***

In the *Close Up 5* on the use of the preliminary reference in the field of the right to non-discrimination, it emerged that ordinary judges are encouraged to challenge domestic provisions, regardless of the failure of the legislator to implement the CJEU's relevant judgments on discriminatory provisions, and of the domestic highest court confirmation of the legality of these national legal provisions and against the further procedural impediments the ordinary courts may encounter.

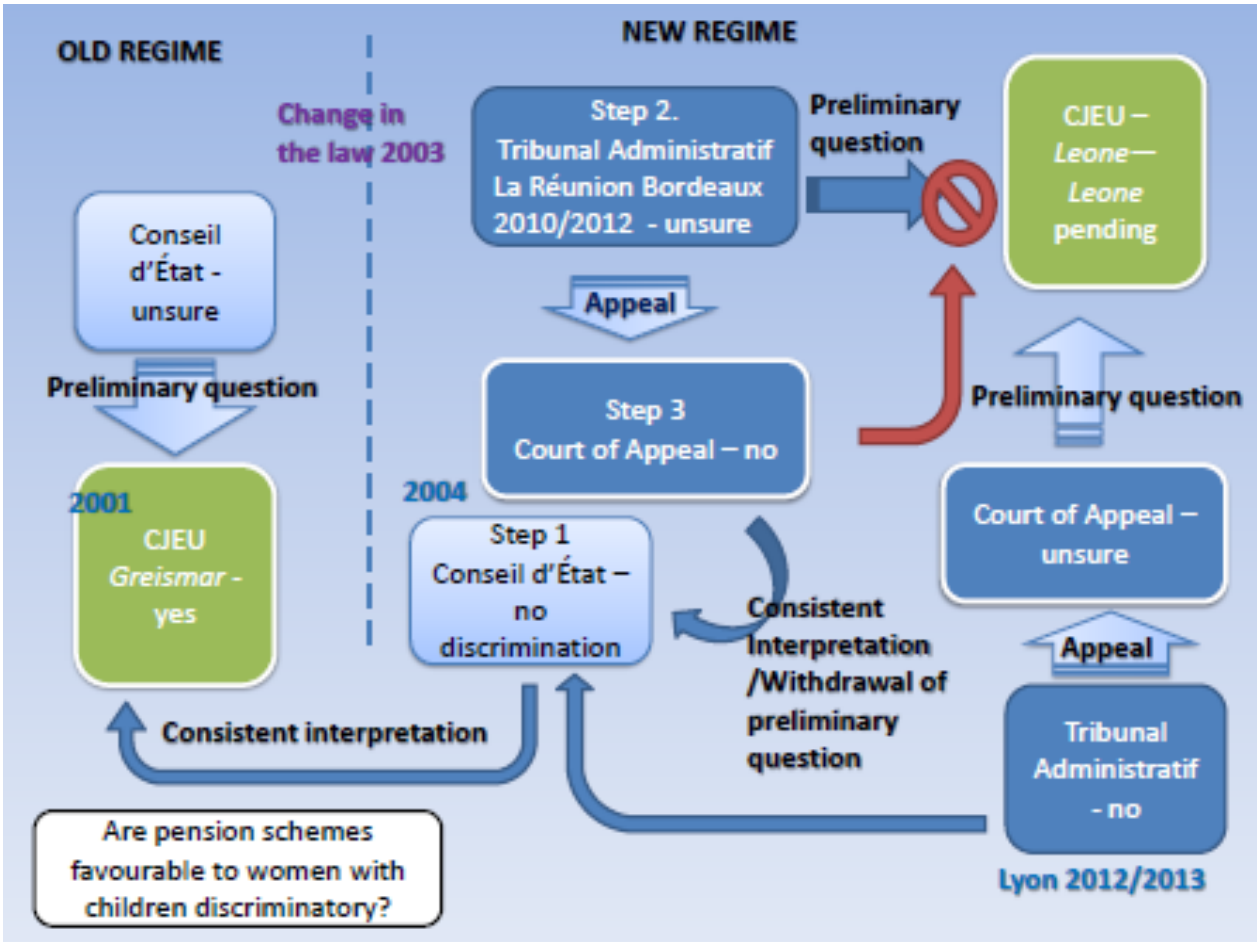
***CLOSE UP 5: Griesmar and its follow up – use of preliminary reference in the field of the principle of non-discrimination on grounds of sex***

***Type of Interaction: Vertical (domestic courts – CJEU), Horizontal Internal***

***Preferential Conditions of Pensions' Schemes for Women (Non-Discrimination)***

***Case Griesmar, C-366/99, Judgment of 29 November 2001***

***Case C-173/13 Leone and Leone, Opinion of AG Niila Jääskinen of 27 February 2014***




In *Griesmar*,[249] the French Conseil d'État had lodged a preliminary question on the compatibility with EU law of a pension scheme applying to civil servants, that granted a preferential treatment to women with children. This measure appeared at odds with the principle of equal pay (now Art. 157 TFEU). The CJEU considered that pension benefits of the kind at stake qualify as 'pay' on account

249 C-366/99, *Griesmar* [2001] ECR I-9383.

of their relation to length of service and salary, and therefore must comply with the principle of equal pay. Moreover, it observed that the measure did not aim to compensate the occupational disadvantages due to the maternal condition but those arising as a result of bringing up children (which concern male and female workers alike). It therefore declared the measure in breach of EU law for direct (*de iure*) discrimination.

The French legislator intervened to amend the discriminatory measure, and bring it in line with the CJEU judgment, by way of extending the service bonus to men (Law no. 2003/775). This scheme was challenged domestically for indirect discrimination, as it was alleged that the requisite conditions to enjoy such benefits, *de facto*, impacted disproportionately on men, keeping in place the original discrimination (namely, there had to be interruption of service of at least two months for each child to be taken into account for granting the bonus). The Conseil d'État ruled in 2004 (*D'Amato*) that no indirect discrimination was in place.[250] Even if it acknowledged that the bonus would benefit mainly women, it noted that the minimum length of interruption was based on objective criteria, aimed at ensuring that the pension benefit would be granted only to those who had suffered an actual career disadvantage due to the investment in time and efforts necessary to raise a new child.[251]

When an ordinary judge tried to lodge a preliminary question to test the correctness of this decision,[252] the Administrative Court of Appeal of Bordeaux annulled the order of reference and remanded the case to the Tribunal,[253] on the basis of the precedent of the Conseil d'État, which was considered to have clarified the legal issue, and the proceedings before the CJEU were discontinued (Case C-572/10 *Amédée*, Order of 28 March 2012). The Court of Appeal conceded that the 2004 judgment had no formal force of *res iudicata*, but noted that it had already solved precisely the question referred to the CJEU by the ordinary judge (the compatibility between the new statute and EU law), and therefore it was fair to believe that the preliminary question was purposeless.[254] Despite of this statement, requests for preliminary references to be sent to the CJEU continued to be raised, and ultimately the Administrative Court of Appeal of Lyon decided to raise a preliminary question before the CJEU.[255]

A. **Conflict:** the interpretation of the notion of 'pay' in the context of civil service, and the assessment of the French national pension scheme for civil servants which first expressly established a preferential treatment for maternity purposes, thus establishing a direct discriminatory conduct, and after amendment it indirectly favoured women against men, and was allegedly argued to establish an indirectly discriminatory conduct against men. In addition to the substantial conflict on the establishment of direct and indirect discrimination based on sex, the rejection of the requests for preliminary reference by hierarchically superior courts also constituted a conflict of

250 France, Conseil d'État, 1ère et 6ème sous-sections réunies, 29 décembre 2004, n. 265097, arrêt *D'Amato*.

251 From the judgment: 'le décret, qui fixe la durée d'interruption du service à deux mois au moins et se réfère aux positions statutaires permettant une telle interruption, repose sur des critères objectifs en rapport avec les buts du b) de l'article L. 12; qu'ainsi, alors même que ce dispositif bénéficierait en fait principalement aux fonctionnaires de sexe féminin, le décret n'a pas méconnu les stipulations précitées de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.'

252 Tribunal Administratif La Réunion 8 décembre 2010 *Amédée*.

253 Cour administrative d'appel de Bordeaux, 29 décembre 2011, no. 11BX00446.

254 From the judgment : « *[…] il résulte de l'instruction que le Conseil d'Etat a jugé […] que l'article 48 de la loi du 21 août 2003 et l'article 6 du décret du 26 décembre 2003 […] étaient compatibles avec le principe d'égalité des rémunérations entre travailleurs des deux sexes, posé par […] l'article 157 du traité de l'Union européenne, l'article 6 de l'accord annexé au protocole 14 dudit traité et l'article 4 de la directive 79/7 (CEE) ; […] il s'ensuit que les questions renvoyées par le tribunal administratif de Saint-Denis de la Réunion à la Cour de Justice de l'Union européenne ne présentent pas de caractère utile à la solution du litige.* »

255 C-173/13, *Leone-Leone,* Opinion of Advocate General Niila Jääskinena of 27 February 2014.

judicial interpretation among the French courts. The Conseil d'État in *D'Amato* based its reasoning on the pronouncement of the CJEU in *Griesmar*, therefore making sure that its interpretation of domestic law was in line with EU obligations. The subsequent challenges to D'Amato are not founded on an alleged disregard by the Conseil d'État of EU law, but on different interpretation thereof. It is precisely on the basis of this difference that the lower courts find it difficult to submit the issue to the CJEU through a preliminary reference, and their requests were rejected by the appeal courts.

A. **Judicial Interaction Techniques:** In the first string of cases (the Griesmar type of discrimination) the Conseil d'etat referred preliminary questions to the CJEU for the purpose of clarifying whether pension scheme fall under the scope of the notion of "pay" as set out in Art. 157 TFEU, and secondly for the purpose of establishing whether a national pension scheme as the French one which "[…] *used a single criterion for granting the credit at issue in the main proceedings, namely that relating to the bringing-up of the children and that, in the case of legitimate, natural or adopted children, it simply took it for granted that they were brought up at the home of their mother*" (para.55) was directly discriminating women against men. Following the CJEU preliminary ruling the challenged law was amended in 2003. The French Conseil d'etat applying the consistent interpretation technique, found the new legislative provision in line with the guidelines of the CJEU and did not consider necessary to send subsequent preliminary questions. Application of EU principles in ordinary courts can be hampered by domestic case-law and hierarchical straightjackets. The judgment of the Conseil d'État, as a matter of fact, is **screening judicial cooperation**, as it keeps the CJEU from confirming or refuting its interpretation of indirect discrimination. The attempt at circumventing the Conseil d'État through preliminary references has been unsuccessful with the reference sent by the Court of Appeal of Lyon in the *Leone Leone* case.

B. **Alternatives:** Regardless of whether the Court of Appeal is right in deeming the preliminary question ill-grounded, there might be ways to obtain the CJEU's word on the matter:

   - **further references might be raised**, which stress the CJEU's interpretation of indirect discrimination, and how it might diverge from the one adopted by the Conseil d'État; it is apposite to recall that the CJEU has reasserted (in *Cartesio*) that national courts enjoy an unfettered power to raise a preliminary question, irrespective of the domestic system of judicial review entitling a higher court to vacate the reference and order the remand and continuation of the main proceedings,[256] as happened in the case of the Court of Appeal's judgment. Eventually, this is precisely what happened with a similar case tried in Lyon: after the administrative tribunal rejected their claim,[257] the plaintiffs impugned the decision before the Administrative Court of Appeal, which decided to raise a preliminary question before the CJEU;[258]
   - the obligation under Art. 267(3) TFUE could be enforced, holding the Conseil d'État to its **obligation to raise a preliminary question**, under penalty of a claim for civil

256 See Case C-210/06, *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641, para. 98: "*Article 234 EC is to be interpreted as meaning that the jurisdiction conferred […] on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.*"

257 See Tribunal administratif de Lyon, Judgment no. 0905603 of 17 July 2012.

258 See Cour Administrative d'Appel De Lyon, Jugement no. 12LY02596. The case is currently pending before the CJEU as C-173/13, *Leone and Leone.*

liability under the *Köbler*[259] doctrine and, possibly, the prospect that a claim is brought to Strasbourg for breach of the right of fair trial (Art. 6 ECHR).

Other alternatives for judicial interaction techniques is the disapplication of national provision method with the consequence that the national judge can set aside the national provision and give redress to the individual, without waiting for the legislator to amend, change, fill the gaps as identified by the CJEU. In case of limitation placed by the national procedural for first instance courts that would need to follow the judgments of the superior instances, the *Cartesio*, *Melki* and *Simmenthal* doctrine give the national judge the power to set aside national legislation contrary to EU law even if that would mean disregard the superior instances' judgments.

E. **Result**: The result of the *Griesmar* use of the preliminary reference technique was the legislative amendment of the French measures which were designed to protect women in their capacity as parents, which is a capacity which both male and female workers have and therefore it cannot find justification in EU law. The second use of the preliminary reference this time not by the Conseil d'etat but by an Administrative Court of Appeal liberated the French first and second instance courts of the interpretation of the national procedural limitation that requests for preliminary references could have been in certain circumstances been rejected by courts in appeal proceedings based on the interpretation of EU law set by the supreme court in that case. In the proceedings concerning the preliminary reference of the Court of Appeal in Lyon in case C-173/13 *Leone and Leone,* Advocat General Niila Jääskinena issued an opinion on 27 February 2014 (and had also issued an opinion in the case *Amédée* before it was discontinued in 2012). The opinion, interestingly, offers an overview of the position of the French government which emphasizes the fact that the issue had been on numerous occasions subject of judgments by Conseil d'état who did not deem it necessary to refer a question to the CJEU. In the view of the French government, it was up to the Court of Appeal in Lyon to describe circumstances which would convince of the necessity to refer to the CJEU (given the standing case law of the Conseil d'etat).

### ii. Obligation of National Courts to Raise the Preliminary Question

In the following paragraphs we will first outline a complex situation when the issue of the clarification of EU law involves multiple national courts which ultimate resort to the CJEU in an attempt to side with a specific judicial interpretation approach (ii.1), while in the following sections we will look at clear cut situations when a national court has the obligation to raise preliminary questions to the CJEU: *ii.2)* when the court at stake is a court or a tribunal against whose decisions there is no domestic judicial remedy (Art. 267(3) TFEU); and *ii.*3) when the national court believes that a legal instrument adopted by the EU is invalid and does not want to apply this legal instrument. The preliminary reference is the only possible way to obtain the invalidation of EU law, which national courts have no power to declare (*Foto Frost*[260]).

[259] Case C-224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.

[260] Case C-314/85 *Foto-Frost* [1987] ECR 4199

### *ii.1 Preliminary Reference and/or Requesting Clarification of Question of Law before a National Supreme Court*

The *Radu* and the *Melloni* cases included under this section are an illustration of the use of the preliminary reference technique in the EAW area in an attempt to obtain recognition of a higher level of protection of this fundamental right than that provided under the EU instrument[261]. The first case also offers an insight into how the power to raise the preliminary ruling can be used involving as many courts as possible in resolving an issue at stake. In *Radu* the court of appeal seeks clarification of EAW rules both at home – at the Constitutional Court, and abroad, at the CJEU. The Spanish Constitutional Court for the first time addressed a preliminary reference to the CJEU. Even though the Spanish Constitutional Court does not speak of its obligation to send a preliminary reference due to its status of a last resort court, it has to be noted that in this case it would have qualified as one such court. A. It can be resumed that in the interplay between the national courts and the CJEU, the courts have engaged in judicial interaction for the purpose of establishing the precise standard of protection of the right to a fair trial in the specific field of the EAW.

***CLOSE UP 6: Radu and Melloni – Use and outcomes of the preliminary reference in the field of the right to a fair trial***

***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***

***Fundamental rights review in case of in absentia decisions under the EAW Framework Decision in extradition proceedings***

**Radu**

The case started before the Court of Appeal of Constanța, which was requested to admit the execution of four EAWs issued by German authorities against Radu Ciprian Vasile. Mr Radu did not consent to his surrender and, in order to avoid the execution of the warrants, used two types of judicial interaction techniques, one provided by national legal sources, and another resulting from the supranational legal norms.

First, he invoked the exception of unconstitutionality of provisions of the national law implementing the EAW FD. He argued that these provisions violate Art. 23(5) of the Romanian 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 Romanian judge is extremely limited in executing the EAW, since he can assess only the form and content of the warrant. The Court of Appeal of Constanta notified the Constitutional Court and suspended the trial until the issue of constitutionality of those provisions is resolved.

The Constitutional Court[262] rejected the exception of unconstitutionality, noting that the challenge of the correctness of the judicial decision of a Member State falls to the issuing State. A contrary decision would breach the principle of mutual recognition of criminal judgments. The provisional custody following the issue of an EAW satisfies the requirements of the right to a fair trial, given that the party

[261] 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.

[262] Decision of the Romanian Constitutional Court no.1290 of 14.10.2010.

may raise one of the grounds for refusal of enforcement of the EAW. The case was returned to the Court of Appeal.

After the failure of the nationally based judicial interaction technique, Mr. Radu requested the Court of Appeal of Constanta to refer questions to CJEU on the issue of whether national courts have the right to decide whether an EAW was issued in accordance with fundamental rights and, if not, to refuse execution, even if such a cause of refusal is not provided by either the Framework Decision 2002/584, or national law implementing the FD. The Court of Appeal of Constanta upheld the request and referred six questions, which raised three main issues: firstly, whether the Charter and the ECHR form part of primary EU law, secondly, what is the relationship between Art. 47 of the ECHR and Art. 6 of the Charter on the one hand, and the provisions of the EAW FD on the other hand, and thirdly, whether the executing judicial authority can refuse to execute the EAW in the event fundamental rights violations.

The CJEU held that the Charter does not allow a refusal to execute an EAW on the basis that the person was not heard by the issuing authority. Following the preliminary ruling of the CJEU on January 2013, the Romanian referring Court of Appeal still rejected the request of surrender. For one of the warrants, the Court of Appeal based its refusal on the *ne bis in idem* principle. For the other three warrants, the Court of Appeal based its refusal on two main arguments: first, it held that the application of the EAW FD is subject to the limits set by Art. 6 TEU and by the Charter of Fundamental Rights. This requires that the judicial authority of the requested State conducts its own analysis of fundamental rights. It may, exceptionally, refuse to surrender the person in situations other than those exhaustively provided for in the Decision and the national legislation transposing it. The respect of fundamental rights was considered by the Court of Appeal as one such exceptional situation.

Secondly, if these warrants were to be executed, there would be a disproportionate interference with Mr Radu's right to liberty and the right to private and family life, since the German judicial authorities' requests were made after a period of 12 years from the date of the alleged crime, and the necessity to surrender the person was not clear. In addition, it was noted that the requested person is already detained in a prison in Romania and continuing to serve the criminal sanction there would help maintain his family relations. Therefore, the purpose of preventing the circumvention of criminal liability would be better achieved by a trial before Romanian courts.

The decision delivered by the Court of Appeal of Constanţa was appealed before the High Court of Cassation and Justice (HCCJ), which upheld the appeal filed by the Prosecutor and quashed in part the appealed criminal judgment, ordering the execution of the EAWs issued by the German authorities and the surrender of Mr Radu. The HCCJ conditioned Mr Radu's surrender: if the German judicial authorities sentence him to prison, he will be transferred to Romania for the execution of the sentence. This is a final decision under Romanian criminal procedural law.

**Melloni**

In a factually similar situation, 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.[263] Audiencia Nacional

[263] A different thread of dialogue can be followed in Italy on the same issue: the ECtHR, in *Somogy vs. Italy* (May 18, 2004), Application No. 67972/01, ruled against Italy for 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 proceeding). 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 unconstitutional Art. 175.2 of the Italian Code of criminal procedure (which provided that, in

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 guarantees that the sentenced person has an opportunity to apply for a retrial of the case and to be present at the judgement. The Constitutional Court decided to stay proceedings and make a reference for a preliminary ruling to the CJEU.[264]

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.

This was the first time in which the CJEU confronted 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 *Melloni* case, 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 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).

The resolution of the case by the Spanish Constitutional Court was delivered on 13 February 2014. It decided to revise the 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 *obiter dicta*, the Constitutional Court recalled its *controlimiti* doctrine.

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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) in so far it did not allow a fresh term to be granted in the case an appeal has been filed by the defense, as a case of consistent interpretation between ECtHR standards and constitutional principles. See Italian Constitutional Court, decision 4 December 2009, p. 317.

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

A. **Conflict:** striking a blanace between conditions of the EAW and the right to a fair trial as enshrined in the national constitutional framework.

B. **Judicial Interaction Technique**: 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 relationship between the fundamental rights guarantees and the apparently exhaustive EAW refusal grounds. Whilst in *Radu* the issue is addressed in a more abstract manner demanding 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 higher level of protection of fair trial than that guaranteed by the EU law. In the latter case, **preliminary reference** is used as a way 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 into violations of another; 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 whatever the right may guarantee in the domestic system of the executing state) would be possible. *T*he 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** so as to strike a balance between the fundamental right to fair trial and the principle of mutual recognition. The principle of effectiveness in connection with proportionality also helped to restore mutual recognition by amending one odd-one-out standard prevailing in Spain for the *in absentia* trials.

   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.

   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 albeit problematic for other MSs), in *Radu* the referring court displeased 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 interpretation in conformity with EU fundamental rights leads to a **technique between disapplication and consistent interpretation**, given that the exhaustive nature of the national refusal grounds is overridden.

C. **Result:** 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 of the national practice with 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 national highest 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 in detriment of the coherence one, 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.[265]

**D. Alternatives**: The use of the preliminary reference in both the *Melloni* and *Radu* cases were good choices for the objective of trying to influence the interpretation of the CJEU towards an approach that will preserve the national highest standards of protection of a fundamental right and making the Court aware of the problems existing at the national level with the implementation of the EAW FD. In the *Radu* case, it has to be noted that the High Court of Cassation and Justice did not side with the interpretation chosen by the referring court and opted for a strict interpretation and application of the CJEU judgments requiring the admission of all EAWs issued by the foreign national court.

### *ii.2 The subject matter refers to the issue of validity of an EU act*

National judges are free to refer a question to the CJEU whenever they interpret and apply EU law. Moreover, a national procedural rule[266] cannot limit the wide discretion of national courts to make a reference to the Court of Justice for a preliminary ruling where they have doubts as to the interpretation of European Union law.[267] **Importantly, internal procedural arrangements and hierarchical set-ups cannot impede or hinder the power of domestic courts to use the preliminary reference procedure.[268]** National courts must always be able to submit a request for a preliminary ruling to the Court of Justice, in spite of judgments from superior courts or the Constitutional Court prohibiting the referral.

When they wish not to apply EU law, instead, the referral to the CJEU under Art. 267 TFEU is the only option available. This limitation is a logical consequence of the rule according to which it is only the CJEU that can determine invalidity and unlawfulness of an EU norm.[269]

### *ii.3 There is no domestic judicial remedy against the decisions of a national court* (Art. 267(3) TFEU)

A court of last resort is a court against whose decision there is no judicial remedy under national law. Importantly, the possibility of challenging a judgment before the constitutional court of a Member State does not qualify as remedy under Art. 267, if constitutionality review is limited to an examination

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[265] It seems that the referring court sided with the interpretation given by the European Commission notes 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*." (para. 60 of the AG Opinion)

[266] So far, the CJEU has considered the following national procedural rules limiting the power of national court to refer preliminary questions to the CJEU as not conform to Art. 267 TFEU: binding judgments of the Constitutional Court; prohibition of raising new legal grounds *ex officio* in last resort proceedings; annulment of decision to refer by a superior court. Case C-210/06 *Cartesio* [2008] ECR I-9641; Case C-173/09 *Elchinov* [2010] ECR I-8889; C-416/10 *Križan and Others*, judgment of 15.01.2013.

[267] *Elchinov*, para. 25, and Case C-396/09 *Interedil* [2011] ECR I-9915, para. 35.

[268] Issues and structures of national constitutional law should not interfere with safeguarding EU law, see Case C-348/89, *Mecanarte*.

[269] Case C-314/85 *Foto-Frost* [1987] E.C.R. 4199, para. 17.

of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement.[270]

A court of last resort's failure to refer a question to the CJEU may trigger the liability of the Member State.[271] State liability for acts of the judiciary is accepted under the system of State responsibility established in *Factortame* and is coherent to the international law principle according to which the States, when performing international obligations, act as a single entity. The *Köbler* judgment applies the conditions for liability specified in *Factortame*[272]:

1) The infringed norm of EU law must be intended to confer rights on individuals;
2) The breach of this norm must be sufficiently serious (the test elaborated by the CJEU refers to a Member State that has manifestly and gravely disregarded the limits of its discretion);
3) There must be a direct causal link between the breach and damage sustained.

The application of *Factortame* principles to acts of the judiciary was necessary in the light of the requirements of the effectiveness of EU law and protection of individuals' rights. Yet, the CJEU did elaborate the specific conditions applicable in this particular context:

1) It adopted an even higher threshold of gravity of the breach. Even if the 'sufficiently serious' condition is already a narrow one to meet, the CJEU determined that liability could be attributable to a court only if the it "has manifestly infringed the applicable law";
2) Additionally, the focus is placed on whether a supreme court (as a court of last resort) has complied with its obligation to refer the preliminary question to the CJEU in line with Article 267 TFEU. Because the contours of the obligation depend on the clarity of the EU norm in question (see *CILFIT*), failure to refer can be excused (no liability arises), if there is no serious judicial misconduct.

Failure to address a preliminary reference to the CJEU by a last resort court can result also in a finding of breach of Art. 6 ECHR by the ECtHR. In a recent judgment,[273] the Italian Court of Cassation was found in breach of Art. 6 (1) ECHR due to the absence of motivation for a refusal to address a preliminary reference to the CJEU at the request of the parties.

In other cases, a failure to raise a preliminary question regarding the validity of an act of EU law (or a domestic act implementing EU law) might be such as to rebut the presumption of equivalent protection that the ECtHR routinely grants to the EU legal system as a whole. In other words, if the refusal to raise a preliminary question has the effect of preventing the CJEU from reviewing the compatibility between an act of EU law and fundamental rights, the ECtHR will suspend its deferential approach and uphold its jurisdiction to review the impugned act under the Convention. As a result, the failure of a tribunal of last instance to discharge the obligation under Art. 267(3) TFEU and raise a preliminary question regarding the compatibility between EU law and the Charter might be insufficient to engage the State liability for compensation under EU law (see above), but might in turn expose the State's liability for breach of the substantive rights of the Convention. This was precisely the case in the recent *Michaud* judgment of the ECtHR.[274] The Strasbourg Court lifted the *Bosphorous* presumption of

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[270] C-416/10 *Križan and Others*, Judgment of 15.01.2013, para. 72.

[271] Case 244/01, *Köbler v Austria*, [2004] ECR 1-10239; C-173/03, Judgment of 13/06/2006, *Traghetti del Mediterraneo* [2006] ECR I-5177.

[272] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

[273] ECtHR: *Dhahbi v Italy*, App. 17120/09, Judgment of 8 April 2014.

[274] ECtHR: *Michaud v France*, App. 12323/11, Judgment of 6 December 2012.

equivalent protection due to the refusal of the Conseil d'État to raise a preliminary question regarding the compatibility of a Directive (and the implementing legislation) with the Charter.[275] Quite apart from the issue of State liability for breach of EU law, this refusal determined the ECtHR's acceptance of its jurisdiction to review the compatibility of the impugned measures with the relevant standard of the Convention.[276]

When reading *Close Up 7*, it must be borne in mind that the choice of the Supreme Court to raise a preliminary question is dictated by a range of concerns: the need to seek clarification regarding the interpretation and validity of EU law, but also the risk of incurring State liability and breach of Art. 6 ECHR for failure to comply with Art. 267(3) TFEU. In the fields of fundamental rights, the failure might even entail the direct responsibility of the State under the other standards of protection of the Convention, because it impairs the *Bosphorous* presumption.

***CLOSE UP 7: Satamedia - Preliminary Reference v Disapplication in the Context of Conflict between Freedom of Expression and Personal Data Protection***

***Type of Interaction: Vertical (Finnish Supreme Court – CJEU - ECtHR)***

In 2008, the CJEU delivered its decision following a preliminary reference addressed by the Finnish Supreme Administrative Court on the interpretation of Article 9 of the EU Directive on Data protection (95/46/EC),[277] which enshrines a derogation for journalistic purposes.

The case concerned two media companies - Satakunnan Markkinapörssi Oy ('Satakunnan') and Satamedia Oy ('Satamedia') - which had reused income tax information of Finnish citizens contained in a public register. The register included information in the public domain to which any person may request access under the Finnish law on the public disclosure and confidentiality of tax information.[278] The first company, Satakaunnan, had published for several years a newspaper where extracts from the data on tax incomes of Finnish citizens were published. Satakaunnan then transferred this data onto CD-ROMs which it gave to Satamedia, an affiliate company. Via agreement with a mobile phone company, the companies set up a service for Satamedia whereby mobile telephone users could receive text-messages with requested extracts of the published information for approximately €2 per request.[279] Both the newspaper and the SMS service, however, allowed personal data to be removed on request.[280]

In 2003 the Finnish Data Protection Ombudsman issued a notice under Finnish data protection law requiring Satakunnan and Satamedia to cease the data processing activity. However, the companies sought

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[275] See ibid., para. 115: "*The Court is therefore obliged to note that because of the decision of the Conseil d'Etat not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the Conseil d'Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply*."

[276] Namely, Art. 8 ECHR, see ibid., para. 116.

[277] Case C-73/07, *Satamedia* (2008).

[278] See Law on the public disclosure and confidentiality of tax information (*Laki verotustietojen julkisuudesta ja salassapidosta*, no. 1346 of 30 December 1999.

[279] *Satamedia*, cit., para. 29.

[280] *Satamedia*, cit., para. 27.

to exclude themselves from the order on the basis inter alia that their activities were exclusively for journalistic purposes.[281] The arguments of the defendants were successful before the Finnish Data Protection Board and, subsequently before the Administrative Court of Helsinki.

However, in the further appeal to the Finnish Supreme Administrative Court, the latter acceded to the Ombudsman's request to address a preliminary reference to the CJEU. It sought, inter alia, a clarification of the meaning of the expression 'journalistic purposes' contained in Article 9 of the Data Protection Directive. As provided also in the recitals of the Directive, Article 9 allows the Member States to limit the application of the Directive's obligations on controllers of personal data where the processing is solely for journalistic purposes, and where necessary to reconcile individual freedoms with the right to receive and impart information under Article 10 of ECHR.[282]

The CJEU did not give a concrete solution to the question. However it provided a limited set of elements on the basis of which one should check whether the activity carried out by the two companies were falling into the category of 'journalistic purposes'. Thus, it was in charge of the Finnish Court to verify whether the test was satisfied, by having regard to the fact of the case.

The balancing exercise carried out by the CJEU revolved around the right of privacy and freedom of expression, taking into account that derogations to the data protection rules based on freedom of expression are allowed only when strictly necessary. Although the analysis of the CJEU was based on the narrow construction applicable to derogations, it ended up in a broad interpretation of the concept of journalism, as Article 9's exemptions and derogations can apply not only to media organisations but to every person engaged in journalism.[283] This was also supported by the fact that the dissemination of information is no more strictly linked to the type of medium used to transmit such data. Moreover, also commercial justification can be at the basis of professional journalistic activity. The test of the CJEU, then, resulted in the fact that the activities in question are to be considered as being "solely for journalistic purposes" within Article 9, Directive 95/46/EC "*if the sole object of those activities is the disclosure to the public of information, opinions or ideas*" leaving completely to the national courts to verify whether this is the case. [284]

The Finnish Supreme Administrative Court decision was delivered on 23rd September 2009 (KHO:2009:82). The Court sent the case back to the Data Protection Board, obligating the Board to send a refusal to Satamedia on their continued publishing of the data. The refusal covered both the publications and the SMS service. The Court stated in its judgement that Article 2.4 of the Finnish Personal Data Act is not in line with the way in which the CJEU has interpreted the scope of application of the Directive.[285]

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281 Finnish data protection law entirely exempted both types of processing from compliance with substantive DP provisions. See Personal Data Act, s2(5) (523/1999) (Finland).

282 *See* Recital 37, Directive.

283 Ibid. at para. 58.

284 Ibid. at para. 62.

285 Article 2 of the Finnish Data Protection Act on the scope of application provides that

"*(1) The provisions of this Act apply to the processing of personal data, unless otherwise provided elsewhere in the law.*

*(2) This Act applies to the automatic processing of personal data. It applies also to other processing of personal data where the data constitute or are intended to constitute a personal data file or a part thereof.*

*(3) This Act does not apply to the processing of personal data by a private individual for purely personal purposes or for comparable ordinary and private purposes.*

*(4) This Act does not apply to personal data files containing, solely and in unaltered form, data that have been published by the media.*

*(5) Unless otherwise provided in section 17, only sections 1—4, 32, 39(3), 40(1) and (3), 42, 44(2), 45—47, 48(2), 50, and 51 of this Act apply, where appropriate, to the processing of personal data for purposes of journalism or artistic or literary expression.*"

The Court reached its resolution through two considerations: the balance between freedom of speech, and the protection of private life. The Court pointed out that the balance requires that, for the part of freedom of speech, information provided to the audience must be important for the society and not only serve curiosity. The Finnish Court looked at the decision of the CJEU, and it also took into consideration the previous jurisprudence of the European Court of Human Rights, particularly *Caroline von Hannover v Germany* (so called Hannover No. 1).[286] This, according to the Supreme Administrative Court, requires greater attention to the protection of private life in light of the capacity of new communication technologies to maintain and reproduce personal information. This was based on the balance between privacy versus freedom of expression referring to the arguments in the *von Hannover* case, in particular the fact that the general interest nature of the discussion with greater restriction on freedom of expression where intended only "to satisfy a readership of curiosity."[287]

Turning to the text-message service, the Finnish Court went on with the balancing exercise, and held that since the processing of data was not directed to the discussion of a social interest necessary in a democratic society, then it could not qualify as processing for journalistic purposes under the Data Protection Act. The Supreme Administrative Court applied directly the proportionality test under Article 8 ECHR to determine the applicability of the derogation in this specific instance. The choice of the Finish Supreme Administrative Court to balance the two fundamental rights at issue by ensuring consistent interpretation with both the CJEU and the ECtHR standards was latter on confirmed by the ECtHR in a case brought against Finland by the two deferent companies.[288]

A. **Conflict:** national norm v Data Protection directive containing derogation for journalistic purposes.

B. **Judicial Interaction Technique**: preliminary reference and proportionality test based on indications by the CJEU and the ECtHR. Preliminary reference permitted the establishment of direction of interpretation and the incorporation of the ECHR standard.

In deciding whether the raise a preliminary question, the Supreme Court complied with the obligation under Art. 267(3) TFEU, and at the same time shielded Finland from possible claims under the principle of State liability and under the ECHR (see discussion above in Part I).

C. **Solution:** balancing activity between freedom of expression and the right to private life; interpretation of 'journalistic purposes';

**D. Alternatives:** disapplication, which in this case would have proven insufficient.

### iii. Exemption from the obligation to raise a preliminary reference

A national court of last resort is exonerated of the obligation to address a preliminary reference on a question of EU law if the requirements stated in *CILFIT Srl v Ministry of Health* (Case 283/81) [1982] ECR 3415 and reiterated in *Junk v Kühnel* (Case C-188/03) [2005] ECR I-885 are met:

> "… the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from

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286 [2005] 40 EHRR 1. See below para. 4.3.1.

287 *See* Supreme Administrative Court Decision, KHO 2009:82 (23.09.2009) sec 5. See at http://www.kho.fi/paatokset/47977.htm (Unofficial translation).

288 See ECtHR, Tommi Tapani ANTTILA v Finland, Appl. no. 16248/10.

submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.

To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all authentic. An interpretation of a provision of Community law thus involves "a comparison of the different language versions."[289]

In short, if there is space for reasonable doubt, and, there exists a possibility that other national courts or tribunals may not find a particular conclusion obvious, then a preliminary reference is required. Whether a conclusion is open to reasonable doubt must, however, be assessed having regard not only to all relevant characteristic features of European law, but also to the different and equally authoritative language versions in which the relevant measure has been enacted.

### iv. Consequences/outcomes of the preliminary rulings

Once a national court has decided to address a preliminary ruling and the CJEU has delivered its judgment, the national court is bound within the case it raised the preliminary questions by the interpretation of the provisions at issue as given by the CJEU. The principles of unity and effectiveness of the EU law require the national court to follow the interpretation given by the CJEU irrespective of other judgments from national courts, even if from higher courts, or the constitutional court, if following the latter would lead to inconsistent interpretation of EU law.[290]

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 disputes hinging on similar points of law; a domestic court may thus stay proceedings pending the resolution of a case by the CJEU (or the ECtHR), even in a different case, that bears on the issue (see the case PM (Botswana) in the Fair Trial Handbook).[291] In other words, the judgments of the CJEU on the interpretation and validity of EU law have an *erga omnes* effect due to the declaratory nature of the interpretation and the obligation to ensure uniform application of EU law.[292] These judgments are retroactively applicable, from the entry into force of the provision that the Court interpreted (*ex tunc*).[293] We can identify two kinds of use of preliminary referencing:

1) The CJEU provides a straightforward answer to the preliminary question, which the national court can apply directly, in an uncritical manner, as it was the case in *Melloni*. As we could see in *Radu (see Close Up 5)*, it is also up to the supreme court to make sure that lower instance referring courts follow up on what the CJEU decided and in case the judgment of the CJEU is

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[289] Case C-283/81, *Cilfit*, paras. 16-20.

[290] *Elchinov*, para. 30, *Križanand Others*, paras. 69 and 70.

[291] Court of Appeal of Bucharest, case no. 4836/2/2008, *SC Agrana Romania SA v Agentia de Plati si Interventie pentru Agricultura (APIA)*, order of 3 December 2008; the French Conseil d'Etat stayed the proceedings awaiting the preliminary reference of the CJEU in a case referred by the UK High Court of Justice (Case C-453/03 ABNA);

[292] Trabucchi, 'L'effet "erga omnes" des décisions préjudicielles rendues par la Cour de Justice des Communautés européennes' [1974] RTDE56

[293] The CJEU established temporal limitation to the *ex tunc* effect of its judgments on the interpretation of EU law in specific circumstances: (1) where there was a risk of serious economic consequences owing in particular to the large number of legal relationships entered into in good faith on the basis of the rule considered to be validly in force; (2) where it appeared that individuals and national authorities has been led to adopt practices which did not comply with Union legislation, to which the conduct of other Member States or the Commission may even have contributed. See K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford University Press, (2014), p. 247; Joined Cases C-338/11 to C-347/11 *Santander Asset management SGIIC*, nyr.

not clear they can refer another preliminary reference asking for its interpretation and clarification. From the point of view of the effectiveness of the EU law we could state that this is the additional duty borne by supreme courts especially in controversial cases such as the EAW (see: Close Up 7 below), and more generally when fundamental rights are applicable.

The EAW cases show that the different standards of protection of fundamental rights across the Member States challenge the EU law principles of mutual trust and recognition. In these cases, such as *Melloni* and *Radu*,[294] the CJEU acts as mediator between national standards and EU law. The preliminary reference mechanism may thus be used as a way of addressing long-standing structural issues of a Member State's judicial system; it can also be used to ascertain the actual limits of EU law, such as in *Melloni*. In the latter case, the supreme courts' mandate is to ensure that limits of the EU law are respected in all instances.

2) Alternatively, the CJEU can provide guidelines for the national courts – usually these guidelines are presented in the form of tests. The guidelines represent both a challenge and an opportunity for national courts, as they leave the ultimate decision, argumentation and reasoning in the hands of national judges. Once the CJEU delivers its guidelines national courts may request the CJEU to elaborate on them (see how the *ACCEPT*[295] ruling clarified the application of the principles stated in *Firma Feryn*[296] judgment).

Supreme courts must, at the same time, ensure compliance with the instructions coming from the CJEU and elaborate them, possibly in the light of other legal sources – be it the constitution or other international agreements like the ECHR.

***Towards preliminary referencing to the ECtHR***

Protocol no. 16 ECHR, which is not yet in force, will introduce a mechanism of preliminary reference, thus connecting national judicial authorities to the ECtHR prior to the exhaustion of domestic remedies.

Higher domestic judicial authorities, which each Contracting Party shall designate at signature (art. 10 Prot 16), may request the ECtHR "to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto", in "the context of a case pending before it" (Art. 1 Prot. 15).

The request will be screened by a 5-judges panel and, if accepted, will be examined by a Grand Chamber (art. 2 Prot. 16). The latter will deliver a public and reasoned advisory opinion, which will be communicated to the requesting judicial authority (art. 4 Prot. 16). The Opinion will **not be formally binding** (art. 5 Prot. 16).

This mechanism, which is evidently inspired by the preliminary reference procedure under Article 267 TFEU, has however three remarkable specific features:

- the mechanism itself is optional: only States that decide to ratify the Protocol will be to rely on it;[297]
- in any event, no judicial authority which will be granted the power to request a preliminary

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[294] These cases were analysed in detail in the JUDCOOP Handbook on Judicial Interaction in the field of the right to a fair trial.

[295] Case C-81/12, *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, nyr.

[296] Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008] ECR I-5187.

[297] According to its Art. 8, the Protocol will enter into force when ten Contracting Parties o the Convention will ratify it. Art. 6 specifies that "*As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly*".

interpretation will be under a duty to make such a request[298]. On the other hand, the ECtHR itself will enjoy a broad discretion in deciding whether to accept the request;[299]

- the interpretation given by the ECtHR will not be binding upon the requesting domestic judge: as the Explanatory Report indicates, "the requesting court decides on the effects of the advisory opinion in the domestic proceedings".[300]

The preliminary reference procedure thus envisaged is conceived expressly as a tool of "judicial dialogue"[301] rather than of a deeper judicial integration, such as the preliminary reference procedure under EU law. Its effectiveness in orienting the ECHR-related decisions of domestic judges (both the requesting judge and other judges, even in other jurisdictions) therefore relies more on the interpretative authority of the ECtHR than on formal legal effects.

### d) Disapplication

When disapplication is possible and a conflict arises between domestic law and supra-national obligations, a national judge is thus placed in the position of having to decide whether to set aside a domestic provision and apply *in lieu* the latter. In doing so, the judge questions the validity of her own legal order and sometimes even the position of its national highest courts, which might have a different opinion regarding the existence of a conflict.. A supra-national source can entail disapplication only if two conditions are met: 1) hierarchical superiority *vis-à-vis* domestic law (as a whole or just the conflicting provision) and 2) capability of being self-executive and creating subjective rights.

These two conditions are fulfilled with respect to **EU law**: the doctrine of primacy (*Costa v ENEL*[302] and its effects in *Simmenthal*[303]) guarantees the former and the test of direct effect (*Van Gend en Loos*[304]) the latter. With respect to all other sources of international law, including **the ECHR**, these two aspects are not granted. Rather, they must be assessed from jurisdiction to jurisdiction, and in the case of international norms other than the ECHR from case to case, as they depend on the provision invoked (which might not be self-executive) and, crucially, on the domestic effect of international law as accepted in the constitutional layout of each State.

#### *i. Disapplication in the EU law*

The primacy of EU law is generally accepted, even over national constitutional provisions.[305] However, the concept was controversial for a long time, and acceptance in certain jurisdictions came

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[298] See Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, para. 7, available at http://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

[299] Ibi, para. 14.

[300] Ibi, para. 25.

[301] Ibidem.

[302] Case 6/64 Costa v. ENEL [1964] ECR 1141: *"It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community [EU] law and without the legal basis of the Community [EU] itself being called into question."*

[303] Case C-106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* SpA [1978] ECR 629: *"A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law, is under a duty to give full effect to those provisions, if necessary of its own motion to set aside any conflicting provisions of national legislation, even if adopted subsequently."*

[304] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 1*

[305] Declaration no. 17, annexed to the Treaty of Lisbon, OJ of the EU C 83, 30 March 2010, p. 344.

only through the doctrinal efforts of domestic constitutional tribunals and legislators. Despite the Court of Justice having declared the principle in *Costa v Enel* (1964) and *Simmenthal* (1971) without leaving any space for doubts, domestic authorities have worked to make it palatable domestically. To do so, they have over time interpreted or shaped the domestic order in order to show that the primacy of EU law is the result of a deliberate and unilateral opening of the domestic order, rather than an inevitable consequence of membership to the EU.[306]

According to the *Simmenthal* doctrine,[307] national courts are obliged to disapply any conflicting provisions of national law. This is only necessary if consistent interpretation of internal law proves impossible.[308] **EU law obliges judges to look for the "consistent interpretation" of domestic law that does not contravene EU law.**[309] **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 efficiency**.

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. In *Dominguez*,[310] for example, a French provision on minimum paid leave was more restrictive than required by the Working Time Directive, and the CJEU instructed the national court to first attempt to construe the exception provided by the French rule expansively, so as to achieve the same aim of the Directive, yet leaving the national law unaltered.

**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.** In line with Article 267 TFEU, it is also up to them to decide whether referring preliminary questions to the CJEU is necessary.[311]

**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 court to request or await the prior setting aside of such provision by legislative or other constitutional means.**[312]

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

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306 As instances of this trend, see: 1) the adoption by the UK of the EC Act 1972 and the EU Act 2011. In these acts, the prevailing force and application of EU law are only authorised through a sovereign act of Parliament (see Art. 18 of EU Act 2011); 2) the case-law of the Italian Constitutional Court, which admitted the primacy of EU law as an application of Art. 11 of the Constitution, see judgment no. 170/84; see also the judgments of the German Constitutional Court (for instance 2 BvE 2/08 of 30 of June 2009 [*Lisbon*]; 2 BvR 2661/06 of 6 July 2010 [*Honeywell];* 1 BvR 1215/07 of 24 April 2013 [*Anti-terror Database*), to see the limits indicated by the BvG to the primacy of EU law over the core constitutional principles of the German Constitution.

307 Case C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, par. 22.

308 Case C-282/10, *Dominguez* [2012] ECR I-000, para. 23

309 Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others* [2004] ECR I-8835, par. 27.

310 Case C-282/10, *Dominguez* [2012] ECR I-000, paras.27-30.

311 See: Case C-555/07, *Kücükdeveci* [2010] ECR I-365, at para. 55.

312 Case C-314/08, *Filipiak* [2009] ECR I-11049, para. 81.

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. 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.[313] This is true regardless of whether the public authority acts as a commercial entity or exercising public powers.[314]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 sparse trend that suggests that the answer is in the positive,[315] provided of course that the single norm satisfies the *Van Gend en Loos* requirements.[316]

Domestic rules set aside for breach of 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 EU-illegal rules empowers a lower level national court to circumvent the national judicial hierarchy (as was the case in the *Winner Wetten* and *Filipiak* preliminary references). However, when there is no direct effect, disapplication is not warranted as 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*,[317] the legislator might be asked to amend the legislation, or/and the domestic norm can be subjected to a review of constitutionality[318]).

On the basis of the right to fair trial, national procedural rules may need to be interpreted differently or even disapplied if they do not effectively protect the substantive rights granted by EU law. The Court is sometimes relatively vague on how this should be done, perhaps in order to avoid encroaching on national competences in setting procedural rules. In *Unibet*,[319] it found that national courts are not required to "invent" declaratory conformity rulings, but also that compatibility with EU law must be decided as a preliminary issue. In *Winner Wetten*, the BVerfG ruled that a German law is invalid, but maintained its effects temporarily.[320] The CJEU, however, found that lower courts had to disapply the law anyway, partly on the basis of the general principle of effective judicial protection. In *Diouf*,[321] the Court found that although the right to an effective judicial review would not require a two levels of jurisdiction in asylum proceedings or that the reasons for reviewing an asylum application under the accelerated procedure be reviewed separately, it would though require that at least these reasons can be reviewed together with the merits of the asylum application in the action which may be

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313 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,* [2005] ECR I-9981 and Case C-555/07, *Kücükdeveci* [2010] ECR I-365.

314 Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-11869, para. 70.

315 See *Mangold* and *Kücükdeveci* cit.

316 For instance, Art. 47 of the EU Charter was considered not to have direct effect, see Case C-176/12, *Association de Médiation Sociale* [2014] nyr. See more details on the topic of the horizontal application of the EFRs as provided by the EU Charter in Part I pp. 20-21.

317 Joined Cases C-6/90 and C-9/90, *Francovich* [1991] ECR 1-5357.

318 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).

319 C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271.

320 The same happened in *Filipiak* in light of Art 190 of the Polish Constitution.

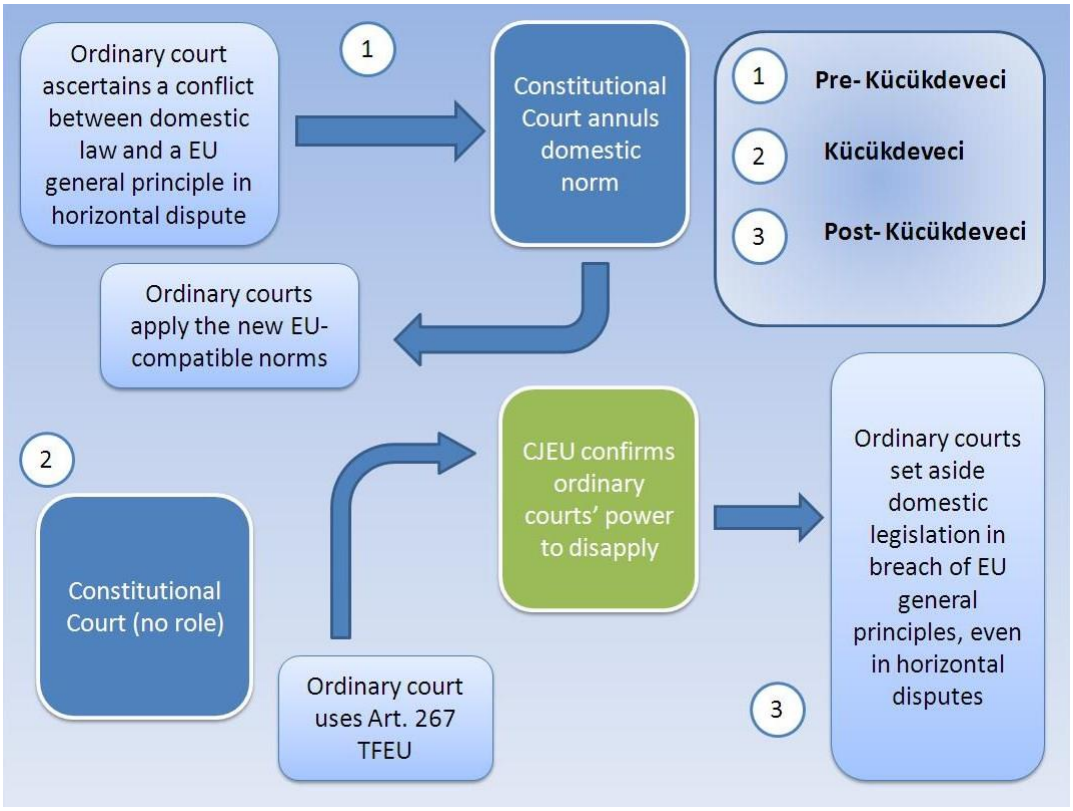
321 Case C-69/10, *Diouf* [2011] ECR I-7151.

brought against the final decision rejecting this application. Therefore the EU right to an effective judicial review does require adjustment by way of judicial interpretation, or ultimately legislative amendment, of national procedural rules The cases selected below demonstrate the general rule of disapplication of a national norm (*Close Up 8 and 9*).

***CLOSE UP 8: Kücükdeveci – Use of disapplication in the field of the right to 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***




In *Kücükdeveci* (C-555/07)[322] 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 on 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 are 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[323]. 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 under the scope of application of EU law.(see Art 51 of the Charter).[324]

[322] CJEU, Case C-555/07, *Kücükdeveci,* [2010] ECR I-365.

[323] CJEU, Case C-144/04, *Mangold,* [2005] ECR I-9981, para.75.

[324] For a discussion on the need to establish first an EU law provision that covers the facts of the case in order to tigger the application of the EU Charter fundamental rights, please see Part I section on *When are European Fundamental Rights applicable to national laws?* or **Annex I** which provides also summary of the relevant CJEU jurisprudence.

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

A. **Conflict:** national provision versus provision of the Employment Equality Directive which was previously held by the CJEU to be a manifestation of the general principle of EU law of non-discrimination based on age. 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) what was the EU law in relation to which the national provision was in conflict: Directive 2000/76 or the general principle of non-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 found incompatible with EU law in a dispute between private parties when according to the Marshall doctrine EU Directives do not have horizontal application.

B. **Judicial Interaction Technique: Preliminary reference** which offered guidelines on the exercise of the proportionality test of the discriminatory treatment introduced by the national legislation; and **legitimized the use of 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 legitimized the national referring court to disapply the national legislative provision following its proportionality test. It has to be noted that in another case referred by a German court, a measures 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*,[325]).

C. **Solution:** National courts are entitled to **apply EU fundamental rights directly if the case falls under the scope of EU law *(in casu* EU secondary provision that governs the facts)**, to exercise the review of national norms against the standard of non-discrimination as set out by the principle of non-discrimination (Art. 21 TFEU and general principles of EU law) given expression in the Employment Equality Directive, regardless of the constitutional arrangements in force in any given Member State. This doctrine of horizontal application of the EU Charter based principle of non-discrimination on grounds of age and general principle of EU law might extend also to other EU fundamental rights and general principles in the future, as the Court has not yet clarified whether it extends or not to all EU Charter fundamental rights.

D. **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 has to be noticed that the *Mangold* case presented

325 CJEU: Case C-229/08, *Colin Wolf v. Stadt Frankfurt am Main* [2010] ECR I-1 185, para. 46.

certain specific circumstances which were not present in *Kücükdeveci* and thus the preliminary reference was the optimal choice before proceeding to disapplication. Consistent interpretation in this particular context could have not been used due to the wording of the provisions.

***CLOSE UP 9: Iberdrola – Use of Disapplication of national law on the basis of the right to a fair trial as construed by the CJEU***

***Type of Interaction: Vertical Indirect (Spanish Constitutional Court – CJEU)***

***Spanish Constitutional Court – duty to disapply national legislation contrary to EU law) – civil/regulatory law***

In 2007, Iberdrola, one of the main Spanish energy groups, was fined for not obtaining the authorization of the Spanish energy regulator before acquiring over 10% of the shares of a corporation operating in the energy sector. In 2008, in a separate case brought by the Commission concerning the same legal provisions, the ECJ declared that this authorization requirement was a non-justifiable violation of the free movement of capital under the EC Treaty (C-207/07, *Commission v. Spain*, 17 July 2008).

Iberdrola challenged the penalty before the energy regulator and thereafter appealed to the Tribunal Superior de Justicia of Madrid, asking them to disapply the Spanish provisions that had been found to infringe EU law. The Tribunal Superior noted that, since the CJEU judgment had been issued after the penalty was imposed, the energy regulator could not take it into account then. It found that the CJEU judgment had not itself annulled any domestic legal provision and that it was only mandatory for Spain from the moment it was issued.

Subsequently, Iberdrola filed an individual complaint before the Constitutional Court for violation of the right to a fair trial (Art 24(1) Spanish Constitution), specifically due to arbitrary and irrational selection of the applicable law. Taking into account the previous CJEU judgment and its effects, the Constitutional Court declared that the right to a fair trial had been violated. This judgment represented a change of course. In the past, the Constitutional Court had declared that the compatibility between EU law and domestic law did not concern the Constitutional Court, and that this was for ordinary courts to decide thereon.

A. **Conflict:** The original conflict between national and EU law in this case was not about the right to fair trial, but about the free movement of capital, as guaranteed by the EU Treaties. The failure of national courts to take account of that conflict and disapply the national rule at issue was, however, a violation of the right to fair trial as guaranteed by the Spanish constitution. This decision is not about the potential violation of the right to a fair trial for not making a preliminary reference, but rather about the effects of a previous CJEU judgment on the activity of domestic courts.

B. **Solution:** The Constitutional Court **gave constitutional relevance to the issue of the application of domestic legal provisions found in breach of EU law**.

C. **Judicial Interaction Technique: disapplication of** national provisions incompatible with EU law as an obligation stemming from primacy of EU law. Also, the Constitutional Court emphasized the ***ex tunc* effects of the CJEU judgments** and profusely quoted the CJEU case law to support its reasoning. Constitutional Court found a violation of the right to a fair trial (Art 24(1) Spanish Constitution), specifically due to arbitrary and irrational selection of the applicable law by the Tribunal Superior.

**Importantly, the CJEU considered not only preliminary reference but also disapplication as parts of the fair trial right.**[326]

D. **Alternatives:** involvement in the form of judicial dialogue through continuing either preliminary reference or the use of one of comparative reasoning).

***Disapplication in the ECHR Context***

The possibility for domestic judges to grant direct effect and primacy to the provisions of the ECHR, as opposed to EU law, is a matter of domestic constitutional law, and therefore it can vary from State to State.

As an instrument of international law, the Convention binds the contracting parties only. In other words, a breach can engage the international responsibility of the defending State, which can be assessed in Strasbourg. However, a breach does not necessarily create enforceable rights for the individuals in domestic proceedings (i.e., the Convention has no direct effect *ipso jure*). Different States have different constitutional arrangements to accommodate the internal effects of international provisions (ranging from a pure monist tradition to strict dualism). Some States therefore mandate the automatic incorporation of international norms in their legal order, whereas other require implementing measures for supra-national obligations to have any domestic effect. This applies also with respect to the Convention.

For instance, the domestic effect of the ECHR in the UK, a dualist jurisdiction, is secured only through the transfusion of an equivalent list of rights in the UK Human Rights Act 1998, which also refers to the case-law of the ECHR as relevant guideline. In Sweden, the ECHR has direct effect and can entail disapplication, subject to the breach being of a manifest nature. In Netherlands and Belgium disapplication is formally possible, since their monist arrangement considers international obligations to be part of domestic law (i.e., applicable in domestic proceedings).[327] Romania although a dualist legal system provides an exception as regards the ECHR which has direct applicability.[328] In Poland, judges are to disapply any national provision not compatible with an international obligation enshrined an international treaty in line with Article 91 of the Constitution, and apply the relevant international norm directly (following the usual direct effect criteria).[329] In Italy, the Constitutional Court forcefully blunted the nascent trend of domestic courts giving direct effect to the ECHR and setting aside domestic provisions, and confirmed that no such form of disapplication is possible. When a conflict arises

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[326] As part of the right to a fair trial, the ECtHR prohibits arbitrary decisions of national courts not referring preliminary questions to the CJEU when they were raised by the parties. See ECtHR: *Dhahbi v Italy*, , Appl. 17120/09, ECtHR judgment of 8.04.2014 ; *Societe Divagsa v Spain*, Appl. 20631/92, judgment of 12 May 1993; *Peter Moosbrugger v. Austria*, Appl. 44861/98, Jugdment of 25 January 2000; *Canela Santiago v. Spain*, Appl. 60350/00, Judgment of 4 October 2001; *Pedersen and Pedersen v. Denmark*, Appl. 68693/01, Judgment of 12 June 2003; *Coëme and Others v.Belgium*, Appl. 32492/96, 32547/96, 33209/96 and 33210/96, Judgment of 22 June 2000.

[327] An overview of the single jurisdictions is provided in G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws - A Comparative Constitutional Perspective* (Europa Law Publishing 2010); see also Janneke H. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law - A comparative analysis* (Intersentia 2014), especially 331-339 (on a selected number of legal orders).

[328] See Art. 11 on the relation between national law and international treaties in general, and Art. 20(2) which provides an exception as regards treaties on fundamental rights.

[329] Incidentally, the same article served as the basis of establishing the duty to disapply national provision that is not in conformity with the EU law which was spelled out very clearly in a judgment of a Constitutional Tribunal of 19 December 2006 in case P 37/05.

between domestic and Conventional norms, a question of constitutionality must be submitted before the Constitutional Court, which might result in the repealing of the internal norm.[330]

Even when direct effect of ECHR provisions is granted, domestic courts typically refuse to apply them in domestic proceedings hinging on the obligations of the State under the Convention (i.e., the obligation to take action to create the necessary conditions for the enjoyment of a right). Instead, judges commonly apply the Convention domestically when a State interference is at issue (breach of a negative obligation).In certain cases, in spite of the recognised direct applicability of the ECHR, the individuals' claims based directly on the ECHR still suffer from a lack of sufficient efficiency. In a recent case brought against Romania, the ECtHR held that it cannot be established that "*a claim based on the direct applicability of the Convention, taken alone or combined with a liability for tort claim brought pursuant to the relevant Articles of the Civil Code, represents an effective remedy for the excessive length of proceedings.*"[331]

As a result, disapplication is possible in certain jurisdictions, be it based on the application of the ECHR or at least on domestic standards read in its light. Alternatively, the interpretation of domestic constitutional law in light of the ECHR, short of entailing disapplication, might nevertheless lead to a declaration of unconstitutionality of domestic norms (see the decision of the Croatian Constitutional Court on the *Legal Aid Act* case[332]).

**Formally, under Art. 46 ECHR, ECtHR's judgments have legally binding force only on the respondent State in each set of proceedings**. However, the ECtHR has observed that "[*t]he Court's judgments […] serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties*".[333] More explicitly, it has also stated that "*bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other states*"[334] Occasionally, the ECtHR has also criticized domestic supreme courts for having retained a given interpretation of ECHR provisions, notwithstanding a different interpretation having been unequivocally given by the ECtHR in a previous case concerning another Contracting Party.[335] This suggests that, beside a formal effect of *res judicata* for the respondent in the case, ECtHR judgments may have a *res interpretata* (interpretative authority) for all Contracting Parties.

Indeed, failure by domestic judges to interpret the ECHR in line with a well-established case law of the ECtHR may result in a breach of the ECHR and engage the States' international responsibility, legitimating the aggrieved individual to bring an application under Art. 34 ECHR.

In addition to that, domestic constitutional and legislative provisions, or domestic courts' jurisprudence, can recognise to the ECtHR jurisprudence the same legal effect of the Convention.[336]

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330 See judgments no. 348 and 349 of 2007.

331 ECtHR, *Vlad and others v Romania*, Appl. nos. 40756/06, 41508/07 and 50806/07, Judgment of 26/02/2014.

332 See the JUDCOOP Handbook on the use of the Judicial Interaction Techniques in the field of Fair Trial.

333 ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, Judgment of 18 January 1978, para. 154; and *Rantsev v. Cyprus and Russia*, Appl. No. 25965/04, Judgment of 7 January 2010, para. 197; *Konstantin Markin v. Russia* [GC], Appl. No. 30078/06, Judgment of 22 March 2012, para. 154.

334 *Opuz v. Turkey*, No. 33401/02, Judgment of 9 June 2009, para. 163.

335 See, e.g. *Modinos v. Cyprus*, No. 15070/89, Judgment of 22 April 1993, para. 20, referring to Dudgeon v. the United Kingdom, Judgment of 22 October 1981, Series A no. 45, concerning the criminal law prohibition of male homosexual conduct in private between consenting adults.

336 For further references, see the Presentation made at the Conference on the Principle of Subsidiarity,Skopje, 1-2 October 2010, by Mr Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights (AS/Jur),

### e) Disapplication v Preliminary Reference

When a domestic court is facing a putative contrast between domestic law and EU law, whether it is raised by the parties or not, one legal issue can be fundamental to resolve the case: whether an EU norm has a direct effect permitting a domestic court to set aside the domestic norm (disapplication). When there is a margin for interpretation regarding the domestic rule, the judge might instead read the EU rule into the domestic one (consistent interpretation), ending up applying the "EU-friendly" version of a domestic statute. If this is not possible, it might still be unclear whether the conflict exists in fact, because the EU norm is ambiguous (this is not a rare occurrence, especially in the field of application of principles, like non-discrimination or fair trial): the legality of the domestic norm might depend on which conception of the EU right at issue is the correct one.

In a similar circumstance, the domestic judge is still free to exercise her discretion and apply EU law. This course of action has the obvious advantage of expediency. Disapplication has indeed the power to trump conflicting legislation and defines the applicable law to the specific case. However, in uncertain cases, the judge exposes herself to a risk of reversal in appeal, and a judge of last instance will be hard-pressed to show that the rule of EU law applied was so unequivocal as to spare her from the duty to raise a preliminary ruling (CILFIT).

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, lodging of a preliminary ruling 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)[337], will provide guidance to the legislator to amend the EU-illegal legislation[338] 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. In the non-discrimination field, the use of preliminary ruling 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.

### f) Proportionality

The proportionality test - a constitutional doctrine[339], general principle of EU law[340] and hereby also a judicial interaction technique - is used to determine whether interferences by the state or authorised by the State, or by the EU with fundamental rights provided by the national constitutions or the EU Charter are constitutionally permissible. Irrespective of whether we consider proportionality as a constitutional or general principle of EU law, applied in relation to the EU or ECHR based fundamental rights, proportionality requires the same test: we first ask whether the right-infringing measure is suitable and necessary for achieving a legitimate public aim. We then go on to inquire whether the detriment caused to the right by the challenged measure is proportionate to the benefit it brings to the public aim. This is called the balancing stage because it involves balancing the value of the

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Parliamentary Assembly of the Council of Europe, doc. AS/Jur/Inf (2010) 04, 25 November 2010, available at http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf

337 See C-416/10 *Križan and Others*, judgment of 15 January 2013.

338 As in the Griesmar case, Close Up 5.

339 See K. Moller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012) and D. Kyritsis, Whatever works: proportionality as a Constitutional Doctrine, Oxford Journal of Legal Studies, Vol. 34, No. 2 (2014), pp. 395–415.

340 Case 11/70 - *International Handelsgesellschaft* v Einfuhr- und Vorratsstelle Getreide [*1970*] ECR 1125.

right against that of the public aim in the circumstances of a specific case. Proportionality is thus an important part of the analysis conducted by both national and European courts when adjudicating on fundamental rights. It is a way of structuring the analysis when asking the question whether a prima facie restriction of a fundamental right is justified by a legitimate interest. If a restriction is found to be disproportionate, normally the measure at stake will be considered to violate fundamental rights.

The test based on the concept of proportionality aims at providing a step by step routine to be followed by national courts in order to resolve conflicts between broadly understood rights and interests. Except when they relate to some specific rights, fundamental rights obligations are not absolute and therefore can be limited when they are exposed to the said interests. In the context of the present Project we are concerned mainly with proportionality used in balancing out fundamental rights and public interest (as in case of principle of non-discrimination or fair trial) and two different fundamental rights (as in case of freedom of expression and right to privacy).

Even though the proportionality test is construed and employed by the ECtHR or the CJEU with reference to a concrete case at stake, the two supranational courts rule with a view that national courts may and sometimes must use their guidelines on their own accord. This means that the proportionality test employed by various courts in various jurisdictions may produce diverse results which are acceptable given their own legal systems characteristics, allowing also sufficient flexibility to accommodate specificity of various cases.

The construction of the proportionality test under the EU and ECHR follows similar sub-questions: suitability, necessity and proportionality *stricto sensu*. The ECtHR routinely uses the proportionality test to gauge the lawfulness of domestic-set restrictions to Convention rights, which can be accepted if the interference is 'necessary in a democratic society.' In light of Art. 52(3) EU Charter requirement securing the same meaning and scope to FRs provided both in the EU Charter and the ECHR, the criteria for the proportionality test applied in corresponding rights needs to be the same under the ECHR and EU legal systems.

The following sections provide an overview of proportionality as viewed from the perspective of the ECHR regime (i) and the EU law (ii). The discussion focusing on specific forms of proportionality within the context of three fundamental rights: iii. Non-Discrimination; (iv) Fair Trial, v. Freedom of Expression will follow.

### ***The ECHR Proportionality and the Margin of Appreciation***

In the ECHR context, proportionality test is usually performed in order to assess whether a measure that restricts a Convention right is justified.

**The margin of appreciation** itself is a technique used by the ECtHR to set a standard of deference to the decision taken by national courts.[341] Specifically, whenever the balancing test following the criteria set by the ECtHR is performed, this is done within the sphere delineated by the margin of appreciation. The cases presented in this section show how a fruitful dialogue between the ECtHR and national courts can develop through which the ECtHR guides the reasoning of domestic courts and then domestic courts have an input into how the ECtHR decides. In other words, one could state that the ECtHR and national courts together 'negotiate' the ultimate balancing routine which is subsequently to be used by all national judges.

The construction of proportionality test is fairly straight-forward, however, it becomes more complex each time a specific right is at stake.

Generally, the test is preceded by the reasoning based on the construction of non-absolute rights as provided for by the Convention. It ensues once the Court has established that (I) an issue at stake falls

[341] On deference, see the section below.

within the scope of one of the substantive Articles of the Convention and (II) there was an interference with the right, followed then by the analysis of the interference: formality, condition, restriction, and penalty.

Note that the sequence of examination by the ECtHR is set and should the answer to any of the questions be negative, the Court will seize to examine them further and conclude that the violation has occurred.

The Court's analysis of a measure interfering with a fundamental right proceeds along the following points of consideration:

**Whether the interference with the right is based on (or provided for by) the 'law'**

The notion of 'law' covers all domestic rules that allow for interference (hence not only acts, but also secondary rules).

Whether the Court will consider a given provision as law will depend on its **'quality'** (legal rules that do not have necessary quality are not considered law even if they pursue legitimate aim).

**'Quality of law'** in line with the Convention comes from the fact that law is compatible with the rule of law, and in particular is accessible (published) and foreseeable in terms of its results/sanctions/remedies. If the law provides for a certain discretion for the authorities, it must also provide for the arbitrary abuse of such discretion. In other words, procedural safeguards may rescue the law in the light of the Convention.

**Whether the interference pursues a 'legitimate aim'**

According to Article 10(2) of the Convention: *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and im-partiality of the judiciary.*

Note: Other substantive articles of the Convention provide for a different catalogue of legitimate aims (for instance, according to Article 9 protecting freedom of thought, conscience, and belief, the interference cannot be justified on the basis of national security).

**Whether the interference was 'necessary in a democratic society' to achieve the legitimate aim and 'proportionate' to that aim (in the light of the doctrine of margin of appreciation):**

'Necessary' = there must be no lesser means available to attain the goal;

The Court examines (a) whether 'there was a pressing social need' for the interference and (b) whether the measure was reasonably proportionate to the fulfilment of the need.

In order to determine what is required in a democratic society the Court usually analyses standards developed by the Council of Europe or conducts comparative reasoning.

A restriction must fit within the margin of appreciation specified by the Court with reference to a specific area/human rights (for freedom of expression - see 1979 *Sunday Times* following the 1972 *Handyside* judgement*).*

**Whether appropriate and effective procedural guarantees against abuse of the interference were provided for**

Increasingly, the Court takes to consideration such procedural aspects considering them a part of 'proportionality' of a measure. In such cases the Court will refuse to examine the case from the perspective of Article 13 ECHR. If the ECtHR finds the domestic rule disproportionate, it will establish a violation of the Convention. National institutions, including courts, are required to comply

with that judgment; national legal systems differ on the effect of ECtHR judgments beyond the cases in which they were adopted (spill-over effect)

***Proportionality in EU Law***

Proportionality is one of the general principles of EU law and is provided for in Article 5(4) TEU according to which content and form of Union action shall not go beyond what is necessary to achieve the objectives of the Treaty. Proportionality is also routinely applied in order to discuss the potential justifications of Member State measures that conflict with EU law, including EU fundamental rights.

The test developed by the Court of Justice does not differ substantively from that developed by the ECtHR. In fact, similarly to the sequence developed by the ECtHR the test may be stopped once two elements of it are employed. At other instances (similarly as in the case of the ECtHR test) there may be more elements of proportionality test applicable to a given legal context thus adding to the prongs of the test.

The components of the EU proportionality test are the following:[342]

- Suitability – is the measure suitable to achieve the desired objective?
- Necessity – is the measure necessary to achieve the desired objective?
- Proportionality *stricto sensu* – does the measure impose a burden on an individual that was excessive in relation to the objective that is to be achieved?

In the context of the EU Charter, Article 52(1) describes the proportionality test. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The components and sequence of the proportionality test under EU law vary somewhat from case to case. The final element of the test – proportionality *stricto sensu* is usually not performed, but left in the hands of the national courts. At other times, the number of components expands. This inconsistency on the part of the CJEU has been criticized, but is an inherent part of the deference to national courts in vein of subsidiarity.[343]

## Fundamental Rights Specific Proportionality

***Proportionality in the context of Non-Discrimination***

Discriminatory measures or practice could, in principle, withstand the scrutiny of the ECtHR and CJEU if they are justified on the basis of public interests (e.g. employment policies, economic growth,

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[342] It has been argued that the proportionality test exercised by the CJEU changes depending on the following factors: whether the measure under review is of a Union or national origin, whether fundamental rights are in balance or not; whether the act under assessment is a regulatory act by the legislator or a decision by the administration (see Tor-Inge Harbo, "The Function of the Proportionality Principle in EU law", (2010) European Law Journal, No. 2, 158–185) however, irrespective of these factors, the three prong test is the same, it might be that in the balancing process, especially the last string (proportionality *stricto sensu*) the CJEU will give more weight to a certain specific Union objective, as the furtherance of the European integration objective than a national objective which would thus led to a different outcome when assessing a national measure.

[343] See for instance, the recent I-Con Debate: K. Moller, "Proportionality: Challenging the critics", (2012) 10 International Journal of Constitutional Law, and F. Urbina, "Balancing as reasoning and the problems of legally unaided adjudication: A reply to K. Möller", (2014) 12 International Journal of Constitutional Law, K. Moller, "Balancing as reasoning and the problems of legally unaided adjudication: A rejoinder to Francisco Urbina", (2014) 12 International Journal of Constitutional Law.

etc) and other employer related objectives in the case of indirect discriminatory conduct. The list of accepted legitimate aims differs depending on firstly, whether the discrimination is direct[344] or indirect[345] and secondly, whether the supranational applicable norm is EU or ECHR. The ECtHR applies a generally phrased justification in both direct and indirect discrimination,[346] while EU law is more precise in distinguishing between direct and indirect discrimination. EU law has a specific list of legitimate aims which can justify direct discrimination, and those are expressly provided in the Anti-discrimination Directives[347] and need to be strictly interpreted, while in the case of indirect discrimination, other legitimate aims than those expressly provided in the EU secondary legislation can be accepted as long as they fulfil the necessity and proportionality requirements. The fact that the ECtHR does not distinguish as precisely as the CJEU between direct and indirect discrimination does not in principle create problems since the ECtHR does not readily accept discriminatory conduct/practice that would qualify as direct discrimination under EU law, for example conduct that touches on the core of personal dignity, such as discrimination based on race and ethnic origin, etc. However the lack of consensus on the precise demarcation between direct and indirect discrimination between the ECtHR and CJEU has, in certain cases, contributed to different solutions being reached by the two courts following the proportionality test.[348] Whether a particular discriminatory measure can be considered as following an accepted legitimate aim and be proportionate will often be in the hands of ordinary courts, as first they will need to establish what precisely is the legitimate aims established by the legislation and identify the will of the legislation in that regard. This is because of the margin of appreciation doctrine in ECHR law (whereby national authorities are free to determine, within certain limits, the prevalence of one interest over another) and of the CJEU's tendency to refrain from carrying out **the proportionality test on national measures which is the chief task of national judges**. The CJEU may wish to leave the detailed proportionality assessment to the national courts because, in preliminary rulings, it does not have access to the full factual record, cannot examine the evidence which is before the national court, and cannot make findings of fact. The task may also be shifted to the national court in situations where it was difficult to reach an agreement within the Chamber of the CJEU on the precise outcome. On the difficulty of national courts to establish the appropriate

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[344] Article 2(2) of the Racial Equality Directive states that direct discrimination is "*taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.*" All the other relevant Anti-discrimination Directive define similarly direct discrimination. The ECtHR defines direct discrimination as a "*difference in the treatment of persons in analogous, or relevantly similar, situations', which is 'based on an identifiable characteristic*." See ECtHR, *Carson and Others v. UK* [GC] (No. 42184/05), 16 March 2010; para. 61. Similarly, ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 175; ECtHR, *Burden v. UK* [GC] (No. 13378/05), 29 April 2008, para. 60.

[345] The EU anti-discriminatory legislation defines indirect discrimination in: Article 2(2)(b) of the Racial Equality Directive states that "*indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons*" and similar definition can be found also in the Employment Equality Directive, Art. 2(2)(b); Gender Equality Directive (Recast), Art. 2(1)(b); Gender Goods and Services Directive, Art. 2(b). The ECtHR states that "*a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.*" See, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00), 13 November 2007, para. 184; *Opuz v. Turkey* (No. 33401/02), 9 June 2009, para. 183; *Zarb Adami v. Malta* (No. 17209/02), 20 June 2006, para. 80.

[346] In *Burden v. UK* [GC] (No. 13378/05), 29 April 2008, the ECtHR held that "[...] *a difference in the treatment of persons in relevantly similar situations ... is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised*", para. 60.

[347] Directive 2000/78/EC provides in recital 25 that "*It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives*", in addition 'genuine occupational requirement defence' is present in each of the directives (except the Gender Goods and Services Directive which does not relate to employment); the Employment Equality Directive also provides as legitimate aims: the permissibility of discrimination on the basis of religion or belief by employers who are faith-based organisations (Art. 4(2)); and, the permissibility of age discrimination in certain circumstances (Art. 6 (1)(a) – (c)).

[348] See the ECtHR, *Andrle v the Czech Republic*, case and CJEU judgment in the *Griesmar* case, more details at p.35.

legitimate aim for direct *v* indirect discriminatory conduct as a first step in the exercise of the proportionality test, please see the judgments of the UK Supreme Court in the *Seldon*[349] and *Homer*[350] case, the former is also detailed in the below Close Up.

The legitimate aims differ also depending on what is put in balance: fundamental right against a Union or a Member State action. In the first scenario legitimate interests are those which correspond to objectives of general interest pursued by the Union, while in the second scenario the legitimate aims are those provided by EU anti-discriminatory directives themselves.[351]

The importance of the proportionality test in normalizing the interaction between legal regimes is clearly visible in cases like *Kücükdeveci* and *Wolf*, or *Römer* or *Danosa*,[352] in which the CJEU weighs the public policy objectives of the domestic measures against the principle of equality.[353] In *ACCEPT*, instead, the CJEU refers to the principles of effectiveness, but leaves the balancing regarding the proportionality of the sanction to the national court;[354] a similar "guidance" ruling is found in *HK Denmark*, Joined cases C-335/11 and C-337/11, see paras. 64 and 90). Similarly, the UK Supreme Court in *Seldon* has delegated the lower courts to run the test of proportionality, after having adjusted the interpretation of some basic principles in keeping with the CJEU's case-law.[355] National courts might use the proportionality test to determine the unreasonableness of a domestic measure (see *Jelušić*)[356] or to contest the legitimate aim chosen by the legislator (see the thrust of the relentless attempts of lower and appeal French courts to challenge national provisions in the post-*Griesmar* saga; see also the Italian courts' assessment of the legitimate purpose sought by collective contract clauses linking dismissals with proximity to minimum pension age[357]).

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[349] *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16.

[350] *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15.

[351] See X. Groussot, General Principles of Community Law, Europa Law Publishing, (2006), 150-151.

[352] See C-232/09, *Danosa v LKB Lizings SIA* [2010] ECR I-11405.

[353] See JUDCOOP Handbook on Judicial Interaction in the field of the principle of non-discrimination, pp.63-66.

[354] Case C-81/12, *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, nyr. See JUDCOOP Handbook on Judicial Interaction in the field of the principle of non-discrimination pp.84-86.

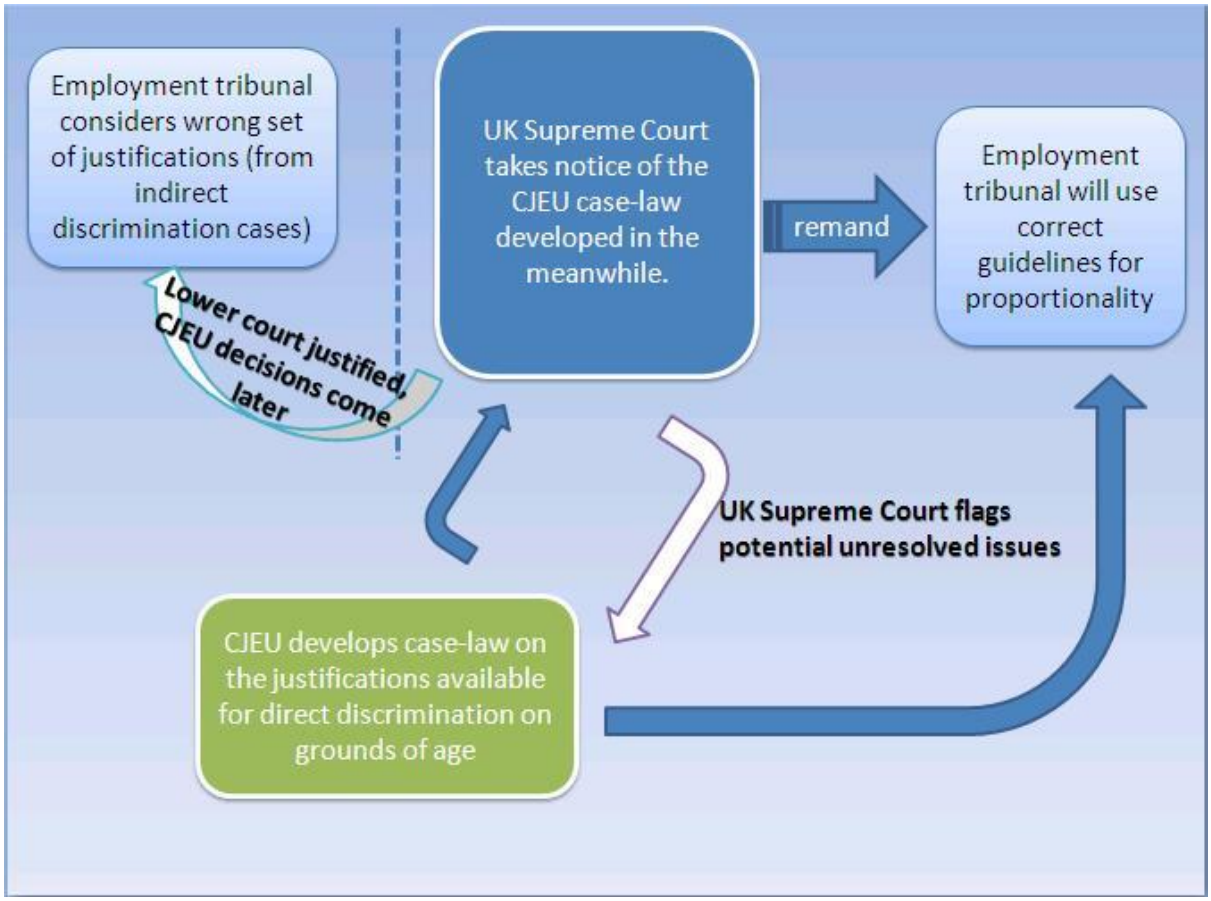
[355] The case is commented in JUDCOOP Handbook on Judicial Interaction in the field of the principle of non-discrimination, pp. 68ff.

[356] Constitutional Court of the Republic of Croatia, judgment U-I/4170/2004 of 29 September 2010, *Damir Jelušić (plaintiff) vs Republic of Croatia*, JUDCOOP Handbook on Judicial Interaction in the field of the principle of non-discrimination, pp.72-75.

[357] Cases discussed in JUDCOOP Handbook on Judicial Interaction in the field of the principle of non-discrimination.

***CLOSE UP 10: Seldon v Clarkson Wright and Jakes - Use of the proportionality test in the field of the right to non-discrimination on grounds of age***

***Type of interaction: Vertical Indirect (UK Supreme Court – CJEU) Horizontal internal (among the UK courts)***




The plaintiff, a former partner in a solicitor law-firm, claimed to have suffered unjustifiable discrimination on grounds of age since following firm's policy he had been asked to retire at the age of 65. The policy, itself was justified on three grounds: providing partnership opportunities to younger lawyers after a reasonable period of time; facilitating workforce planning by expecting vacancies in advance; and "limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm[358]". Under the EU Framework Directive, age retirement rules are categorised as directly discriminatory measure which have to be justified by legitimate aim provided by the Equal Employment Directive, be necessary and proportionate to that specific aim; UK law, after a period in which it provided for an explicit possibility of compulsory retirement at the age of 65, has the same rule without differentiating between legitimate aims for direct v indirect discrimination, as provided by the Equal Employment Directive. The UK Supreme Court (SC) judgment[359] is concerned with the **legitimacy** of the above aims in case of direct age discrimination and with whether they can be invoked by the employer, as well as with the particular regime of partnership (as opposed to ordinary employment relationship).

358 Case note by L. Vickers, S. Manfredi, (2013) Industrial Law Journal, No. 1, at 62.

359 *Seldon (Appellant) v Clarkson Wright and Jakes (A Partnership) (Respondent)* [2012] UKSC 16, available at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0201_Judgment.pdf.

The UK SC, referring to CJEU precedents,[360] noted that the list of grounds for justifiable (direct) discrimination on grounds of age of Art. 6(1) of the Framework Directive is not exhaustive, and other grounds can be invoked, provided that they reflect a public interest (rather than purely individual interests of the employer, such as cost reduction); moreover, they should be read more narrowly than for indirect discrimination. The SC also remarked that, age, as opposed to other prohibited grounds, is not "binary" in nature – "younger people will eventually benefit from a provision which favours older employees."

The CJEU case-law is extensively cited to show: 1) that the references did not concern, as in the case at hand, provisions of individual contracts, but legislation, collective agreements et al; 2) legitimate aims under Art 6(1) of the Framework Directive are public social or economic policy objectives[361], and not purely individual reasons particular to the employer; 3) flexibility for employers is not a legitimate aim in itself (AG Bot in *Kucükdeveci*); 4) a number of legitimate aims (9) have been recognised (para. 50); 5) additionaly, the measure must be necessary and proportionate; 6) the gravity of the effect on the discriminated employees has to be weighed in the balance; 7) the scope of the tests for indirect discrimination under Art. 2(2) and for age discrimination under Art. 6(1) is not the same; in case of direct discrimination, unlike indirect discrimination, only public interest reasons chosen by the State rather than the employer establish the legitimacy of a pursued aim.

The UK SC categorised the 9 legitimate aims established by the CJEU in its jurisprudence up until the case before the UKSC (a list of 12 CJEU judgments)[362] in two main categories relates to: 1) inter-generational fairness and 2) dignity. In application to the present case, the Supreme Court accepts that individual employers may invoke such justifications, on the basis of CJEU case law. More precisely: "The first two identified aims were staff retention and workforce planning, both of which are directly related to the legitimate social policy aim of sharing out professional employment opportunities fairly between the generations (and were recognised as legitimate in *Fuchs*).[363] The third was limiting the need to expel partners by way of performance management, which is directly related to the "dignity" aims accepted in *Rosenbladt*[364]and *Fuchs*. It is also clear that the aims can be related to the particular circumstances of the type of business concerned (such as university teaching, as in *Georgiev*).[365] I would therefore accept that the identified aims were legitimate."[366]

Notably, the SC approved the lower court's treatment of justifications inspired by the case-law on indirect discrimination,[367] but acknowledged that that the judgment pre-dated the period when the relevant CJEU decisions were rendered.[368]

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360 Case C-388/07, *The Incorporated Trustees of the National Council on Aging v. Secretary for Business, Enterprise and Regulatory Reform* [2009] ECR 1-1 569; Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, [2007] ECR I-8531.

361 Art. 6 of the Employment Equality Directive provides as legitimate aims: *"(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.*"

362 See para. 50(4) of the *Seldon* judgment available online at http://www.bailii.org/uk/cases/UKSC/2012/16.html

363 Joined Cases C-159/10, *Gerhard Fuchs* and C-160/10 *Peter Köhler v Land Hessen* [2011] nyr.

364 Case C-45/09, *Rosenbladt v Oellerking* [2010] ECR I-9391.

365 Joined Cases C-250/09 and C-268/09, *Georgiev (Vasil Ivanov) v Tehnicheski Universitet e Sofia, Filial Plovdiv* [2010] ECR I-11869.

366 See para. 67 of the judgment.

367 Used also in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15. The lower court had relied on the EU and domestic precedents in Joined Cases C-4/02 and C-5/02, *Schönheit v Stadt Frankfurt am Main* [2004] IRLR 983; and *R*

Ultimately, the appeal was dismissed, and the assessment of proportionality on which the discrimination claim depended was remanded to the lower courts to be re-assessed on the basis of the UK SC judgment and the recent judgments of the CJEU as summarised and assessed by the Supreme Court.

A. **Conflict:** claimant raised a conflict between the national legislation implementing the Employment Equality Directive and the provision of this Directive in regard to legitimate aims that can justify direct discrimination; while the Directive differentiates between legitimate aims for direct *v* indirect discrimination, and provides for specific legitimate aims that can justify direct age discrimination (Art. 6), the UK legislation did not provide such specific differentiation, but included on provisions regarding justification for discriminatory conduct; questions regarding the assessment of the legitimacy of the objectives given for direct age discrimination were raised before the UK courts.

B. **Judicial Interaction Techniques:** the UK Supreme Court engaged in a consistent interpretation exercise with an impressive list of CJEU's precedents from the very first case on a similar issue up until the very last before the pending case before the Supreme Court, for the purpose of establishing what can be considered as legitimate aims for direct age discrimination and what are conditions that need to be fulfilled by the challenged provision to be considered proportionate.[369]

   Moreover, it entered a veritable distance-dialogue with the Court of Justice, namely in respect of: 1) the analysis of recent case-law, which is so detailed that it includes a reference to the formation of the Court in the various decisions and to the identity of the Judge Rapporteur, presumably to highlight the emersion of a *jurisprudence constante*, validated by the management of these cases by the "expert" member of the Court; 2) the stressing of mixed instructions deriving from EU law: the UK SC took the opportunity to flag a possible inconsistency in EU law.[370] Specifically, it aired the fear that, in spite of the CJEU's reassurances that each Member is free to prioritize certain public interests over others, when assessing the proportionality of a discriminatory measure, the lack of guidelines in domestic legislation had been sanctioned by the CJEU and had passed its scrutiny. In practice Regulation 3 (the contested UK legislation implementing the Employment Equality Directive), which says nothing about the prevailing interests of society that should deserve protection in discrimination cases, is a provision that pleases the CJEU but fails to make use of the **margin of discretion** promised by the Court of Justice, and is therefore unable to guide national courts towards a predictable result. It is just the case to note that the CJEU's sanctioning of Regulation 3 does not necessarily implicate a

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*(Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, stating that legitimate aims do not need to have been articulated at the time when a measure was adopted.

368 See para. 67: "*Their conclusions are particularly impressive given that they were deciding the case in November 2007, before any of the European jurisprudence discussed earlier had emerged. They did approach the justification of direct discrimination in the same way as they would have approached the justification of indirect discrimination, whereas we now know that there is a difference between the two*."

369 Besides those referred to above, the UK SC mentions or discusses the following cases: *Age UK – David Hütter v Technische Universität Graz*, Case C-88/08 [2009] All ER (EC) 1129; *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-341/08, [2010] 2 CMLR 830, *Wolf v Stadt Frankfurt am Main*, Case C-229/08 [2010] 2 CMLR 849, the AG Opinion in *Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, [2011] 2 CMLR 703; *Ingeniørforeningen i Danmark v Region Syddanmark*, Case C-499/08 [2011] 1 CMLR 1140; *Hennigs v Eisenbahn-Bundesamt; Land Berlin v Mai*, Joined Cases C-297/10 and C-298/10, [2011] ECR; *Prigge and others v Deutsche Lufthansa AG*, Case C-447/09 [2011] IRLR 1052.

370 See para. 53: "*On the one hand, Luxembourg tells us that the choice of social policy aims is for the member states to make. It is easy to see why this should be so, given that the possible aims may be contradictory, in particular between promoting youth employment and prolonging the working life of older people. On the other hand, however, Luxembourg has sanctioned a generally worded provision such as regulation 3, which spells out neither the aims nor the means which may be justified. It is also easy to see why this should be so, given that the priority which might be attached to particular aims is likely to change with the economic, social and demographic conditions in the country concerned*."

rejection of national guidelines: it is for the UK to take advantage of the margin afforded by EU law, yet being aware that illegal measures would be subjected to the CJEU review.

C. **Solution**: the UK Supreme Court referred back the case to the Employment Tribunal to review the case based on its guidelines which are on their turn based on the recent evolution in the CJEU jurisprudence on the matter of assessing the proportionality of national direct age discriminatory measures.

D. **Alternatives:** preliminary reference, however, in the given case it would have added to the complexity of the CJEU case law. The choice of the Supreme Court was also such as to emphasise the fact that chaotic and prolific activity on the part of the CJEU can prevent national courts from ensuring the effectiveness of the EU law, and that national courts can of themselves based on a thorough assessment of the CJEU relevant jurisprudence summarise the relevant guiding principles that need to be followed by way of consistent interpretation by national courts.

***Proportionality in the context of Fair Trial***

Restrictions of the right to fair trial on the basis of public interests such as **national security, protection of privacy or judicial economy** could withstand the scrutiny of the ECtHR and CJEU. Yet again, the proportionality test is a compulsory step for measures to be considered legal, its outcome is often in the hands of ordinary courts. This is because of the margin of appreciation doctrine in ECHR law (whereby national authorities are free to determine, within certain limits, the prevalence of one interest over another) and because of the CJEU's tendency to refrain from carrying out the proportionality test on national measures (it often provides national judges with guidance and instructions on how to perform it, but the latter are entrusted with the actual performance of this balancing exercise).

The importance of the proportionality test in normalizing the interaction between legal regimes is clearly visible in cases like *Tariq* and *Ibrahim*.[371] It is important to note that, in the context of the right to fair trial, the proportionality assessment can take place in two distinct, but related, contexts. First, it could refer to the general acceptability of a domestic procedural scheme from the point of view of safeguarding the right to fair trial. An example of that is the discussion of whether, in the national rules in *Tariq*, an acceptable balance was drawn between the right to fair trial and national security, or whether the various national rules on witness statements in *Ibrahim* provided an effective counterbalance, to make sure that the right to fair trial can be effectively protected in individual cases.

Another way of using proportionality is to examine whether a particular action of a court, e.g. the application of the 'counter-balancing measures' in *Riat*,[372] or the analysis of proportionality of the use of a European Arrest Warrant in *Assange*[373], violates the right to fair trial. The second aspect may be much more relevant for national courts. If it is linked to the first aspect, however, it may require national courts to engage with supranational case law in order to set the frame for their own particular balancing exercise.

***Close Up 11: The Austrian Constitutional Court, U466/11 and others – use of the proportionality in the field of the right to a fair trial (migration/asylum)***

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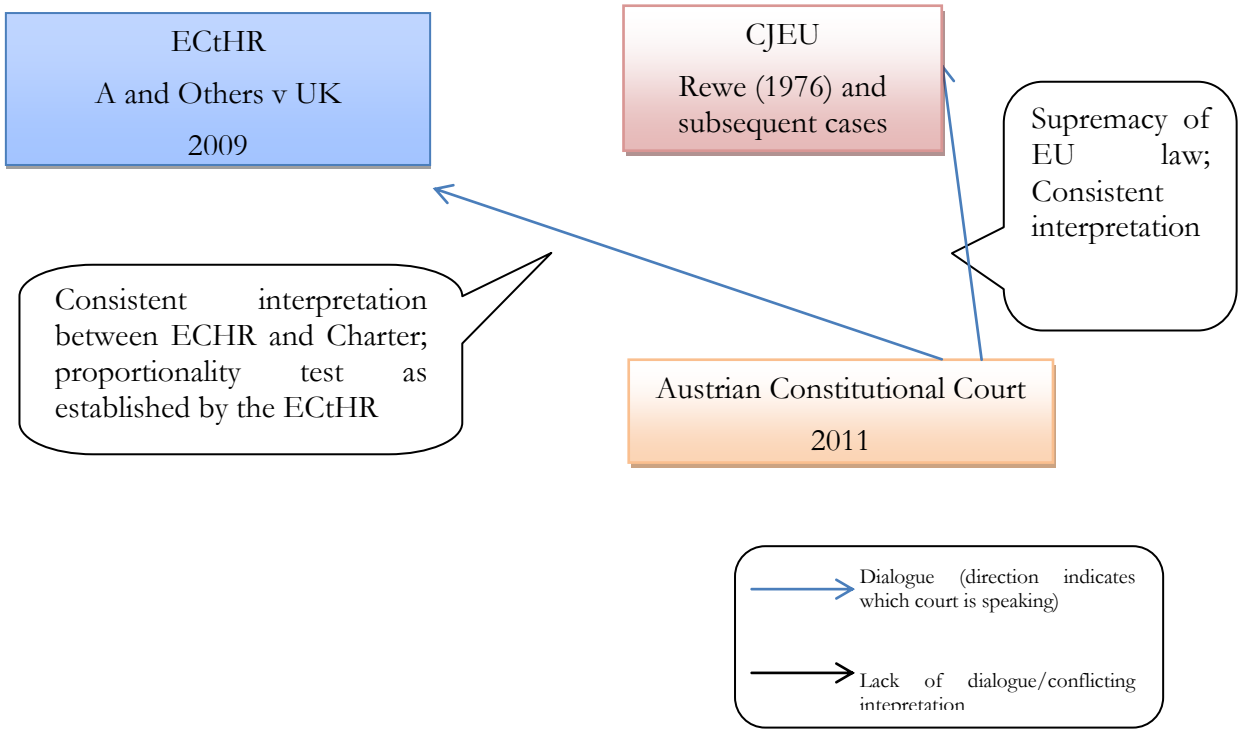
[371] See JUDCOOP Handbook on Judicial Interaction in the field of the right to a fair trial, pp.53, 78.

[372] See JUDCOOP Handbook on Judicial Interaction in the field of the right to a fair trial, pp. 78ff.

[373] See paras. 155-159 of the High Court decision, noting that while Mr Assange's reliance on the principle of proportionality was correct, it fails on the facts. The High Court uses comparative reasoning to this end; it also mentions the need to demonstrate trust to the Swedish courts.

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

***Domestic Court establishes the scope of application of the European right to a fair trial into domestic legal system by merging the highest standards of protection of the FR under the EU Charter and ECHR***




The applicants are two 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 constitutionally protected right to a hearing, which was denied to them in the proceedings. Their claim was based directly on alleged violations of Art. 47 of the EU Charter, which provides (in the relevant paragraph, Art 47(2)) that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law". 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. The issue of the applicability of the Charter may be of particular importance in asylum cases, where Art 6 ECtHR on the right to a fair trial may be difficult to apply given that it applies with less force to proceedings which are neither civil nor criminal.

The Austrian Constitutional Court first extensively cites the 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 to 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 principles, requiring 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 references to the CJEU, but not if there is no doubt on the proper interpretation of EU law. Interestingly, 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 Art. 47 of the Charter in particular, the Court notes its broader scope of application than the ECtHR as well as the fact that a higher level of protection can be granted under the Charter. The Constitutional Court held that while, under Art 6, the right to a hearing only applies in civil law cases, Art. 47 of the Charter extends that protection to asylum proceedings and thus the applicants can benefit from it.[374] The assessment of a violation will, however, depend on proportionality. Citing the case law of the ECtHR, the Constitutional Court finds that this right can be limited in exceptional circumstances and that it needs not 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. On this basis, the Constitutional Court finds no violation of the Charter.

**A. Conflict: between the national legal provision on levels of jurisdiction in cases of subsidiary protection and the constitutional, the ECHR and EU Charter standards of protection of the right to a fair trial; clarification of the levels of protection of the right to**

374 "*Procedures in which decisions on asylum and residence of foreigners on the territory of a State are made do not fall within the scope of Art 6 ECHR. From Art. 47 (2) of the Charter, however, a right to an oral hearing is to be derived, even in cases in which such a requirement does not follow directly from Art 6 due to the fact that the latter is not applicable… Art. 47(2) of the Charter also needs to be taken into account in the interpretation of the constitutionally guaranteed right to effective judicial protection (as a corollary of the duty of conform interpretation of Union law or to prevent situations of reverse discrimination). Conversely, the interpretation of Art 47 (2) of the Charter has to consider the constitutional traditions of the Member States…*" See the summary of the judgment in German at http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09879686_11U00466_2_01/JFR_09879686_11U00466_2_01.pdf.

**a fair trial in asylum proceedings under the EU Charter v ECHR** and compared to the national constitutional provisions;

**Solution:** In this case, the Court decided to change its jurisprudence without making a reference to the CJEU. With this judgment, the Austrian Constitutional Court changed its approach as to the legal force of the EU Charter into the domestic constitutional order. According to the Court's previous case-law, "constitutionally guaranteed rights" as well as the entire domestic constitutional order – including the European Convention on Human Rights and its Protocols which have constitutional status in Austria – formed the standard for the Court's review. European Union law, however, is not part of Austrian constitutional law. Therefore, the Constitutional Court based its former case-law on the assumption that EU law does not form a standard for its review. With this judgment, the Constitutional Court **equated a violation of the Charter with a violation of domestic constitutional law**.[375] Perhaps somewhat counter-intuitively, the Court constructs fundamental rights as a **more effective and direct cause of action in the domestic system** than 'regular' norms of EU law would be.

B. **Judicial Interaction Techniques:** On the issue of **establishing the scope of application of the European Fundamental Right to a Fair Trial**, the Austrian Constitutional Court identifies Art. 47 EU Charter as covering the facts of the case, unlike Art. 6 ECHR which does not cover asylum proceedings. The Court extensively relies on CJEU case law (inter alia, principles of direct effect, supremacy, equivalence and effectiveness) to establish the **scope of application of EU law**; it also uses **consistent interpretation** to decide on the substance and content of the right to fair trial, looking at both ECtHR and CJEU case law.

**Proportionality** is used in order to establish whether a violation of the right to fair trial took place; ECtHR case law on the permissibility of national measures is used as a benchmark (**consistent interpretation**).

### ***Proportionality in the context of Freedom of Expression***

In the context of freedom of expression, proportionality aids the task of balancing the freedom either with other rights (such as right to privacy or data protection) or public interest (guarantees for journalists). In both cases the 'necessity in democratic society' is evaluated (be it under the framework of the ECHR or the EU law) on the basis of a number of elements which have been developed by the ECHR.

Earlier on, in *Close Up 2*, we have already referred to the proportionality test which lied at the heart of *Belpietro v Italy* case. There, the ECtHR made use of and provided further guidelines as to the assessment (in a democratic society) of (A) **proportionality of sanctions** for defamation.

In the present *Close Up,* we will be in turn focusing on (B) **proportionality in balancing out two rights.** The list below provides an overview of elements of proportionality drawn from the case law of the ECHR which frequently provide the basis for evaluation of both aspects of proportionality. Each

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[375] In this judgment the Court held that the rights and freedoms guaranteed by the CFR may be invoked as "constitutionally guaranteed rights" and may also serve as a standard of review for constitutional norm review proceedings, when the guarantees of the EU Charter equal "constitutionally guaranteed rights" in wording and determinateness. For a short analysis of the judgment, see Dr. Brigitte Bierlein, Vice President of the Austrian Constitutional Court, The Austrian Constitutional Court's Influence on the Legal Order, available at http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CD4QFjAC&url=http%3A%2F%2Fportal.concourt.sk%2Fdownload%2Fattachments%2F17269094%2FPrispevok_Bierlein.pdf&ei=FY5XU8ntKqqBywOfqYLQDw&usg=AFQjCNFMfHkH2C8htaso8hkvCi70yFXQTA&sig2=2EDax2WHA3OFWbJm5dAhSw&bvm=bv.65177938,d.bGQ

of the elements should be taken into consideration whilst undertaking the balancing activity by a national judge:

The standards of freedom of expression need to take into consideration the special controlling function of the press of a 'public watchdog'. The role of journalists is to diffuse information on public issues. Protection of exchange of ideas in the context of public debate is particularly important *(see Handyside vs the UK, Długołęcki vs Poland; Jucha and Żak vs Poland).*

Fulfilment by the press of the role of 'a public watchdog' may be put in danger when the state imposes excessive restrictions on journalists connected with the threat of custodian penalty. Such restrictions may have 'a chilling effect' and discourage journalists from fulfilling their functions. Freedom to receive information may thus be infringed upon (see *Lingens v Austria, Długołęcki v Poland).*

The ECtHR considers custodian penalty for defamation as proportionate only in exceptional circumstances – with reference to hate speech or incitement to violence only *(*see *Cumpana and Mazare vs Romania)* or when the state acts as a custodian of public order (see *Castells v Spain).*

In case of public persons a higher level of interference with their right to private life in favour of the freedom of expression is permitted than in the case of individuals not possessing such function, position in society. It is particularly relevant for executing public functions, controlling politicians and political institutions (see *Lingens v Austria, Castells vs Spain, Lewandowska-Malec vs Poland).*

When evaluating statements, national courts need to distinguish between statements of fact and statements of opinion; only the former should be tested from the point of view of their truthfulness. (see *Lingens vs Austria, Dalban vs Romania, Smolorz vs Poland).*

Freedom of expression encompasses also statements that are of controversial or even provocative and shocking in nature. (see *Mamere vs France, Handyside vs the UK).*

Satirical statements benefit from protection of the freedom of expression under the following conditions: (1) the statement is not misleading as to the facts; (2) the main goal of the satire does not lie in compromising someone or destroying his reputation. *(*see *Leroy v France, Kuliś&Różycki v Poland).*

With reference to the right to privacy, the ECtHR, following an extensive dialogue with national courts (see: *Close Up 13*)[376] has elaborated a seven prong test (based on *von Hannover* saga and *Axel Springer* judgments) which in the most distilled form takes the following form:

1) Contribution to a debate of general interest; 2) How well known is the person concerned and what is the subject of the report? 3) Prior conduct of the person concerned; 4) Content, form and consequences of the publication; 5) Circumstances in which the photos were taken; 6) Reliability of the journalistic information; 7) Severity of the sanction imposed by the courts.[377]

The Close Up we chose to reflect the use of the judicial interaction technique of proportionality is applied in this case in light of the ECHR, however there might be instances when the freedom of expression needs to be balanced with another right and the proportionality test must be applied (also) under the EU law framework, as was the case detailed in Close Up 10 - *Satamedia*. It could also happen that similar facts that are brought before the ECtHR and the CJEU might be approached differently by the two courts due to their different tasks and objectives. For instance, in *Lentia*[378], the

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[376] For more details on the von Hannover case, see JUDCOOP Handbook on Judicial Interaction in the field of the Freedom of Expression, at 38-48.

[377] After the *Hannover* judgment, in the *Ricci v Italy* and *Ciuvica v Romania* judgments of 2013, the ECtHR applies (and thus recommends also to the national courts) a less elaborate test for cases concerning the divulgation to the public of allegedly defamatory information, which could be considered defamatory: 1) the interests involved; 2) the control exercised by the domestic courts; 3) the conduct of the applicant and 4) the proportionality of the sanction (first developed in the Stoll case, paras.109-112, in 2007).

[378] ECtHR*, Informationsverein Lentia and others v. Austria*, Appl. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90.

ECtHR held that the broadcasting monopoly in Austria constituted an encroachment of Article 10(1) ECHR, whereas the CJEU in the *ERT*[379] case left the proportionality test to be settled by the referring domestic court.

### *CLOSE UP 12: Von Hannover – balancing the freedom of expression of press with the right to privacy of public figures*

### *Type of interaction: Horizontal Internal (among the German courts); Vertical Indirect (German courts – ECtHR)*

The exercise of freedom of expression might conflict with the right to privacy and/or family life (Article 8 ECHR, Article 7 EU Charter). Article 10 ECHR intends to promote the progress of society as a common good, and permits even publication of facts related to the private life of individuals when the information serves a public interest and/or debate. On the other hand, Article 8 ECHR primarily protects the individual against arbitrary interference by public authorities,[380] requiring States to refrain from such interferences (negative obligation) and to take appropriate measures to protect the private and family life of all individuals (positive obligation). Thus, it may well happen that, in specific circumstances, these two rights give rise to competing claims[381] of the individuals. For example, the right of the press to publish facts of private life of individuals, including public officials, which sometime can include offending, shocking, or disturbing facts,[382] and the right of the individual to be protected from unwarranted disclosure of their private life by the press.

Guidelines on how to solve similar cases have been authoritatively provided for by the ECtHR. The Strasbourg Court held that these two fundamental rights have equal standing and importance, which implies that in principle, one cannot take priority over the other. The criteria and the specific judicial interaction techniques that have been applied by the supranational court in order to find a solution to competing protections of freedom of press and privacy were distilled in the following four cases that will be discussed below: *Hannover cases No. 1*,[383] *2*,[384] *3*[385], and the *Axel Springer*[386] case.

All these cases originated from German courts, involving both direct and indirect judicial interactions between German courts of all levels of jurisdiction and the ECtHR. The judgments of the ECtHR have then been cited by other national and regional courts. The Strasbourg Court judgments have been used by national courts as basis for adapting judicially developed doctrines (see the UK example below), changing previous judicial approaches to cases involving conflicts between freedom of expression and right to privacy (see the French and the German examples below). At times the

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379 CJEU, Case C-260/89 *ERT*.

380 Public authorities include courts and tribunals, government departments, local authorities and 'any person certain of whose functions are functions of a public nature', statutory media regulators

381 Legal literature suggested that instead of assessing these cases as instances involving competing exercises of freedom of expression and right to privacy, we should rather speak of a conflict between different obligations which the State has towards different individuals and the society. In fact, both the holder of the freedom of expression and that of the right to privacy could in principle institute proceedings against the State for insufficient protection of one or the other respective human rights. In this way the legal force and importance of the two fundamental rights is preserved without having to choose to give priority to one right over the other. See the comment of P. Ducoulombier, 'Conflicts between Fundamental Rights and the European Court of Human Rights: An Overview' in E. Brems (ed) *Conflicts between Fundamental Rights*, Intersentia, Oxford, 2008, 217 – 246, at 221-2.

382 Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see ECtHR: 15974/90 *Prager and Oberschlick v Austria* (1995), para. 38; Appl. no. 38432/97, *Thoma v Luxembourg* (2001), paras. 45-46; and *Perna v Italy*, cit., para. 39.

383 ECtHR: Appl. no. 59320/00 *Von Hannover v Germany I* (2004).

384 ECtHR: Appl. nos. 40660/08 and 60641/08 *Von Hannover v Germany II* (2012).

385 ECtHR: Appl. no. 8772/10 *Von Hannover v Germany III* (2013).

386 ECtHR: *Axel Springer AG v Germany*, cit.

ECtHR's own change of interpretation from *Von Hannover No. 1* to *Von Hannover No. 2* judgments have given rise to different interpretations of its judgments by the national courts within the same jurisdiction and in similar cases.

The first three cases were brought by Princess Caroline of Hannover (*Hannover No. 1*, *2*, and *3*), and another one by a publishing company (Axel Springer).

## Von Hannover Saga

**ECtHR – *Von Hannover no. 1* (Application No. 59320/00, Judgment of 24 June 2004)**

The first *Von Hannover* case raised the issue of the protection of private life of Princess Caroline of Hannover against the freedom of expression. A tabloid published in Germany but also in other European countries a series of photographs taken in public places, showing Princess Caroline in different scenes of her private life. Princess Caroline brought civil proceedings against the publisher seeking an injunction preventing further publication of the photos in other European countries and damages in regard to those that were already published.

Before the German court, Princess Caroline claimed that the publication infringed her personality right (Articles 2(1) and 1(1) of the Basic Law) and her right to protection of her private life. She also alleged a breach of her right to control the use of her image, under the Copyright Act. From the first instance until the Constitutional Court, the German courts invariably held that, under the exception established by section 23 of the Copyright Act, which allows publication of images portraying an aspect of contemporary society without prior consent, and since she was a figure of contemporary society "par excellence," her right to protection of private life could not assist her in public places. Only in respect of the photographs showing Princess Caroline with her children did the Constitutional Court allow her appeal on the grounds that they infringed her rights under the Constitution. All other photos had been taken exclusively in public places and thus, even if they showed her in scenes of her private life, they could have been published without her consent (see the different approach of French courts in similar cases balancing the right of privacy of public figures with freedom of expression).[387] The Court of Appeal of Hamburg additionally pointed out that "even if the constant hounding by photographers made her daily life difficult, it arose from a legitimate desire to inform the general public." (see para. 21 *Hannover no. 1*, ECtHR judgment).

After several failed attempts before German courts, Caroline of Hannover sought relief before the ECtHR arguing that German courts did not protect adequately her private life from intrusions by the press. The Third Section of the Strasbourg Court applied the proportionality test and took issues with the German courts on two main issues:

1) The *subject of the publication (public or private figure)*. The ECtHR disagreed with the definition provided by the German courts of a "public figure par excellence". The ECtHR distinguished between different public figures based on whether they exercised or not official functions. Therefore, while politicians and public servants who are exercising official functions must accept a wider intrusion into their private life, celebrities who are not exercising such functions could not be subjected to the same level of limitation of their private life. It found that the criteria that had been established by the German courts to distinguish a figure of contemporary society "par excellence" from a relatively public figure were not sufficient to ensure the effective protection of the applicant's private life.[388] The Court found that

387 In balancing freedom of expression with the right of privacy, French courts conferred initially a decisive role to the consent of the individual to the specific exercise of freedom of expression which injured her private life. Therefore, French judges limited to assess the limits of authorisation to the specific publication, manifestation of the freedom of expression.

388 See S. Foster, "The public interest in the private lives of public figures and the European Court of Human Rights", *Cov.L.J.* 2012, 17(1), 105-112.

Princess Caroline was not a politician, and not even a State official, a position that could have justified such an extensive intrusion into her private life.

2) The *type of information which is imparted to the public*. The ECtHR differed on whether the publication of the photographs was justified by "a legitimate desire to inform the general public" as noted by the Court of Appeal of Hamburg. The ECtHR noted that the contribution to a debate of general interest is not present when a publication "only satisfy[ies] the curiosity of a certain readership." According to the ECtHR the legitimacy of publishing photographs showing the Princess playing various sports, outside her Parisian residence and in a beach club were considered unrelated to any debate of public interest. The ECtHR held that as long as there is no public interest in the disclosure of personal information about an individual, regardless of his/her position in the society, the exercise of freedom of expression will be held to be in violation of Article 8 ECHR.

**ECtHR – *Von Hannover No. 2* (Applications Nos. 40660/08 and 60641/08, Judgment of 7 February 2012)**

The *Hannover No. 2* case concerned the publication of other three pictures of Princess Caroline of Hannover in a magazine: two of them showed her while with her husband in a skiing holiday in St. Moritz; in the third she was attending the Rose Ball. Although the pictures could not be considered to be of public interest, they could be interpreted as informing the readership on the behaviour of the royal family during the grave sickness of the Prince.

The Hamburg regional Court **decided not to follow the interpretation previously established by the Federal Constitutional Court in this kind of cases**, where the latter Court did not recognise a legitimate interest unless the person photographed had retired to a secluded place away from the public eye. Relying on the jurisprudence of the ECtHR, the Regional Court found that in the present case it was Princess Caroline's right to protection of her personality rights that prevailed. In reaching this conclusion the Regional Court referred extensively to the ECtHR judgment in *Von Hannover No. 1*. It found that the applicant's relationship with her father, regardless of the fact that he was ill, did not contribute to a debate of general interest to the society, especially as the applicant was connected to the prince of a State of minor importance in international politics and merely through a family tie and she did not exercise any official function.

If the first instance court gave precedence to the right to privacy on the basis of the requirements established by the ECtHR in *Von Hannover No. 1*; the appeal courts gave precedence to freedom of expression as it resulted from the judgment of the German Constitutional Court.

The Hamburg Court of Appeal found that, whilst the articles were primarily of entertainment value, the publication of the photos was nonetheless lawful in terms of the judgment of the Constitutional Court of 15 December 1999, whose main legal reasoning (*tragende Erwägungen*) was binding on the Court of Appeal (para. 26)

Contrary to the first instance court, the decisive element in the German appeal court's reasoning was the ECtHR test of the public interest debate. It allowed the publication of the pictures in *Von Hannover No. 2* on the basis of the existence of a legitimate public interest aspect in how the family of Prince Rainier was conducting itself during his illness. In that context, the publication of picture with the Princess in vacation was held to serve the purpose of public interest. The Princess complained to the ECtHR, alleging a violation of her right to privacy.

Unlike in *Von Hannover No. 1*, the Grand Chamber of the Strasbourg Court did not disagree with the interpretation of the German Federal and Constitutional Courts. It further noted that the German courts had made changes to their case law following the decision in *Von Hannover No. 1*. Siding with the reasoning and interpretation of the German higher courts, it held that the pictures could be published without violating the Princess right to private life. It held that "the characterization of Prince Rainier's illness as an event of contemporary society… having regard to the reasons advanced by the German courts…cannot be considered unreasonable" (para. 117). In its judgment, the ECtHR set out five

criteria relevant to balancing competing rights under Articles 8 and 10 ECHR: **1.** The contribution of the information to a debate of general interest; **2.** The notoriety of the person concerned; **3.** The prior conduct of the person concerned; **4.** The content, form and consequences of the publication; **5.** The circumstances in which the photograph was taken.

The ECtHR held that it was in the public interest to know how the family of Prince Rainier was reacting to the latter's illness. It has been argued[389] that this change of attitude of the ECtHR – namely, the broadening of the definition of the public interest defence as compared to Hannover No.1 - is a reaction to the criticisms attracted by its previous judgment in the Hannover No. 1 case. Probably, those criticisms led the ECtHR to reinstate the margin of appreciation that the Member States and their national courts are said to enjoy in the application of both freedom of expression and right to privacy.[390] Furthermore, unlike in the *Hannover No. 1* case, the German courts considered the applicant a public figure based on the criteria established by the ECtHR. This appears to have contributed to the change in the approach of the ECtHR in the *Hannover No. 2* case.[391]

***ECtHR – Von Hannover No. 3 (Application No. 8772/10, Judgment of 19 September 2013)***

After the *Von Hannover No. 2* judgment, Princess Caroline applied for the third time before the ECtHR on a similar issue. The German courts had rejected her application for an injunction against a magazine which published photographs of her holiday house. The pictures were accompanied by a commentary on celebrities' practice in renting luxury resorts. This judgment of the ECtHR clarifies the ultimate approach of the Court after the oscillating first two instalments. The ECtHR seems to have endorsed a deferential approach that respects the reasoning of the national courts, somewhat closer to *Von Hannover No. 2* case. Thus, as long as the balancing exercise has been undertaken by the national courts in conformity with the criteria laid down in the Court's case law, the Court will require "strong reasons" to substitute its view to that of the domestic courts.[392]

***ECtHR – Axel Springer (Application No. 39954/08, Judgment of 7 January 2012)***

The follow up case concerns the limitation of the right to privacy of a famous German actor. He had successfully obtained a court injunction preventing the publication on a tabloid of pictures accompanied by an article relating to his arrest for possession of drugs during the Oktoberfest in Munich. Unlike the case of Princess Caroline of Hannover, in this case the application was filed by the publisher of the newspaper, alleging an undue restriction of his freedom of expression (compare the judgment of the German court with the judgment of the House of Lords in the English case *Campbell v. Mirror Group Newspapers Ltd*).[393] After failing to obtain a remedy in German courts, he claimed the violation of Article 10 ECHR. Unlike in the *Von Hannover No. 2* case,[394] this time the Strasbourg Court sided with the applicant, and contradicted the German courts. The Court followed the test developed in its *Von Hannover No.1* judgment: it took notice first of the distinction between pure public figures and private individuals,[395] then of the distinction between public interest and what the public is

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389 See S. Foster, "The public interest in the private lives of public figures and the European Court of Human Rights", *Cov.L.J.* 2012, 17(1), 105-112; A. Ohly, "Privacy v. Freedom of Expression in the ECHR", *JURIST - Forum*, Apr. 3, 2012, http://jurist.org/forum/2012/03/ansgar-ohly-privacy-rights.php .

390 For a commentary of the *Hannover II* judgment of the ECtHR from the perspective of the application of the margin of appreciation recognised to the national courts, see B. Pillans, "Private lives in St Moritz: Von Hannover v Germany (no 2)", *Comms. L. 2012*, 17(2), 63-67.

391 Ibid.

392 *Von Hannover v Germany III*, cit., para. 47.

393 In this case the UK House of Lords considered an article including pictures of Naomi Campbell at a meeting of Narcotics Anonymous to be illegal and prohibited its publication.

394 The Axel Springer case was reviewed by the Grand Chamber of the ECtHR jointly with the *Hannover No.2 case*.

395 The following questions were established by the ECtHR as questions which the national courts have to raise in such cases: How well known are the person concerned and the subject matter of the report? What is the prior conduct of the

interested in, or curious about.[396] In *Axel Springer*, the ECtHR added two more elements to the test: the reliability of the published story and how severe the court sanction is. In *Axel Springer*, the ECtHR found that the criteria weighed in favour of freedom of expression, and held that the grounds advanced by the respondent State were not sufficient to establish that the interference complained of was necessary in a democratic society. "*Despite the recognition of a margin of appreciation enjoyed by the States, the ECtHR considered that there was no relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued by informing the public*." (see para. 110). This clarifies the relationship between margin of appreciation and principle of proportionality in the hands of the ECtHR. Even when the former is acknowledged the Court of Strasbourg does not renounce the test of proportionality in order to assess whether a given conduct corresponds to a violation of the ECHR.

In addition, this judgment exemplifies the often untapped potential of the interplay between courts. The Strasbourg Court has added new elements (what we called criteria) to its test, also in order to overcome the ambiguities of its previous decisions and in light of the national follow up. It is important to note that the decisive elements in the ECtHR test in these cases is the contribution made by the impugned publication to a debate of general interest[397] and the national courts to apply its 7 prong test criteria (see the *Axel Springer* case)

A. **Conflict:** Between freedom of expression and right to private life of a public figure. The balancing between the two was addressed differently by the ECtHR and national courts.

B. **Judicial Interaction Technique** - The impact of *Von Hannover No. 1* on the national case-law is different depending on the preferred outcome of the **proportionality test** within each jurisdiction. Some courts favour a higher degree protection of freedom of expression (see the approach of the German courts, especially in *Von Hannover No. 1*), while others (like the ECtHR) give priority to the right to private life (even of public figures). The different approaches taken at national level are an emblematic example of the possible disagreements between courts in the "construction" of the balancing in a multilevel and pluralistic context. In particular, balancing does not seem to follow a single homogeneous scheme before courts and the same applies at national level (given the high heterogeneity in terms of constitutional structures of the member States of the EU and the ECHR). Different outcomes of the weighing test might depend on different factors: the wording of the relevant provisions included in the fundamental charters adopted as parameter by the different courts, the nature of the proceedings before the different courts (this is one of the reasons suggested by the German Constitutional in its order no. 1481/04, for instance, where it also recalls that in certain areas the balancing must be carried out taking into account the specificity of national law: family law, immigration law, and the law on protection of personality.[398] On that occasion the Federal Constitutional Court stressed the particularities of the proceeding before the ECtHR, which might lead to a different outcome in the balancing between values).

It needs to be noted that **there is a meaningful margin of appreciation that the ECtHR affords to national courts.** What the Grand Chamber made clear was that in exercising a supervisory jurisdiction it is principally concerned that a proper process is carried out by the domestic courts, taking into

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person concerned (in particular whether the person claiming violation of right to privacy has previously made public declaration of his private life or not)?

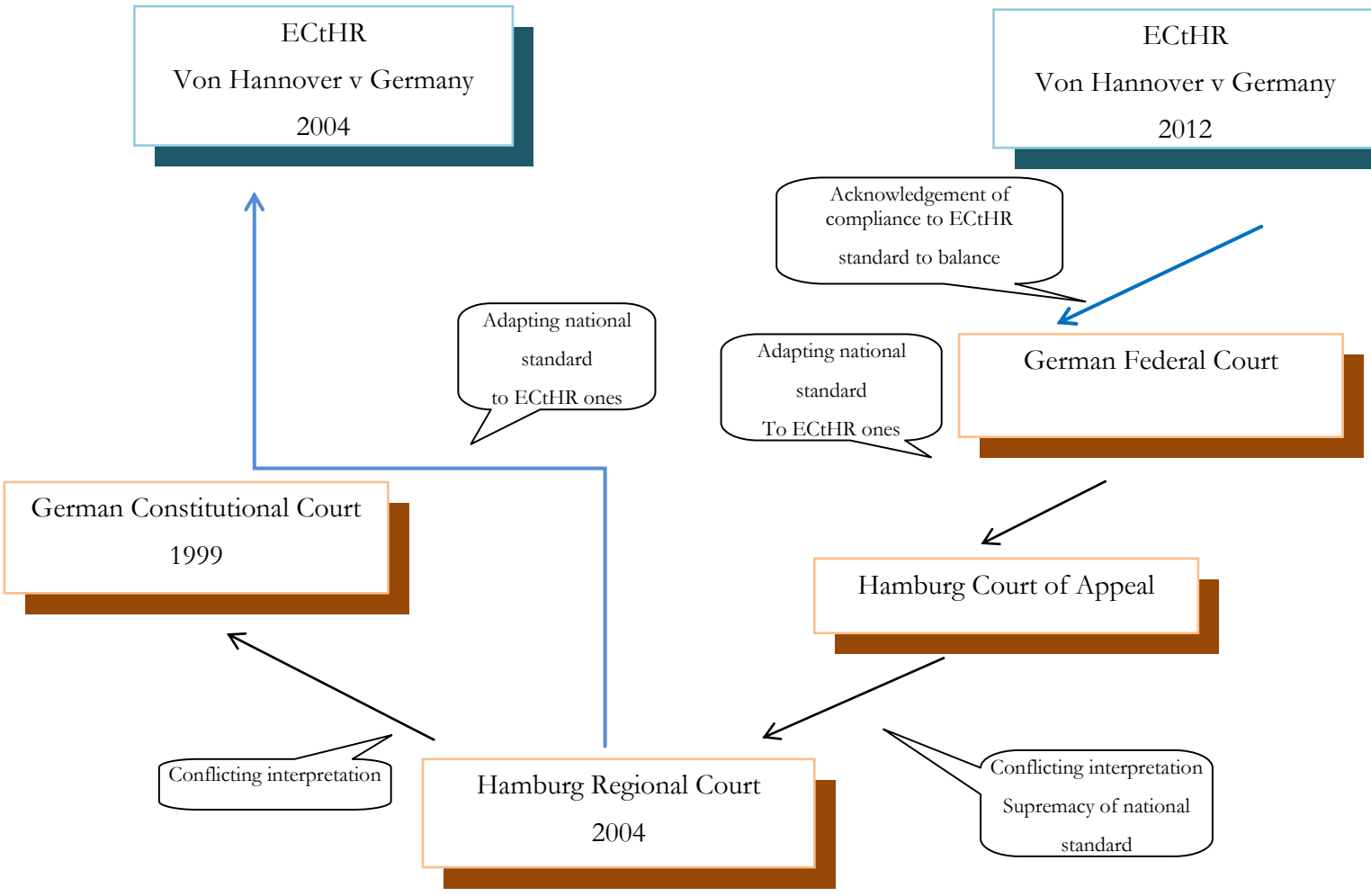
[396] The following questions would need to be raised by national courts when assessing the contribution of the publication to a debate of general interest: is there contribution to a debate on a matter of public interest? What are the method of obtaining the information and its veracity? What are the content, form and consequences of the publication?

[397] B. Pillans, "Private lives in St Moritz: Von Hannover v Germany (no 2)", (2012) Comms.L., (2), 63-67.

[398] On this see: F. Hoffmeister, "Germany: Status of European Convention on Human Rights in Domestic Law", (2006) *International Journal of Constitutional Law*, (4), 722-731.

account the methodology and jurisprudence of the European Court of Human Rights. Thus, if it is clear that a domestic court has applied the criteria set out, the ECtHR will respect the legal reasoning of the national court and the substantive balance thus reached between competing interests.[399] Instead of imposing solutions in a top-down way, the ECtHR provided national judge with a due-diligence checklist: national judges are likely to adjudicate within the limits of the ECHR when they follow the ECtHR's instruction. The **proportionality test** is used as a vertical tool of cooperation to ensure predictability and ascertain whether the specific outcome of national proceedings is within the limits of the **margin of appreciation.**

Dialogue among courts – Germany - ECtHR




### g) Comparative Reasoning

Until a few years ago, comparative law was seen as a matter for academic research; a very interesting body of knowledge, but not immediately relevant to practice of law. Legal practitioners would admit its importance in theory, but they would add that they themselves were, of course, too much occupied with the latest developments in national laws on specific legal topics. National judges, even from supreme and constitutional courts, are very often overburdened with cases which leave them

399 *Von Hannover v Germany* [2012] EMLR 16 at p. 368 [para 107].

very little time to look abroad for solutions to pending cases. Also, since they are bound by the requirement that legal proceedings are finalized in a reasonable period of time, they will tend to solve the disputes based on the national legal criteria. The legal landscape has undergone deep transformation which forces the use of comparative legal reasoning, foreign law and jurisprudence. Firstly, the EU legal system requires unification and harmonization of national laws. And due to the globalization and progress of science and technology, problems related to protection of individual rights has grown in complexity and requires constant search for solutions (for instance: protection of the individual's privacy from new means of technological communication, framing of individual rights of persons with human enhancements). In particular, the EU instruments implementing the principle of mutual recognition and trust in civil and criminal law and fundamental rights systems have forced national courts to become aware of legal systems outside their own.

When using comparative reasoning, national judges should take into account the differences and analogies that exist between the context in which they operate and that of foreign judges. This is relevant in order: 1) to choose a foreign decision that might be helpful to decide their own cases; 2) to adapt the solution experimented in another context to their own legal orders. Vertical circulation of solutions devised by the CJEU is somewhat a different case. Here the adoption of a solution is accompanied, for instance, by the primacy of EU law and by a de facto *erga omnes* effect of the interpretative rulings of the Luxembourg Court.

At EU level the CJEU hardly makes express reference to the case law of courts other than the ECtHR and more in general to comparative law elements (it is much easier to find some germs of comparative reasoning in the Opinions of the Advocate General). Implicitly or explicitly, the CJEU develops comparative analysis when constructing a general principle of EU law inferred from national constitutional traditions (as in *Mangold*).

In case of the ECtHR, comparative analysis may be used in order to detect the existence of a consensus in domestic legal system s and to subsequently determine the width of the margin of appreciation left to states parties to the Convention.[400] In *Gruene Punkt*,[401] long delays in EU court (General Court) proceedings were found by the CJEU to be in breach of the fundamental right to a fair trial (ECHR Art. 6(1), EU Charter Art. 47). In *Chronopost*,[402] the CJEU ultimately decided that there was no bias just because the same Judge Rapporteur was appointed in two related cases, while relying heavily on ECtHR case law. This could be described as an instance of comparative reasoning that approaches consistent interpretation. In the same sex couples case law both in Italy and Spain,[403] comparative reasoning was paired up with consistent interpretation technique by national courts in order to break the impasse and create the space within constitutional sphere for recognition of same sex unions into the legal systems of the two states.

In practice, comparative reasoning is used to achieve a number of purposes as presented in the below overview:

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[400] ECtHR, *Schalk and Kopf v Austria*, Appl. No.30141/04, Judgment of 24 June 2010.

[401] CJEU, C-385/07 P *Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities* (2009) ECR I-6155.

[402] CJEU, Joined cases C-341/06 P and C-342/06 P *Chronopost SA and La Poste v Union française de l'express (UFEX) and Others* (2008) ECR I-4777.

[403] See extensive discussions at pp. 46 and 51 respectively of the Non-Discrimination Handbook- *Change in Interpretation of national legal norms within the boundaries established by the CJEU/ECtHR (within a pre-determined margin of discretion/appreciation.*

***- To strengthen the reasoning and distinction of a given case (Close Up 13);***

***- To find a solution when a present legal tools give you none (Close Up 14);***

***- To operate within the margin of appreciation as casually practiced by the ECtHR (Close Up 15)***

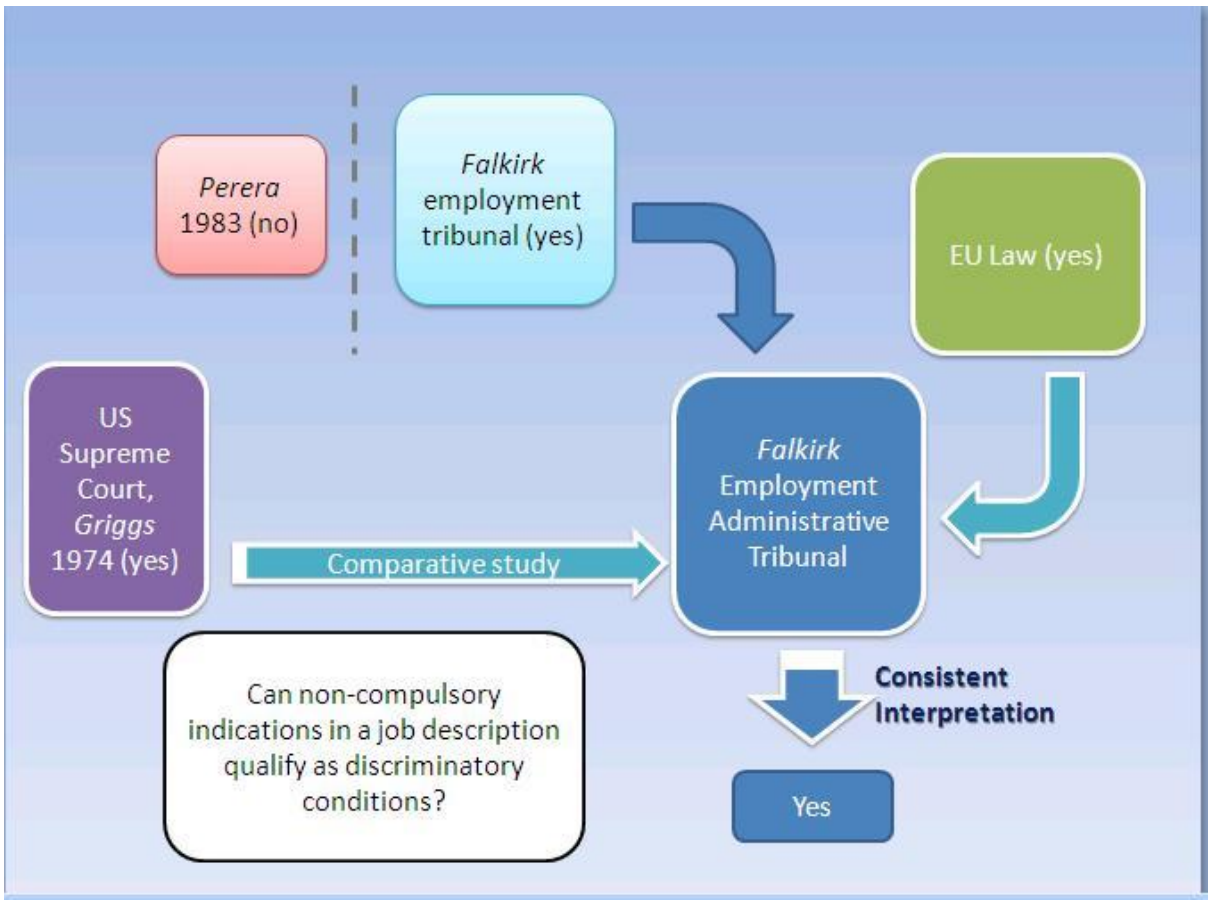
***CLOSE UP 13: Falkirk Council v Others – Use of comparative reasoning – foreign national judgments – in the field of the right to non-discrimination on grounds of sex***

***Type of cooperation: Horizontal external (ordinary court – foreign courts) Vertical (ordinary court – CJEU/EU law)***

*National courts can engage in comparative analysis of the treatment of similar principles across jurisdictions to draw support for their reasoning;*

*National courts interpret domestic provisions in light of EU law, performing their duty of consistent interpretation to prevent conflicts.*

*Note: see also the judgment of the Spanish Constitutional Tribunal on the recognition of same sex marriages on the added-value of the comparative reasoning in the field of non-discrimination (existence of the European consensus in a sensitive area of law)*[404]




The plaintiffs claimed that management training and supervisory experience as criteria for employment to a managerial post at a prison were indirectly discriminatory against women. According to theUK employment tribunal judgment, while these were not conditional requirements but criteria indicating "desirable" skills, in practice they were used as decisive elements by the interview panel. The plaintiffs referred to EU law precedents, and argued that these criteria had a disparate impact on women, who were mostly employed in lower-level posts and therefore it was harder for them to meet these criteria. The main legal issue was whether such indications that fell short of establishing mandatory

404 Constitutional Court, STC 198/2012, 6 November 2012, available at http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106. The case is commented in JUDCOOP Handbook on the use of Judicial Interaction Techniques in the field of the principle of non-discrimination, at pp.52-55.

requirements for a position can be held illegal on grounds of unjustifiable discrimination. The industrial tribunal, which upheld their claim, performed the proportionality test and concluded that the discriminatory effect of the practice was not justified by the employers' legitimate needs.

The Employment Administrative Tribunal (EAT) dismissed the employer's appeal,[405] finding that the requirement indeed would inevitably disadvantage women due to the large number of women without managerial training or experience in social work posts (the first limb of the test) and that it was not justified to attach such importance to managerial experience for a first-level managerial post (second limb). It also distinguished from a previous case, *Perera*,[406] in which it was held that to qualify as requirement a criterion must be such that failure to satisfy it would bar one's chances to obtain the job. *De facto* impairments, like in the instant case, were held enough to entail discrimination.[407]

The EAT strengthened its reasoning in two ways. First, it referred to the Equal Treatment Directive (207/76/EC), holding that the "requirement of condition" statutory formula fell to be interpreted in light of the Directive, which did not support a narrow reading,[408] and in any case could be invoked directly against the employers in this case, since the dispute was a vertical one.

Moreover, and very interestingly, the EAT made a general reference to the concept of indirect discrimination and provided a teleological interpretation of the domestic act (the UK Sex Discrimination Act 1975) holding that it was designed precisely to prevent situations in which women were put at a *de facto* disadvantage. In making this statement, the Tribunal recalled similar instruments adopted in the US, and even mentioned a precedent decided by the US Supreme Court.[409] In this precedent dating more than ten years before the other UK precedents mentioned, it is clear that the Tribunal acknowledged its inspirational value, in that it represented the leading case on employment discrimination that discussed the adverse impact theory.

Today, the issue seems mute since the Burden of Proof Directive 80/97/EC makes it clear that indirect discrimination cannot require a specific 'absolute bar' to a particular position. The use of consistent interpretation and foreign precedents to distinguish from UK case-law, therefore, was subsequently validated by the EU legislator.

A. **Conflict:** evaluation of the criteria of indirect discrimination in a national context.

**B. Judicial Interaction Techniques**: EU-**consistent interpretation** of domestic law led to a change in domestic case-law. In particular, it is remarkable to appreciate the EAT's keenness to embrace the 'purposive approach' and avoid narrow constructions that might hinder the effective attainment of EU law's objective (in this case, the eradication of discriminatory measures).

The reference to the seminal US *Griggs* case represents one vivid instance of horizontal judicial interaction (**comparative analysis**). Even if it formally takes the form of an *obiter dictum*, it is not hard to appreciate its real importance within the reasoning of the Tribunal, which needed to provide an authoritative reason to distinguish from *Perera*. The distinguishing was based on an axiological

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405 *Falkirk Council v Whyte* [1997] IRLR 560, available at http://people.exeter.ac.uk/rburnley/empdis/1997IRLR560.html.

406 *Perera v Civil Service Commission* [1983] IRLR 166 CA.

407 See para. 6: "*We consider that each case has to be determined on its own merits, and the status of the factors in question relevant to the application for the post in question very much depends upon the circumstances of a particular case. Some may be too trivial to be regarded as a condition or requirement; but, equally, if material, and it is shown otherwise that qualifying for the particular factor is more difficult for women then for men in the appropriate workplace, we do not see why that should not be a condition or requirement in terms of the legislation in relation to applications for the post, particularly when the relevant factor or factors turn out to be decisive.*"

408 On the contrary, the Tribunal recognized the interpretative principle of the purposive approach, sanctioned by House of Lords in *Litster v Forth Dry Dock Engineering Co Ltd* [1989] IRLR 161.

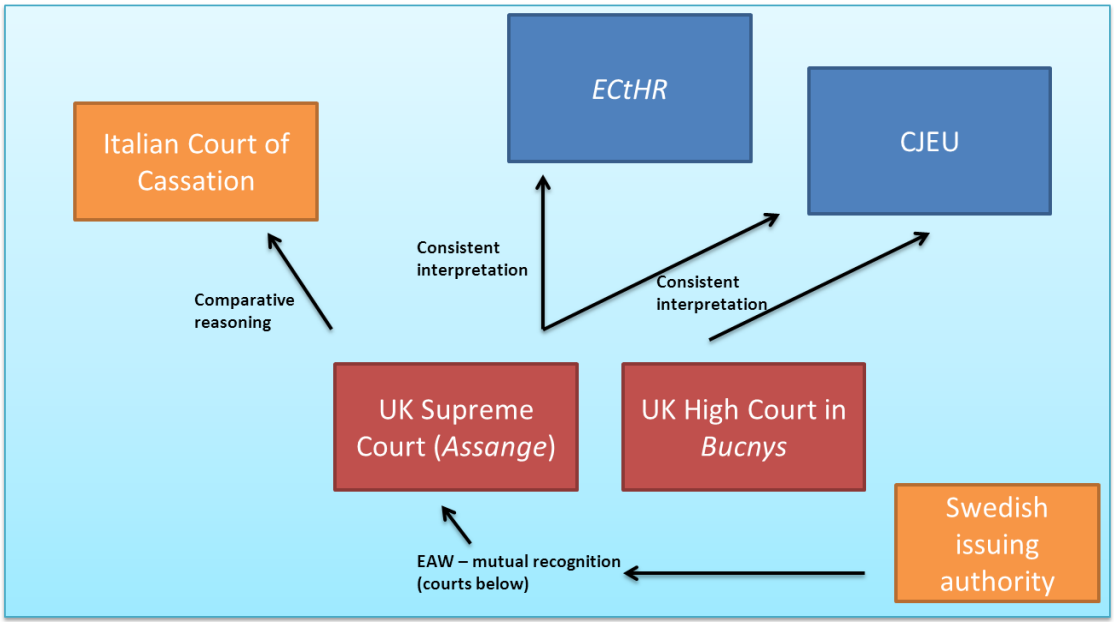
409 *Griggs v Duke Power Co* [1971] 401 US 424.

reasoning (*de facto* discrimination is not less harmful than *de jure* discrimination) and a thin endorsement of the purposive approach peculiar to EU law (which fails to clarify why it should not apply to race discrimination). The decisive support, however, was drawn precisely from the well-established US constitutional doctrine, which tackled squarely the issue of the factually disparate impact of measures that are *prima facie* neutral. This seems a typical case where similar principles have been considered and construed in different jurisdictions, and comparative analysis can represent a convenient shortcut for courts dealing with novel legal issues, as well as a handy enhancement of the authoritativeness of their reasoning.

**C. Alternatives:** preliminary reference.

***CLOSE UP 14: Assange (FT) – use of comparative reasoning and mutual recognition of foreign judgments in the field of the right to a fair trial***

***Type of cooperation: Vertical Indirect (UK Supreme Court - CJEU and ECtHR), Horizontal External (UK Supreme Courts – national courts from other Member States)***




Mr Assange, an Australian citizen, was subject to an EAW issued by the Swedish Prosecutor Authority for sexual related offences. Mr Assange argued before UK courts that the EAW had not been issued by a judicial authority within the meaning of s.2 of the 2003 UK Extradition Act implementing the EAW Framework Decision (FD). He mainly relied on the jurisprudence of the ECtHR interpreting Art. 5(3) to mean that a prosecutor cannot be considered a judge or other officer authorised to exercise judicial power. The main point of law before the UK Supreme Court (UKSC) was whether 'judicial authority' under the 2003 UK Extradition Act (EA) was to be attributed a meaning identical to the one established by the ECtHR. If so, the Swedish Prosecutor would have likely not passed the high threshold established by the ECtHR.

The majority of the UKSC held that since the EA was an implementing act, the term 'judicial authority' should be interpreted in conformity with the FD, accepting that 'judicial authority' would be viewed as an autonomous concept by the CJEU.[410]

410 See the more detailed analysis of the UK High Court in the *Bucnys* case: "*The wording has to be capable of being adapted to the legal systems of all Member States. So we think that the CJEU would say that there can be no preconceived template of what constitutes a "judicial authority", so long as the particular "judicial authority" designated by a Member State accorded with certain autonomous, objective,*

In the *Bucnys*[411] and *Assange* cases, the UKSC held that, in order to interpret this legal concept, it will have to use the interpretative tools that the CJEU itself would use. Since the CJEU had not yet had the opportunity to interpret this concept, the UKSC opined that, according to its previous jurisprudence, the CJEU would consider: (i) the wording of the FD; (ii) a comparison of its different language versions; (iii) the aims of the FD and of the Treaties; (iv) the genesis of the FD and previous European extradition procedures; (v) the practice of applying the FD by the Member States and positions taken in response by the EU institutions."

The UKSC compared **the natural meaning of "judicial authority**" in the English and French versions, and chose to give higher importance to the French version since it was the language of the first draft of the FD; however, the term was interpreted equally broadly in both versions. Next, establishing the **(2) the objective of the FD**, the UKSC compared a previous version with the final version of its text. The previous version defined 'judicial authority' as including judges and prosecutors; the final one did not include this precise definition any more. The UKSC interpreted the purpose of this omission to be to broaden the meaning so that it was not restricted to a judge or a public prosecutor: the removal of the definition was intended to leave the phrase vague so as to accommodate a wider range of authorities (para. 65).

Mr. Assange argued that the meaning of this EU law-based term should follow Art. 5(3) ECHR , namely a judge or other officer authorized by law to exercise judicial power. He invoked 17 judgments of the Strasbourg Court to that effect. He also claimed that the term should be interpreted consistently across the different provisions of the FD. The UKSC did not share this interpretation. It held that "The phrase is capable of applying to a variety of different authorities… the contexts permit the issuing judicial authority to have different characteristics from the executing judicial authority and, indeed, for the phrase judicial authority to bear different meanings at the stage of execution of the EAW dependent upon the function being performed." (para. 75) The UKSC argued that the stage of proceedings when the ECtHR definition becomes relevant is the stage of the execution of an EAW, and not the stage at which a request is made by the issuing State for the surrender, or as the English statute terms it, the extradition, of the fugitive (para74). According to the UKSC, "[t]he protection provided by Art 5 [ECHR] is that the individual arrested is brought promptly before a judge or other officer authorised by law to exercise judicial power and that he is able to take proceedings by which the lawfulness of his detention is decided quickly by a court and his release ordered if the detention is not lawful (para 148).

The Court decided that a public prosecutor was a "judicial authority" within the meaning of the UK Extradition Act, and, accordingly, that the EAW was lawfully issued.

A different decision was reached by the UK High Court in the *Bucnys and Sakalis* case in regard to public officials of the Ministry of Estonia that issued an EAW in the name of one of the defendants.

The UK High Court of Appeal decided that a conviction EAW issued by a department of the Estonian Ministry of Justice could not be executed, because it was not issued by a "judicial authority" in the meaning of the EA 2003 and thus also the EAW FD, because it was not shown that the department's personnel have sufficient functional independence from the executive.

A note on comparative reasoning:

*norms. That approach would be consistent with Art 34(2)(b) EU of the European Union Treaty which provides that Framework Decisions are "binding…as to the result to be achieved but shall leave to the national authorities the form and methods [ to do so]".*"

411 *Bucnys and others. v. Lithuanian and Estonian Ministries of Justice* [2012] EWHC 2771 (Admin)) para. 88. The Bucnys case followed the Assange case and cantered around the same point of law, namely, this time whether the public officials of the Ministry of Justice can be considered 'judicial authorities'.

One of the techniques that UK Courts wanted to use for the purpose of solving the case was comparative analysis of relevant national jurisprudence from other Member States. The UKSC found in its judgment of July 2012 that it did not have knowledge of relevant foreign judgments from other Member States that dealt with the same subject matter, except Piaggio (Germany) (14 February 2007, Court of Cassation Section 6 (Italy), which it cited in support of its reasoning.[412] At that time, however,the Supreme Court of Cyprus already assessed (2008) whether the Swedish public prosecutor in the Office of Financial Crime was a competent judicial authority in the meaning of Art. 6 FD EAW, finding that every public prosecutor in Sweden is a competent judicial authority for issuing the EAW.

In a previous judgment from 2005, the same Supreme Court of Cyprus found that Dutch public prosecutors can be considered as judicial authorities, adding that "It is up to each MS to decide how to give effect to a EAW FD which states that an EAW is to be issued by a 'judicial authority'."

A. **Conflict**: establishment of the notion of 'judicial authority' in such a manner that it is coherent with the CJEU and national legal order.

B. **Solution: 'Judicial authority' is recognized** to be an **autonomous concept of EU law** whose interpretation should be based upon EU law (primary, secondary and soft law) and not the ECHR based definition of the equivalent concept. **Conclusion: The coherence and uniform interpretation** and application of European Fundamental Rights by national courts should not depend solely on the vertical relations, between national courts and the CJEU. In an intertwined pluralist legal system composed of EU, ECHR and national legal systems, national courts should be informed of the manner in which national courts of other EU countries interpret and apply EU, ECHR laws and respectively European Fundamental Rights in similar cases.

**C. Judicial Interaction Techniques:** The UKSC found itself bound to interpret the concept of 'judicial authority' from the 2003 Extradition Act in conformity with Art. 6 EAW FD, based on the **duty of consistent interpretation** established by the CJEU in *Pupino*. **Until December 2014** the UK court **could not send preliminary references** to the CJEU. Given the above, the **UKSC had to decide what interpretative** tools it will use in order to reach a conclusion on this matter. The tools applied by the UKSC were **comparative reasoning** (by looking at **foreign judgments from the Member States**), replication of the CJEU interpretative arsenal (**textual, contextual and teleological interpretations** of the concept of judicial authority from Art 6 FD), and **interpretation of Art 5(1), (3) and 6 ECHR consistent with the relevant jurisprudence of the ECtHR**; the justification for assessing EU soft law **and the implementation practices of the Member State**s in regard to Art 6 EAW FD was based by the UKSC on **Art. 31(3)(b) of the Vienna Convention of the Law of the Treaties.**[413]

**D. Alternatives**: none!

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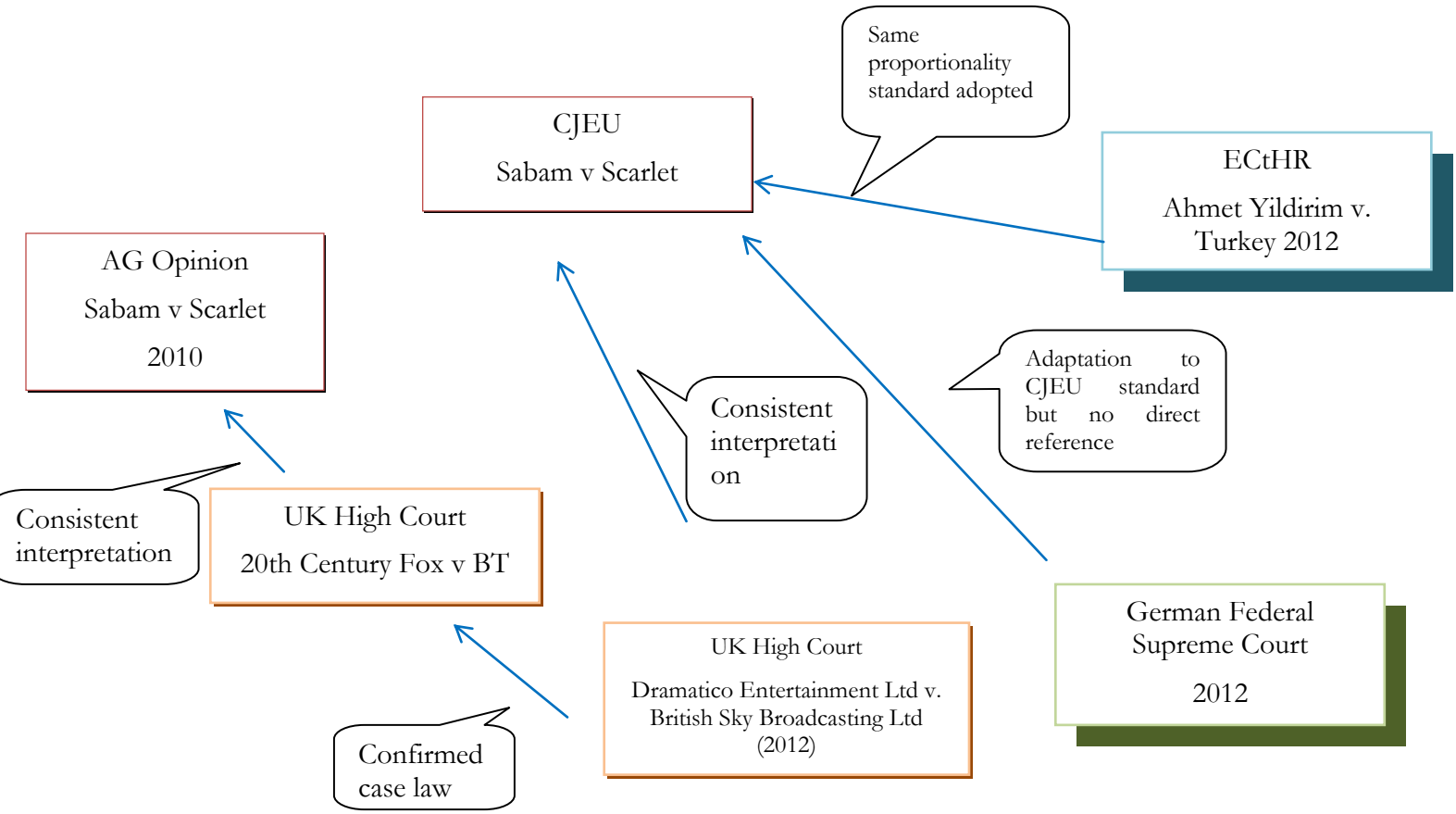
[412] The Piaggio case was not exactly on the same issue, since there was no dispute as to the nature of a Public Prosecutor as a judicial authority (like in the *Assange* case), but the issue concerned the violation of Law n. 69 of 2005, Art 1, paragraph 3 since the EAW was not signed by a judge. The Italian Court of Cassation established that the provision does not refer to the EAW, as erroneously claimed by the applicant, but to the injunction/order on the basis of which the warrant itself was issued (in that case, it appeared clearly that the arrest warrant was issued by the Local Court of Hamburg on August 24, 2005, duly signed by judge Reinke).

[413] According to the UKSC, Art 31.3(b) of the Vienna Convention on the Law of Treaties allows the Court to take into account "subsequent practice" in the application of the Framework Decision, provided that it "establishes the agreement of the parties regarding its interpretation".

***Close Up 15:*** **Sabam v Scarlet (Belgium, and impact on UK and German jurisprudence)– use of comparative reasoning in the field of the freedom of expression**

***Type of interaction: Vertical (national direct and indirect – CJEU, national – EctHR) and Horizontal External***




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 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. 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.[414]

Before the delivery of the decision by the CJEU, but after the publication of the AG *Cruz Villalón* opinion on the case, the UK High Court delivered its judgement in the *20th Century Fox v BT* case.[415] This case is about 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 1988,416 in order to block or at least impede access by BT's subscribers to a website currently located at www.newzbin.com.

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:

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414 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?*"

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

416 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."

"*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 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).417

In its decision,[418] 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 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 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 distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.

**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.419

417 See that Arnold LJ also addressed the question of proportionality, affirming that "*In general, I am satisfied that the order sought by the Studios is a proportionate one. It is necessary and appropriate to protect the Article 1 First Protocol rights of the Studios and other copyright owners. Those interests clearly outweigh the Article 10 rights of the users of Newzbin2, and even more clearly outweigh the Article 10 rights of the operators of Newzbin2. They also outweigh BT's own Article 10 rights to the extent that they are engaged. The order is a narrow and targeted one, and it contains safeguards in the event of any change of circumstances. The cost of implementation to BT would be modest and proportionate.*" P. 199.

418 Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 24 November 2011.

419 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), 16 July 2013.

**German case law**

In Germany a subsequent ruling of the German Federal Supreme Court did not take into account the CJEU judgement directly.420 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, which after 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.

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 right to regulate access to internet in order to preserve public interest[421]

In *Ahmet Yildirim v. Turkey* judgment,[422] 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

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

421 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 CJUE on the compatibility of generalised measures of internet control.

422 ECtHR: Appl. no. 3111/10, *Ahmet Yildirim v. Turkey* (2012).

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.

**A. Conflict:** Freedom of expression versus copyright.

**B. Solution: 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*).

C. **Judicial Interaction Techniques:** 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.**

D. **Alternatives:** None!

### h) Deferential approach (margin of appreciation, judicial self-restraint, equivalent protection)

In order to create space for accommodation of the European judgments, supranational courts use various doctrines of deference to national legal systems and practices, when the latter are challenged for their compatibility with the supranational norms: Variable intensity/standard of review, judicial self-restraint and margin of appreciation.[423]

Amongst these the margin of appreciation is the doctrine developed by the ECtHR. The CJEU, on the other hand, uses judicial self-restraint and deference techniques in its relations with domestic

[423] T. O'Donnel, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", Human Rights Quarterly 4 (1982) 477; Y. A Takahashi, "The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry", in *Constituting Europe The European Court of Human Rights in a National, European and Global Context*, A. Follesdal, B. Peters and G. Ulfstein (eds.), Cambridge University Press, pp. 62-106.

courts.

***ECtHR and the margin of appreciation technique***

The notion of margin of appreciation is based on the idea that each society is entitled to certain discretion in balancing individual rights and public interests, as well as in resolving conflicts that emerge as a result of diverse social values and moral convictions.[424] This discretion, however, always goes hand in hand with the supervision by the ECtHR[425], in order to ensure conformity with fundamental rights as defined in the ECHR. The notion thus performs a substantive and a structural function. From a substantive point of you, it traces the boundaries of the balancing exercise and proportionality assessment by domestic authorities. Structurally, it defines the intensity and limits of the review made at the international level.[426]

Under the ECHR, the margin of appreciation is a judge-made doctrine[427], soon to be incorporated in the Preamble of the Convention when Protocol no. 15 will be in force, whereby the Court imposes self-restraint on its power of review, accepting that domestic authorities[428] are best placed than an international court to make an assessment involving values and conception that may be understood differently in different national contexts.[429]

The doctrine is an important aspect of the wider principle of subsidiarity underlying the ECHR. Occasionally, the expression "margin of appreciation" is used by the ECtHR in situations where domestic authorities enjoy some measure of discretion, to which the Court must defer. The use of the expression "margin of appreciation" to indicate generally a discretion for State is exemplified by the decision concerning whether Art. 2 ECHR (right to life) applies to the unborn.[430] Another example is provided for by cases in which the ECtHR is confronted with allegations that domestic authorities have been wrong in ascertaining the facts before it, or in interpreting and applying domestic law or even acts between private persons[431]. The ECtHR recognises that in principle the ascertainment of facts,[432]

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[424] See Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards", 31 International Law and Politics 843 (1999).

[425] ECtHR, *Handyside v UK*, Appl. No. 5493/72, Judgment of 7 December 1976, Series A, Vol. 24, para.48.

[426] See, George Letsas, "Two Concepts of the Margin of Appreciation", 26 Oxford Journal of Legal Studies, 705 (2006)

[427] In *Ireland v UK* (18 January 1978), the ECtHR first used the term 'margin of appreciation', in that case, when assessing whether the national security objectives under Art. 15 ECHR could constitute justified restriction to Arts.3, 5, 6 ECHR: "*It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Article 19), is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis (Lawless judgment of 1 July 1961, Series A no. 3, p. 55, para. 22, and pp. 57 - 59, paras. 36 -38). The domestic margin of appreciation is thus accompanied by a European supervision.*"

[428] This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (Engel and othersj udgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100; cf., for Article 8 para. 2, *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the *Golder* judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45).

[429] Judge D. Spielmann, "Allowing the Right Margin the European Court of Human Rights and the National Margin Of Appreciation Doctrine: Waiver or Subsidiarity of European Review?" *CELS Working P*aper February 2012, available online at http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf

[430] *Vo v. France* [GC], No. 53924/00, Judgment of 08 July 2004, para. 82.

[431] ECtHR, *Pla and Puncernau v. Andorra*, Appl. No. 69498/01, Judgment of 13 July 2004 ECHR 2004-VIII – concerned the exclusion of an adopted child from inheritance as a result of a judicial interpretation of the testator's intent, the ECtHR found violation of Arts. 8 and 14 ECHR based on its own interpretation of the applicable law.

the assessment of evidence[433] and the interpretation and application of domestic law[434] falls within the competence of domestic authorities, especially courts. Consequently, it does not challenge the latter's findings, unless they are "arbitrary or manifestly unreasonable".[435] This is particularly relevant when the Court has to assess the legality of a given interference in conventional rights. In the great majority of these cases, this exercise is made without referring to the margin of appreciation doctrine.

However, the doctrine has been typically elaborated and applied by the ECtHR when a balancing exercise is required under the ECHR. In this context, national public authorities, including national courts, have been granted a certain margin of appreciation in balancing

1) between an individual's person right and a public interest ground, including the evaluation of the means to achieve the sought social objective; and

2) two competing rights and freedoms.

The doctrine of margin of appreciation first came into play in the application of derogation clauses (e.g. Art. 15 ECHR) and was designed to respond to the concerns of Member States that international policies could threaten their national security.[436] Subsequently, it expanded to any right which is, expressly or implicitly, subject to restrictions which are necessary in a democratic society. The restrictions on the rights provided for by Articles 8 to 11 ECHR (private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of association), and Articles 1 to 3 P1 (property, education, free elections) call "naturally" for the application of a margin of appreciation. The Court has then extended the scope of application of the doctrine to procedural rights and in particular under Article 6 ECHR. On the other hand the margin of appreciation is virtually inexistent when it comes to the non-derogable rights (i.e. right to life, the prohibition of torture, inhuman and degrading treatment, and the prohibition of slavery and forced labour).

According to the ECtHR, "the scope of this margin of appreciation is not identical in each case but will vary according to the context".[437] It will depend on many factors, such as:

- The right at stake and its relevance for the applicant: for example, the margin is narrow when a particularly important facet of an individual's identity or existence or an intimate aspect of private life is at stake[438] or when a difference of treatment on grounds of race or gender must be justified[439];
- The nature of interference and the gravity of the restriction[440];
- The nature of the legitimate aim pursued by the interference: a wider margin is recognised when the measure is taken in the context of socio-economic reforms or when it aims at

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[432] ECtHR, Klaas v. Germany, Judgment of 22 September 1993, Series A, no. 269, para. 29.

[433] ECtHR, Klaas v. Germany, Judgment of 22 September 1993, Series A, no. 269.

[434] Brualla Gómez de la Torre, p. 2955, § 31, and the Edificaciones March Gallego S.A, p. 290, §33.

[435] ECtHR, *Pla and Puncernau v. Andorra*, Appl. No. 69498/01, Judgment of 13 July 2004 ECHR 2004-VIII; ECtHR, Klaas v. Germany, Judgment of 22 September 1993, Series A, no. 269; Brualla Gómez de la Torre, p. 2955, § 31, and the Edificaciones March Gallego S.A, p. 290.

[436] ECtHR, *Greece v. United Kingdom*, App. No. 176/56, 2 YEARBOOK EUROPEAN COMMISSION ON HUMAN RIGHTS 174 (1959); ECtHR, *Lawless v Ireland*, App. No. 332/57, 2 Yearbook European Commission on Human Rights 318 (1960); ECtHR, *Brannigan and McBride v. the United Kingdom*, App. No. 14553/89, at para. 43.

[437] ECtHR, *Sunday Times v UK*, Appl. No. 6538/74, Judgment of 26 April, 1979 , Series A,

[438] *Evans v UK* and *Dudgeon v UK.*

[439] *D.H. and others v. Czech Republic.*

[440] *Dudgeon v. UK*; *Klaas v Germany*; *Buckley v. the United Kingdom*, 25 September1996, § 74, Reports of Judgments and 1996-IV.

protecting public morals[441] or elements of State's sovereignty, such as national security and electoral matters. The margin is inherently more restricted when there is a conflict between fundamental rights, and in particular when a measure is aimed at protecting minors;

- The existence of a common ground in domestic legal systems, especially among Member States of the Council of Europe. When there is no European consensus as for the interpretation and application of a certain right, then national authorities enjoy a wide margin of discretion.

Once the width of the margin of appreciation in a given case is established, the Court considers whether this margin has been "overstepped" by domestic authorities.[442] According to an ECtHR Judge, *"[t]he proper application of this theory will thus depend on the importance to be attached to each of these various factors. Where the Court holds that the margin of appreciation is a narrow one, it will generally find a violation of the Convention; where it considers that the margin of appreciation is wide, the respondent State will usually be 'acquitted'."*[443]

In practice, when facing delicate issues, such as recognition of same-sex marriages,[444] euthanasia,[445] right to life of the unborn baby[446] and abortion,[447] artificial insemination by donor,[448] and other subject matters falling under the concept of public morality,[449] the ECtHR has shown considerable self-restraint, deferring to the decision by national authorities.

The doctrine of the margin of appreciation implies that the application of the ECHR is *not* necessarily uniform across all High Contracting Parties, whereas, at least in principle, the application of the EU Charter of Fundamental Rights is less concerned with local peculiarities and advocates an unconditional compliance with the uniform standards of protection set therein.[450]

### *CLOSE UP in the freedom of expression field – the scale of the margin of appreciation in the ECtHR jurisprudence*

The margin of appreciation technique was mostly present in the Project's Handbook dedicated to the judicial interaction in the field of freedom of expression. The right to freedom of expression in addition to being of vital importance for democratic societies, is also crucial for the enjoyment of many

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441 Court emphasized that "the nature and requirements of morals vary from one country to another, from one region to another." See, ECtHR: app. no 10737/84, *Müller and others v. Switzerland* (1988). Therefore, the lack of a uniform conception of morals provides a legitimate justification for the Court to evade its supervisory role. See more on this topic in O. Bakircioglu, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases", German Law Journal, 2007, Vol. 8 No. 7, pp.711-734, at 727.

442 ECtHR, *Handyside v UK*, Appl. No. 5493/72, Judgment of 7 December 1976, Series A, Vol. 24, para.48.

443 Dissenting opinion of Judge Malinverni, joined by Judge Kaladjieva; *Lautsi v. Italy*.

444 ECtHR, *Schalk and Kopf v. Austria*, Appl. No. 30141/04, Judgment of 24 June 2010.

445 ECtHR, *Haas v. Switzerland*, Appl. No. 31322/07, Judgment of 20 January 2011.

446 ECtHR, *Vo v France*, Appl. No. 53924/00, Judgment of 8 July 2004 Reports 2004-VIII, para. 82.

447 ECtHR, *A, B and C v. Ireland* [GC], Appl. No. 25579/05, Judgment of 16 December 2010, paras 233-238.

448 ECtHR, S. H. and Others v. Austria, Appl. No. 57813/00, Judgment of 1 April 2010.

449 Court emphasized that "*the nature and requirements of morals vary from one country to another, from one region to another.*" See, ECtHR: app. no 10737/84, *Müller and others v. Switzerland* (1988). Therefore, the lack of a uniform conception of morals provides a legitimate justification for the Court to evade its supervisory role. See more on this topic in O. Bakircioglu, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases", (2007) German Law Journal, No. 7, 711-734, at 727.

450 However, note the Case 399/11 *Melloni* (2013), where the CJEU established a test to evaluate if national standards may apply diverging from European ones.

other rights provided in the Convention. One can infer from the ECtHR's case law on free speech generally that different kinds of speech enjoy different levels of protection, with journalistic speech – that of the public watchdog – allowing a very limited margin of appreciation to the Contracting States, and artistic speech somewhat lower down the scale, and thus permitting a wider margin of appreciation. We can thus observe that the margin of appreciation is wider in areas involving moral choices,451 and narrower in others such as political speech or criticism of the judiciary.[452] The margin of appreciation also varies depending on the person whose fundamental rights are limited by the freedom of expression. The margin is much narrower when criticisms target the Government. The Court, in *Castells*, noted that free political debate constitutes the heart of a democratic society, and thus "*the limits of permissible criticism are wider with regard to the Government, by virtue of its dominant position, than in relation to a private citizen, or even a politician.*"[453]

In cases involving exercise of freedom of expression coming in conflict with public interests or other fundamental rights, the settled test established by the ECtHR to establish whether the exercise is conform with the ECHR is whether the statement is within the acceptable limits of criticism relating to matters of public concern that contributes to a public debate, or is it merely personal, destructive or unjust.

In the *Hannover No. 1* and *No 2* cases, the ECtHR clarified that it will respect the margin of appreciation recognised to national courts, as long as it is clear that a domestic court has applied the criteria set out by the ECtHR.[454] However in numerous cases the ECtHR has openly disagreed with the reasoning of national courts, replacing the decisions and options of the national judiciaries with that of its own (see *Ricci v Italy*, para. 54, *Cumpana and Mazare*, *Hannover case no.1*).

Particular doctrines and legal tests may embody the idea of deference without expressly referring to a "margin of appreciation". The ECtHR concept of a 'flagrant denial of a fair trial' under Art 6, for example, defers to various national levels of protection that do not reach that extent of infringement, in cases that fall outside the scope of the 'normal' disciplines of the ECHR right to a fair trial. Perhaps problematically, this can trickle down to the national level, so that national courts grant the same amount of deference to their own legislatures and executives even in the absence of the limitations that led the ECtHR to restrain itself (see the Croatian Constitutional Court in *AZ* and *DAPT*).

It is possible to see how the ECtHR acknowledges state discretion in cases like *Schalk and Kopf* (mentioned in all same-sex couples' rights cases, including the Polish case on tenancy succession, see Handbook on Judicial Interaction Technique in the field of the principle of non-discrimination (*JUDCOOP Handbook I*)), and how different jurisdictions make different use of it (contrast the Italian, French, Portuguese and the Spanish judgments on same-sex marriage, see the (*JUDCOOP Hanbdook I*) and the consistent interpretation technique in present Handbook Chapter II section II ). Interestingly, the existence of a margin of appreciation might serve as a defence for a measure that seemingly contradicts the ECHR, and therefore the national court must examine this issue to make a determination about its ECHR-compliance (as did the Croatian court in the *Jelušić* case reported in *JUDCOOP Handbook I*).

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451 ECtHR, , *Müller and others v. Switzerland,* Appl. No 10737/84, Judgment of 1988.

452 ECtHR , *Perna v Italy,* Appl. No. 48898/99 Judgment of 2003.

453 ECtHR, *Castells v. Spain*, Appl. No. 11798/85, Judgment of 23 April 1992, para. 46.

454 ECtHR, *Von Hannover v Germany* [2012] EMLR 16 at p 368 [para 107]. For more details on the test established by the ECtHR in that case and *Axel Springer*, see Close Up 10 of the present Handbook, and the JUDCOOP Handbook on Judicial Interaction in the field of the Freedom of Expression, pp.38-48.

***Judicial deference in the EU legal system***

The CJEU typically leaves to national judges the task of performing the assessment of the proportionality of national measures to fundamental rights. In so doing, it *de facto* allows Member States to apply slightly different balancing policies when two or more rights are in tension.

There are situations in which EU secondary legislation (Directives) will leave a margin of discretion to the national legislature. These are situations that will not be determined entirely by EU law, where legislative provisions are not strictly required, nor prohibited by it. In this case, national courts can review domestic laws in light of the rules and principles embedded in the national legal orders.

As to how national courts interpret the margin of discretion left to them by the CJEU see the conclusion of the Romanian Court of Appeal of Court of Appeal of Târgu Mureș, which identifies a margin for domestic law that the Court of Appeal of Bucharest rejects, in *Sindicatul Liber* case in *JUDCOOP Handbook I*.[455] Sometimes this assessment is made more difficult by the lack of instructions as to the scope of State's margin of manoeuvre, and by the fact that EU law does not directly endorse this doctrine. When EU law applies, therefore, domestic courts could be genuinely unable to determine whether the balance struck by a national measure makes it acceptable (see this problem in *Seldon*, see *Close Up 11*), even when it is the CJEU itself that refers this assessment to the national judge (e.g. on the issue of proportionality). The very fact that the CJEU often hands over the proportionality test to the national court is in itself an expression of judicial restraint/margin of appreciation inspired by deference.

***Example of deference between the ECtHR and CJEU***

Another example of judicial deference in the adjudication of human rights in Europe is the doctrine of equivalent protection. It entails a presumption of ECHR-compatibility of EU acts, as first spelled out in the *Bosphorus* decision.[456] A similar reasoning underpins the *Solange* doctrine of the German Constitutional Court, which refrains from reviewing EU acts against its own constitutional standards, unless a serious violation is at stake.[457] Other domestic constitutional courts adopt a similar stance when it comes to preserving the core values of the national legal order.

### i) Mutual Recognition of Foreign Judgments

*Legal basis and definition*

The TFEU devises 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 form of a principle of mutual recognition based on mutual trust. The principle of mutual recognition of foreign judicial and quasi-judicial acts is required in the fields of asylum,[458] civil,[459] and criminal

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[455] See JUDCOOP Handbook on Judicial Interaction in the field of principle of non-discrimination, at pp.96-99.

[456] ECtHR, *Bosphorus v. Ireland*, App. no. 45036/98, Judgment of 30 June 2005, para. 155.

[457] The *Solange*-principle has undergone an initial development and a series of adjustments over time, see *Solange I*, BVerfGE 37, 271 2 BvL 52/71 of 29 May 1974; *Solange II*, BVerfGE 73, 339 2 BvR 197/83 of 22 October 1986; *Maastricht-Urteil*, BVerfGE 89, 155 of 12 October 1993; *Banana*, BVerGE, 2 BvL 1/97 of 7 June 2000; *European Arrest Warrant*, BVerfGE, 2 BvR 2236/04 of 18 July 2005; *Lissabon-Urteil*, 2 BvE 2/2008 of 30 June 2009, up to the recent *Honeywell* decision of 6 July 2010 (BVerfGE, 2 BvR 2661/06).

[458] 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).

cooperation.[460] Legal scholars have thus defined the EU based principle of mutual recognition as:

"*the principle of mutual recognition requires that, notwithstanding differences between the various national rules that apply throughout the EU, objects, activities or decisions that are lawful in accordance with a Member State's legal framework must be accepted as equivalent to objects, activities or decisions carried out by one's own state, and must be allowed to take effect in one's own sphere of legal influence (either by granting them access to the national territory, or by taking them into account in any subsequent decisions, or by executing them), unless one of the available grounds for non-recognition applies*."[461]

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. The principle of mutual trust in the Member States' legal system's compliance with Fundamental Rights has though been recently 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[462]. This principle has been contested in light of either the EU secondary legislation incompatibility 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[463] 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.

*Functions of the judicial interaction technique of mutual recognition*

There are two reasons why mutual recognition is important as a technique of judicial interaction. Firstly, judicial interaction is inherent in mutual recognition: faced with the need to recognize the output of foreign courts, national judges are required to engage in dialogue. Secondly, mutual recognition is particularly relevant in connection with the right to fair trial, as the cases on the European Arrest Warrant (*Melloni*, *Radu* see *Close Up 8*) and Dublin Regulation (*M.S.S v Greece and*

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459 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.*"

460 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).

461 C. Janssens, *The Principle of mutual recognition in EU law*, Oxford University Press, 2013, p.5.

462 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 [2003] OJ L 338/1, 23.12.2003.

463 C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department* and Case C-493/10, *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*; *Melloni*, *Radu* and *Jeremy F* cases in regard to the EAW FD; Case C-491/10 PPU, Aguirre Zarraga [2010] ECR I-14247.

*Belgium*,[464] *N.S.*[465]) demonstrate: the need to recognize foreign decisions might in some circumstances clash with the right to a fair trial. It is important to mention that mutual recognition and trust are not absolute, and that in certain circumstances, exceptions are permitted expressly by the EU instruments (see, for e.g. Art. 15 and 3(2) of the Dublin Regulation, or Arts. 3- 5 of the EAW Framework Decision[466]), and confirmed by the European courts (commonly admitted by the ECtHR in situations where there is a 'flagrant denial' of the right to a fair trial in the Member State where the individual is to be surrendered under the Dublin Regulation return proceedings).

When national courts want to challenge the mutual recognition they have the option of the preliminary reference, whereby they can ask for change of previous jurisprudence (*Melloni)*.

Mutual recognition involves also a strong comparative reasoning element - requiring national courts to functionally approach legal provisions and seek understanding of their objectives and relevant stances of foreign courts.

It has to be noted that mutual recognition is a procedural requirement and proportionality and generally judicial interaction techniques can be used by national judges to test the application of this rule. An automatic application of the principle of mutual recognition in the AFSJ without observance of the fundamental rights is excluded.[467]

### *3. As conclusion- Short guidelines on the use and order of Judicial Interaction Techniques*

The use of judicial interaction techniques by national judges is not a formal exercise. Yet, in order to understand their utility and the potential they carry, it is useful to conceive of them as steps in logical reasoning. When addressing judges in the course of the Project and whilst creating handbooks, the project team strived to present how conflicts (of norms and/or interpretations) could be addressed through the use of judicial interaction techniques in order to arrive at two results: to **enhance** a national system of fundamental rights protection whilst ensuring its **convergence** with that of the European level. In order to best represent the pathway to these two objectives, a more structured presentation was offered. Steps that are followed are represented in the graph below.
According to this approach and starting off with divergence framed as conflict of norms and/or interpretations, national judges need to identify the source of the conflict and the hierarchical relationship between norms/interpretations at stake. Having done so they can determine whether national norm can be interpreted in line with the standard set on the European level – in other words they take **Step 1** of **Consistent Interpretation**.

Should they find that consistent interpretation does not provide them with conclusive, clear cut and undisputable answers, from the point of view of their national judicature, answer, they may

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[464] ECtHR, *M.S.S. v. Belgium and Greece,* Appl. No. 30696/09, Grand Chamber Judgment of 21 January 2011.

[465] C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department* and Case C-493/10, *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.

[466] Although Articles 3 and 4 of the EAW FD on grounds for non-execution are silent on fundamental rights in general, the text of the Framework Decision nonetheless makes reference to respect for fundamental rights: paragraphs 12 and 13 of the preamble; the overriding importance of fundamental rights in European law is again set down in Article 1(3) EAW.

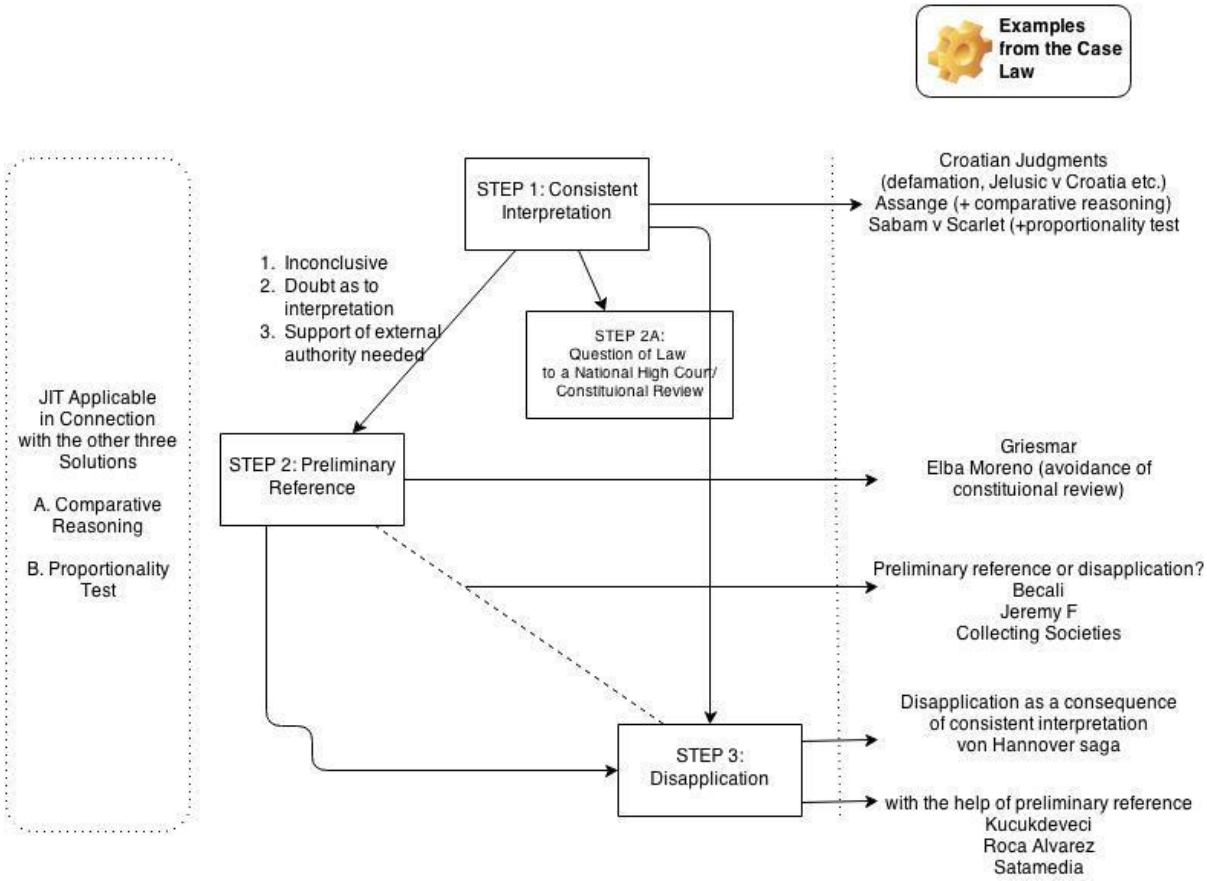
[467] A number of national judges have used the principle of proportionality for rejecting the execution of foreign rulings issuing EAWs and consequently of the application of the EAW FD in cases they considered unlikely that a penalty within the FD threshold will be applied in the requesting Member States, or when in light of the long elapsed time since the start of the criminal proceeding the surrender did not seem justified (see the Court of Appeal of Bucharest in the *Radu* case in Close Up 6, or the Irish Supreme Court in the Stapleton case - ECtHR, *Stapleton v Ireland,* Appl. No.56588/07, Judgment of 4 May 2010).

consider two options: requesting help from the CJEU – thus taking **Step 2** and starting **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 replies in the body of case law - or following the CJEU's indication in a concrete preliminary ruling issued in reply 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, permit for inserting a structurally determined reasoning such that is comparable to similar exercises undertaken by courts in other states.

Thus the below graph offers an overview of the toolbox at the disposal of national judges with indication as to when each of the tools may be applied and the manner in which conflicts may be resolved with their help.




## III. Functional Approach: Judicial Interaction Techniques in Comparative Perspective

## *1. Introduction*

The use of Judicial Interaction Techniques (JITs) in the field of fundamental rights promotes the fulfilment of two main goals: 1) avoiding or resolving conflicts among the national, supranational and international spheres of rights protection (*convergence*); and ensuring the highest possible level of rights protection (*enhancement*).

The precise choice of the type of judicial interaction technique depends on the type of conflict at issue in the case, while its precise application depends on whether it is possible to achieve both or only one objective.

Clearly, due to a number of obstacles that can present themselves to a judge (i. e. national traditions, legal culture, stance of supreme courts) the two objectives cannot be achieved at all instances. The availability of achieving the objectives will determine the structure of this **Part III** and will be a starting point for the cross-analysis of examples in the areas of the right to non-discrimination, fair trial and freedom of expression.

In light of the objectives pursued by JITs in EFRs adjudication (convergence and enhancement), which need to be achieved in EFRs cases, we can distinguish two settings. In the first setting, both objectives of convergence and enhancement can be fulfilled, provided that specific obstacles are overcome by national judges. Here JITs serve as tools to overcome such obstacles. In the second setting one of the two objectives cannot be achieved. The identified settings will provide the framework for our further discussion.

## *2. JITs at the purpose of Convergence and Enhancement of EFRs*

### a) Functional Approach to Judicial Interaction Techniques

Given that the first of the objectives is to find the interpretation that is consistent with the ECHR and the EU law, testing whether a national provision can be interpreted in a coherent manner with a corresponding European level one the first step is the application of the consistent interpretation JIT *(Step 1: Consistent Interpretation)*. If the consistent interpretation technique proves not to be sufficient or does not provide a conclusive answer, the choices for the national court are two: either where EU law is at stake, refer the question to the CJEU that would provide the conclusive answer (*Step 2: Preliminary Reference)* or he can set aside a national norm (if it can do so given the characteristics of its own legal system) (*Step 3: Disapplication)*. Arguably, referring a question to a national high court could also be considered a remedy, yet, from the perspective of the EU law – a controversial one.

As it can be seen, these are chiefly consistent interpretation, preliminary reference and disapplication that are used most consciously by judges as in their case the actual decisions of procedural and substantive nature need to be made. The two remaining judicial interaction techniques: the proportionality test and comparative reasoning remain complementary to any of the other techniques; used as reasoning device giving grounds for choices made by a national court which can use them in both vertical and horizontal judicial interactions, as well as both internal and external. Their use is necessary not only in the area of fundamental rights but virtually in all areas of law where interests and rights are balanced, or new solutions – lacking in a given legal system - are sought.

The use of proportionality by national courts has become commonplace in the current legal setting. The extensive discussion of this principle as introduced in **Part II** of this study presents the spectrum of possibilities offered by this tool; a tool which is complementary to the use of consistent

interpretation, preliminary reference, or disapplication techniques. Proportionality can serve multiple functions when solving a case: (i) It can aid in providing grounds of rulings and other decisions made by a national judge (i.e. to disapply or refer to the CJEU); (ii) performed by a national court it can permit maintaining a national norm in a legal system but adjusting it to the supranational standard; (iii) the proportionality test performed by the CJEU at the request of a national judge can provide a conclusive answer to a given conflict or problem of interpretation; (iv) in the multilevel system of EFRs protection, the open-ended formula of the proportionality test can allow to bring in other elements of the proportionality test, that were not given sufficient focus by the CJEU.

In fact, application of this principle will logically precede disapplication of national norm(s). The assessment of limitation of a certain fundamental right for the benefit of protecting another fundamental right was visible in *von Hannover saga* (see the extensive discussion in *Close Up 13* of this Handbook) and the creation of defamation standard[468] in the freedom of expression realm offers possibly the most vivid examples on how the proportionality can become a key concept to evaluation as to what constitutes a right; or how a limitation can be constructed. In both cases, the precision with which the ultimate result was achieved owes greatly to the wisdom of supreme courts that continued to re-apply the reasoning bringing up further elements that remained unspecified in an earlier case law whilst disapplying national provisions. Importantly, however, when doing so they would apply consistent interpretation to the areas that have been sufficiently clarified in an earlier case law.

The principle of proportionality can also offer a gateway for national courts to perform the test and whilst enjoying the sphere of deference granted to them by the European courts. The *Sindicatul Liber* case (see the extensive discussion at pp. 95-97 of the *Non-Discrimination Handbook*) offers an example of a situation where the proportionality test performed by two courts led to two completely different outcomes as to the provisions on retirement age. This particular case proves that proportionality as used in a diverse manner by various courts may be used as a stand-by mechanism – as long as provisions at stake are not altered or the question to the CJEU is referred.

Obviously, the liberty of national courts to perform their own proportionality test is restricted when the CJEU provides the ultimate answer to such test. This was the case, for instance, in *Italian Collective Contracts* case study (see the extensive discussion at pp. 77-80 of Non-Discrimination Handbook). There, once the preliminary ruling has been passed, a national referring court was bound by it.

This, however, does not close the door for further references to be addressed to the CJEU in the future on similar cases, yet once such reference is made, the national court must specify the extent to which clarity was not achieved – also through the use of the principle of proportionality.

Finally, if the CJEU offers to national judges the proportionality test which is very much rooted in the EU legal system but neglects the ECHR standard, the open-ended structure of the test permits elaboration of such standard and inclusion of additional requirements as defined by the other court. This was exactly what the Finnish court did in *Satamedia* case where data protection based analysis proved to be insufficient to ensure the protection of freedom of expression as determined by the ECtHR.[469]

The willingness or reluctance to engage with judicial dialogue techniques is partly premised upon the legal culture of each country. Some countries are more open to the influence of other legal systems and international law, whereas others tend to rely predominantly on internal sources. Elements of constitutional design might be relevant to explain the attitude towards dialogue in the field of

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[468] See the extensive discussion in on *Freedom of expression building of standard in defamation cases* of the Handbook on the use of Judicial Interaction Techniques in the field of the freedom of expression.

[469] Case analysed in *JUDCOOP Handbook on Judicial Interaction in the field of the Freedom of Expression*, pp.83-87, and also commented on at pp. 25, 47 and 142 of the present Handbook.

fundamental rights. For instance, dualist countries might be more reluctant to engage with external legal sources. In the UK, the European Convention on Human Rights was incorporated within the domestic legal system through the Human Rights Act in 1998. Also, the model of judicial review of legislation might further or hinder the use of techniques such as disapplication or the preliminary reference. In countries with centralized models of judicial review of legislation, ordinary courts have faced more difficulties in following *Simmenthal*.

The *Assange* case (*Close Up 15*) offers a very good example of searching for a solution when it cannot be achievedsolely within a legal sphere within which a judge is functioning. Similarly to the above quoted cases, comparative reasoning aids the exercise of consistent interpretation.

Finally, as it was demonstrated by the *von Hannover* string of cases (*Close Up 10*), comparative reasoning may be a *de facto* phenomenon taken on board by supreme national courts, wherever the effort is made to elaborate the standard in a negotiated manner.

We shall move on to the detailed presentation of the five scenarios that together with the preliminary comments on the use of judicial interaction techniques will offer the full picture – this time from the perspective of objectives that are to be attained in the course of fundamental rights adjudication.

### b) Both Convergence and Enhancement in EFRs Protection May be Achieved

***Scenario 1 – Convergence and Enhancement can be achieved in situation of conflict of norms***

The first of the scenarios is the simplest of all. It concerns the conflict between two norms – national and European one, which have a partially overlapping scope of application. Here the tool of consistent interpretation provides a conclusive answer to a national judge, or at least raises a doubt as to whether a national norm can be applied, given the diverse standards of protection offered by the EU or ECHR law. When EU law is at stake, the additional technique of preliminary reference lies at the judges' disposal permitting them to seek a clear and final answer. Within the realm of the ECHR, judges do not have such a possibility at their disposal and must rely on the extensive (and sometimes conflicting) case law of the ECtHR in order to solve conflicts.[470] The extent to which they are at ease with such an exercise depends on their own national legal culture.

There are multiple examples of use of the consistent interpretation judicial interaction technique in the case law concerning non-discrimination, fair trial and freedom of expression. For instance, the Croatian Constitutional Court frequently and in an unquestioning manner uses consistent interpretation not only to draw inspiration from the ECtHR case law – it virtually copies the standard into the Croatian legal system as it could be seen both in the Judges' Defamation case (see the extensive discussion in *Close Up 13: Freedom of expression - building of standard in defamation cases* of this Handbook) as well as *Jelusic v Croatia* case (see the extensive discussion at pp. 71-73 of Non-Discrimination Handbook).

Clearly, most of the ECtHR judgments passed against states would be followed up sooner or later by a complacent reaction on the part of national courts (though this is not a given if we take into consideration defamation practices of Polish courts despite repetitive sentencing on the part of the ECtHR).[471] In the EU law sphere, highly developed non-discrimination provisions would be followed by national courts even on most controversial issues such as same sex unions (see: Same sex couples – Italy (see the extensive discussion at pp. 46-50 Handbook on Non-Discrimination) and Spain (see the extensive discussion at pp. 51-53 Handbook on Non-Discrimination), or Disability in Italy - (see the extensive discussion at pp. 81-82 of Non-Discrimination Handbook). The French case law in the immediate follow-up to the CJEU *Griesmar* ruling in France offers an example of a consistent interpretation performed immediately by the referring highest court following the CJEU judgment.

Yet, even there, sometimes doubts will arise as to how to apply a norm following consistent interpretation. In doubt, the clarification is sought at the CJEU as in the *Accept case* (even though the indications are not subsequently followed by the referring court: see the extensive discussion at pp. 83-86 of Non-Discrimination Handbook) or the *Collecting Societies* case (see the extensive discussion in Case note no.10 of the Handbook on Judicial Interaction in the field of freedom of expression). The latter provides a very interesting comparison into the perceptions of when consistent interpretation is a sufficient tool (France) and when it needs to be given a firmer foundation by a new preliminary ruling (Romania) in a particular legal order and factual context. Sometimes clarification is sought, even if the CJEU does not have jurisdiction to offer a solution to the national court. Consider, for instance, a situation where the claim is based on one of the grounds protected only under the ECHR and national law, and not under the EU law (see *case Agafitei*, p. 9 of this Handbook). The CJEU is very much

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[470] Once Protocol no. 16 to the ECHR enters into force the national highest courts might have such an opportunity to refer directly to the ECtHR.

[471] Freedom of expression provides many examples where the case law of the ECtHR is followed dully. See: *Ernst and others v Belgium* - (see the extensive discussion at pp. 31-33 of Freedom of Expression Handbook), *Satamedia* – Finland (see the extensive discussion at pp. 82-87 of Freedom of Expression Handbook), Italian Newspaper Archives (see the extensive discussion at pp. 88-92 of Freedom of Expression Handbook).

accommodating for the national courts specific procedural limitations, and to ensure a fast answer to the questions raised by the national courts it offers the solution of the urgent preliminary ruling, as seen in the *Jeremy F* case (where CJEU can give an answer in around 2 months time).

In the freedom of expression context, the standards established by the ECtHR in cooperation with national high courts when balancing the right to freedom of expression with the right to privacy of public persons is applied following the consistent interpretation technique (as seen in the *Von Hannover* saga).

The judicial interactions between the different courts of legal systems proclaiming European fundamental rights have contributed in the last decades to a dynamic of mutual reinforcement and increase of standard of protection of these fundamental rights. The *JUDCOOP Handbooks* have provided several examples where increase of standard of protection of a fundamental right in one of the legal systems has impacted also on the level of protection of that same fundamental right in the other legal systems, by way of reinforcing the protection. The *M.S.S. v Belgium and Greece* judgment of the ECtHR is such an example which has ensured that the implementation of the EU Dublin Regulation into the national practice will not violate the right to prohibition of torture, inhuman and degrading treatment and the right to an effective judicial remedy.[472] That ECtHR judgment has then been embraced also by the CJEU adopting a similar interpretation (*N.S.* and *N.A*), and thus allowing a smooth application of the consistent interpretation technique by the national courts and thus fulfilment of convergence as one of the objectives of JITs. The CJEU is following closely the standards of protection ensured by the ECtHR, as shown in the *Diouf* and *Jeremy F* cases, where Member States' measures implementing specific EU instruments such as the EU Qualification Directive or the EAW FD, have been challenged as contrary to Arts. 6 or 13 ECHR and Arts. 47 and 48 of the EU Charter. In these cases the conflict at stake is that of norms and their interpretation.

However, sometimes convergence cannot be ensured at the same time with enhancement. In *Diouf* and *Jeremy F*, the CJEU cited the relevant judgments of the ECtHR in order to define the ***minimum standards*** of judicial review, finding that the ECtHR does not necessarily require a second level of jurisdiction. In both cases national constitutional provisions provided for higher standard of protection. In *Diouf* the conformity of an accelerated procedure with the right to effective judicial remedy was also discussed. The ECtHR could not deal with that issue directly in light of the fact that asylum proceedings are excluded from the ambit of Art. 6. However, Arts. 3 and 13 were considered by the ECtHR in asylum proceedings in the 2011 judgment in *Rahimi v Greece* (App. no 8687/08). Enhancement of European Fundamental Rights can still be ensured at the national level however, as it has been realized in the *Jeremy F* case, where the French *Conseil Constitutionnel* declared unconstitutional the national law implementing the EAW FD for not ensuring to individual subject to an EAW an appeal against the decision of extending the surrender decision to other criminal acts, even if the CJEU judgment did not require such a level of protection of the right to a fair trial. In both cases consistent interpretation is used as a tool for resolution of the conflict.

Finally, as it was the case in *Home Office v Tariq and related cases* (see pp. 56 of Fair Trial Handbook) the European courts may acknowledge standards created in the two legal systems, thus forcing national courts to follow blended CJEU-ECtHR standard created for the needs of combating terrorism.

Thus, this deference approach existing between the ECtHR and CJEU ensuring a convergence of the two legal systems, can sometimes ensure a minimum of standards of protection of fundamental rights,[473] however national judges can ensure enhancement of fundamental rights via consistent

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[472] In *M.S.S. v Belgium and Greece* deals with the conflict between norms of Article 3 ECHR and the Dublin II Regulation.

[473] Another such instance of horizontal dialogue between the CJEU and ECtHR can be found also in *M&Co v Germany* (Appl. no. 13258/87) decided in 1990, the applicant was claiming breach of the right to a fair trial under Art 6 ECHR in the course of the execution of a CJEU judgment in a competition case.

interpretation and comparative reasoning with the judgments of other national courts that have found innovative solutions to achieve such an objective (as seen in the Austrian Constitutional Court in *Close Up 14*).

***Scenario 2 – Convergence and Enhancement can be achieved in cases of conflict of norms and judicial interpretation in vertical relations (CJEU/ECtHR and national courts)***

The second of the scenarios –the most frequently represented one – refers to a situation in which national norm cannot be reconciled with a EU/ECHR one by means of any interpretation. If this is the case the attainment of the objectives of convergence requires that a national norm is set aside and the EU/ECHR standard is applied in order to ensure the higher level of protection of an individual right. This technique may be aided by a preliminary reference to the CJEU. In most cases included in this Handbook, in fact, (i) preliminary reference is used in order to confirm the intention on the part of national courts to disapply a specific provision – this is the basic, strategic, use of the procedure. Yet, the preliminary reference can be also used in order to (ii) establish minimum standards and subsequently elaborate them using proportionality. Concerted preliminary reference can also serve to provide clarification to an issue that was not sufficiently explained by a higher court (iii) especially in the light of the analogous case law of the ECHR. Finally, (iv) preliminary reference can serve as the warning sign sent by a national court both to other courts and the CJEU about problems with the guidelines provided by the CJEU in the course of its earlier case law.

(i)Where setting aside a national provision is concerned, the area of non-discrimination offers a number of interesting examples. Cases *Roca Alvarez* (see Non-Discrimination Handbook p.57 and section on disapplication of this Handbook) and *Kücükdeveci* (see Non-Discrimination Handbook, p.66) offer insights into the reasoning as to how such measures can be applied – especially following the judgment of the CJEU. In the area of fair trial, the implementation of the EAW FD[474], the Belgian Constitutional Court made use of the preliminary reference technique and asked the CJEU whether the removal of the double criminality requirement for 32 types of offence was contrary to the principle of non-discrimination and equality and whether the derogation would be contrary to the principle of legality in criminal matters. The CJEU replied that the 2 principles were not violated as the objective of the FD was not harmonisation. The Italian Constitutional Court, on the other hand, struck down as unconstitutional a national legal provision wrongly implementing the EAW FD on the basis of the EU primary law provision of ex-Art. 12 EC (now Art.18 TFEU) without referring to the CJEU, considering the legal issue to be sufficiently clear based on the previous CJEU jurisprudence.[475]

(ii) The *Satamedia* case[476] provides inspiration on how to ensure compliance with both the Strasbourg and Luxembourg courts' standards when they set for different levels of protection of a FR – hence where the standard is built from two existing ones. The Finnish Supreme Administrative Court when having to establish the appropriate balance between the competing exercises of data protection with the freedom of expression of two Finish companies decided to refer a preliminary reference to the CJEU on the interpretation of the legal notion at issue originating from an EU legal source.[477] The

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474 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (EAW FD).

475 See Constitutional Court, Decision no. 227/2010, p. 25 (the official translation of the text is available athttp://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2010227_Amirante_Tesauro.doc) Case commented in *JUDCOOP Handbook on Judicial Interaction in the field of the Right to a Fair Trial.*

476 See the detailed analysis of this case in the *JUDCOP Handbook on Judicial Interaction technique in the field of Freedom of Expression*, pp. 82-88.

477 Case C–73/07, *Tietosuojavaltuutettu v Satakunnan Markkinaporssi Oy* [2008] ECR I–9831. This is a preliminary ruling delivered by the CJEU at the request of the Finnish Supreme Administrative Court question preliminarily referred by the Finnish Supreme Administrative Court regarding the interpretation of the 'journalistic purposes' derogation contained in Article 9 of the EU Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council on the

balancing exercise carried out by the CJEU revolved around the right to privacy and the freedom of expression, taking into account that derogations to the data protection rules based on the right to freedom of expression are allowed under the Data Protection Directive only when strictly necessary. Although the analysis of the CJEU was based on the narrow construction applicable to derogations, it ended up in a broad interpretation of the concept of journalism, as Article 9 Data Protection Directive's exemptions and derogations can apply not only to media organisations but to every person engaged in journalism. The test of the CJEU, then, resulted in the fact that the activities in question are to be considered as being "solely for journalistic purposes" within Article 9, Directive 95/46/EC "*if the sole object of those activities is the disclosure to the public of information, opinions or ideas*" leaving completely to the national courts to verify whether this is the case. [478] In the follow-up of the CJEU preliminary ruling, the Finnish Supreme Administrative Court developed a proportionality test mixing the maximum standards of protecting freedom of expression as resulting from the CJEU preliminary ruling[479] with the maximum standard of protection of the other fundamental right at issue - right to privacy, as developed by the ECtHR in the *Hannover* and *Axel Springer* case law.[480] The solution reached *in casu* by the national court is thus an example of how to ensure both coherent application of EU law and higher standards of application of fundamental rights in a case of conflicting fundamental rights.[481]

(iii) As far as the need for the CJEU guidance is concerned, there are a number of examples that prove the importance of the preliminary reference, see for example the cases referred by the UK and Irish courts on the implementation of Art.10 of the Dublin Regulation following the *M.S.S. v Belgium and Greece* judgment of the ECtHR which held that Member States should not enjoy an absolute presumption of compliance with FRs under this EU Regulation. Thus the CJEU was given the opportunity by national courts to remedy an erred application of an EU directly applicable act that would led to violation of the right to prohibition of inhuman and degrading treatment.[482]

(iv) The reference to the CJEU case law can be used in a judgment of a national court as a warning sign for lower courts when disapplying national case law. This was the case in *Seldon v Clarkson Wright* (see the extensive discussion at pp. 67-73 of *Non-Discrimination Handbook*).

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protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31). This sought to resolve a disagreement between the Finnish Data Protection Board and Ombudsman.

[478] Case C–73/07, paras.54 and 56: "*54. Article 9 of the directive refers to such a reconciliation. As is apparent, in particular, from recital 37 in the preamble to the directive, the object of Article 9 is to reconcile two fundamental rights: the protection of privacy and freedom of expression. 56. The obligation to do so lies on the Member States. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly. Secondly, and in order to achieve a balance between the two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in the chapters of the directive referred to above must apply only in so far as is strictly necessary.*"

[479] Case C–73/07, *Tietosuojavaltuutettu v Satakunnan Markkinaporssi Oy* [2008] ECR I–9831. This is a preliminary ruling delivered by the CJEU at the request of the Finish Supreme Administrative Court question preliminarily referred by the Finnish Supreme Administrative Court regarding the interpretation of the 'journalistic purposes' derogation contained in Article 9, EU Data Protection Directive. This sought to resolve a disagreement between the Finnish Data Protection Board and Ombudsman.

[480] See Supreme Administrative Court Decision, KHO 2009:82 (23.09.2009) sec 5. See at http://www.kho.fi/paatokset/47977.htm (Unofficial translation).

[481] Following the judgment of the Finish Supreme Administrative Court, Tommi Tapani Anttila, the editor in chief of the magazine where tax related information was published and which following the limitation imposed by the FSA Court had to reduce the magazine's content, lodged on March 22, 2010, a complaint against the decision of the FSA Court before the ECtHR which is still pending. See Appl. no. 16248/10 of 22.03.2010.

[482] *M.S.S. v. Belgium and Greece* (Grand Chamber Judgment of 21 January 2011, application 30696/09); *NA v. United Kingdom* (Judgment of 17 July 2008, application 25904/07); on similar issues, see the preliminary rulings in C- 411/10 and C-493/10, *N.S. (C-411/10) v Secretary of State for the Home Department et M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform. It* has to be pointed out that the recent jurisprudence of the ECtHR should raise more awareness on the likelihood of violation of fundamental rights by EU Member States. In addition to the *M.S.S v Belgium and Greece*, finding Belgium and Greece in violation of the prohibition of inhuman and degrading treatment and also of the right to fair trial, see also the recent judgment of the ECtHR in *Musa v. Malta*, finding Malta in violation of Art 6 ECHR.

***Scenario 3 – Convergence and Enhancement can be achieved in cases of conflict of norms and judicial interpretation in horizontal relations (between the national courts within the same Member State or between different Member States)***

This particular scenario takes place where on horizontal level within a given jurisdiction there exists no common standard of a fundamental rights protection. The conflict that needs to be resolved in this case is that of interpretation among the national courts of the same MS or between the courts within the MS on the interpretation and application of the same FR. A national judge when put in such position needs to not only apply convergent and enhancing standard for fundamental rights protection, but also distance himself from the case law of one of the highest courts in his country. Distancing is difficult given the procedural hierarchical constraints that limit actions of lower courts.

Three type of conflicts are entailed by this scenario: (i) on horizontal axis: between highest and constitutional courts; (ii) on vertical axis: between highest/supreme courts v national courts; (iii) on horizontal axis: between national courts.

Conflict between highest and constitutional courts is very well illustrated by the conflict between two supreme courts in the defamation case in Romania. The dilemma a national judge faces here is the choice between one of the stances represented by the two high courts on the penalization of defamation *Cumpana and Mazare v Romania* case (see JUDCOOP Handbook on Judicial Interaction in the field of the Freedom of Expression, case note sheet no. 3).

In the area of fair trial, case *Križan and Others v Slovenská inšpekcia životného prostredia* offers not only the example of the conflict between the highest courts in a state, but also the means of its resolution. This judgment is furthermore meaningful as the CJEU delivers significant procedural guidelines to lower courts on preliminary reference when they encounter obstacles from the highest courts. It emphasises their liberty to file the preliminary reference regardless of the stance of the highest courts. In case *Jozef Križan and Others v Slovenská inšpekcia životného prostredia,* the preliminary reference was addressed by the supreme court of Slovakia of its own motion, in proceedings following a judgment of the Constitutional Court of Slovakia, which ordered the supreme court to reverse its previous judgments based on constitutional rights. According to the Slovak law, there were two provisions which prohibited the supreme court from referring questions to the CJEU: Judgment of the constitutional court in the same case is binding on the supreme court to the extent that it would have to reverse its previous judgment; National rule prohibiting the supreme court from raising a ground alleging infringement of the law which was not relied by the parties to the main proceedings. In the judgment of 15 January 2013,[483] the CJEU re-stated the complete freedom which national courts, from the lowest to the supreme court, enjoy in relation to the Constitutional Court judgments on the interpretation on points of EU law and the power to address preliminary references. "A rule of national law, pursuant to which legal rulings of a higher court bind another national court, cannot take away from the latter court the discretion to refer to the Court of Justice questions of interpretation of the points of European Union law concerned by such legal rulings. That court must be free, if it considers that a higher court's legal ruling could lead it to deliver a judgment contrary to European Union law, to refer to the Court of Justice questions which concern it." (para. 68) The consequences of sending such a preliminary reference in spite of the legally binding superior judgment of the Constitutional Court on the referring court are clear: "[…] the national court, having exercised the discretion conferred on it by Article 267 TFEU, *is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court of Justice and must, if necessary, disregard the rulings of the higher court if it considers, in the light of that interpretation, that they are not consistent with European Union law*."[484].

[483] See Case C- 416/10, *Križan and Others*, Judgment of 15 January 2013.
[484] *Elchinov*, ibid., para. 30; C-416/10 *Križanand Others*, ibid., para. 69.

This judgment together with the *Simmenthal* doctrine permits national courts to prioritise the application of CJEU judgment and EU law against the judgments of the national hierarchical superior courts, including the constitutional courts that would limit their power to refer preliminary references, or their obligation to set aside national legislation contrary to EU law including European Fundamental Rights. These judgments might help in cases such as those included in the Non-Discrimination Handbook, where the Romanian Constitutional Court limited the power of national court to set aside national legislation on the basis of discriminatory grounds,[485] or in the Freedom of Expression Handbook, where the Romanian Constitutional Court had a diverging approach on the criminalisation of insult and calumny from the Romanian supreme court (see Freedom of Expression Handbook, pp. 69-72). Or similarly when French first instance courts were prevented to address preliminary questions to the CJEU by the hierarchical superior courts, see the French case law post-*Griesmar, which* finalized with the recent and still undecided at the moment of writing, *Leone-Leone*. The first preliminary reference was withdrawn by the national referring court following the pressure from national supreme courts.[486] Still the doubts as to the interpretation of national provision were such that another national court felt compelled to raise virtually the same question to the CJEU. The question was even more necessary because of the analogous interpretation of 'pay' provided by the ECtHR in 2011 in *Andrle* judgment, where the ECtHR gave a more limited interpretation then under the EU legal system.[487] Interestingly, the two references require interpretation of limitation of non-discrimination principle by the French law previously adjusted to fit the EU standard. Of possible relevance is the fact that AG Jääskinen in both its opinions found that the relevant provisions of French law were EU law conform, after a first amendment of the national legislation was done following the Commission pressure with an infringement procedure.[488]

The conflict between supreme/constitutional court and national courts (ii) is very well represented both in the follow up to the *Radu* (see Close up 6) case as well as in the Italian same sex marriages case (See Non-Discrimination Handbook, pp. 46-50). In the latter case the Court of Appeal used the elements of comparative reasoning and consistent interpretation in order to arrive at conclusions opposing to those of the Constitutional Court.

The last of the conflicts is a horizontal one in which national court disagree about interpretation of specific norms. In *Sindicatul Liber* case (See Non-Discrimination Handbook, pp. 95-97) two courts of appeal, despite using consistent interpretation techniques arrived at different conclusions – either consistent interpretation or disapplication.

The examples provided in this scenario show the full spectrum of Judicial Interaction Techniques and their strategic use. The cases presented belong to the most interesting and complex ones – and inspirational ones for the national judges in their every day practice.

### c) Only One of the Objectives Can Be Achieved (Either Convergence or Enhancement) in a Given Case

#### ***Scenario 4 – Only Convergence Can be Achieved Due to Constitutional Nature Concerns***

The final scenario comprises a limited number of situations where the higher standard of protection is compromised for what could be called constitutional interest. Such an approach towards specific fundamental rights issues is permissible in two situations only: where the constitutional identity of a

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485 See the Romanian Constitutional Court decision, no.997/2008.

486 Case C-572/10 *Amédée*, Order of 28 March 2012.

487 See the discussion in Part I Section The Vertical Relation between the CJEU and ECtHR.

488 C-173/13 *Leone and Leone* Advocat General Niila Jääskinena issued an opinion on 27 February 2014. The AG delivered also its opinion in Case C-572/10 *Amédée.*

Member State is at stake and where the efficiency of EU law is to be threatened through application of a higher standard of protection.

In the first case, the issue at stake is national constitutional courts attitude towards human rights adjudication in the multi-level structure of the EU,[489] the references to the case-law of the CJEU in the decision-making process of the constitutional courts (CCs), or the constitutionality review of the provisions which transpose EU law.[490]

The complexity of adjudication in this area is further fuelled by the threatened position of national constitutional provisions and courts should the latter allow independent adjudication to the European courts, and to the CJEU in particular. There are two quite opposite risks which are likely to appear as a consequence of parallel human rights adjudication in the national and EU levels. On the one hand, if the CCs would autonomously apply human rights solely based on their domestic constitutional catalogues, then significant differences in the regime of the application of human rights to the same factual reality can appear, creating thus confusion in the European judicial system. On the other hand, if the CCs would limit themselves in accepting the interpretation given by the CJEU to the human rights catalogue in the Charter without any of their influence, that would lead to a judicial standardization of fundamental rights, which would put in danger national identities which the TFEU aims to protect.[491] The solution to counter both of the risks is a constant, substantive dialogue between the CCs and the CJEU through the preliminary rulings procedure enshrined in Art. 267 TFEU, a dialogue which appears to be taken more and more seriously.

Frequently, however, fundamental rights protection level is lowered within the EU legal order. This happens whenever the higher fundamental rights protection standard would threaten the delicate constitutional balance of the EU and its Member States. These can be constitutional values of the Member States or these of the EU.

In the first case standards are lowered in the name of traditional values, or – following nomenclature of the CJEU – national constitutional identity.[492] Such approach can be traced in the Polish same sex union case (see *Close Up 1* in this Handbook and the extensive discussion at pp. 90-93 of *Non-Discrimination Handbook*) where the Polish Supreme Court emphasized that marriages are privileged in the Polish legal system as the consequence of a choice of Polish sovereign expressed through the constitutional provision. What is important is that in this particular case the Polish Supreme Court acted within the margin of appreciation sphere allowed it by the ECtHR.

The second of these cases to provide somewhat analogous situation is that of a situation where efficiency of EU law could have been compromised had a higher standard of protection been chosen

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[489] See the famous *Solange I* (Judgment of 29 May 1974, 37 Entscheidungen des Bundesverfassungerichts 271) and *Solange II* (Judgment of 22 October 1986, 73 Entscheidungen des Bundesverfassungerichts 339) decisions of the German Constitutional Court. For a commentary on the *Solange* argument, see A. Tzanakopoulos, "Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument", in *The Practice of International and National Courts and the (de)fragmentation of International Law*, O. Kristian Fauchald and A. Nollkaemper (eds.), Hart Publishing, 2012, at 185 – 215.

[490] See the 'data retention saga 'in the decisions of the Constitutional Courts of Romania (Decision No. 1258 of 8 October 2009), and Germany (1 BvR 256/08 Judgment of 2 March 2010), or the Czech Republic (the decision of 31 March 2011). Several constitutional courts of the Member States decided that certain provisions of the national laws which implemented Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC were unconstitutional, because they breached the right to privacy enshrined in the national Constitution.

[491] Art. 4(2) TEU; M. Cartabia, "Europe and rights: taking dialogue seriously", (2009) European Constitutional Law Review, Issue 1, 6-7; Cartabia argues that pluralism is the most appropriate model describing the contemporary relationship between the Member States and the EU; see also N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999), p. 120, and a famous definition by M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing, 2003), at 501.

[492] Addressed for the first time in Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*.

by a national court. Here it is the CJEU that protects its legal system and does not permit any threat to it that would stem from the lack of convergence. A very good example for how this problem was dealt with by many courts is offered by the European Arrest Warrant case law. The most obvious illustration of the scenario at stake is provided by *Melloni* (see *Close Up 7*) which has lead the national supreme court to change the line of the case law in accordance with the CJEU preliminary judgment. On the other hand, however, in *Radu,* the referring court chose the enhancement of Fundamental Rights to the detriment of convergence and did not follow the CJEU preliminary ruling. In response, the High Court of Cassation and Justice decided to choose the convergence to the detriment of enhancement. In *Jeremy F*, on the other hand, the Conseil Constitutionnel did not need to make such dramatic choices as the internal procedural law permitted it to observe the strict time limits of the EAW FD.

To conclude, instances where it is acceptable for a national court to choose a lower standard of protection are very limited. Unless there is a clear guidance on the part of either the constitutional court or the CJEU, the general interpretative rule of Arts. 52(3) and 53 of the Charter of Fundamental Rights will prevail. Nevertheless, the mere possibility of this scenario taking place needs to be present in the mind of any judge when passing a ruling on FRs due to the particular importance of this legal area in national constitutional systems.

***Scenario 5 – Only Enhancement Can Be Achieved***

The final line of our considerations goes to Scenario 5 where out of the two objectives, only enhancement of rights can be met. This takes place only at an instance where there is a conflict between the ECHR and the CJEU with the former offering a higher (or more elaborate) standard of protection. In such cases, courts may choose enhancement of fundamental rights protection standard to the detriment of convergence.

Clearly, given the emphasis placed by the CJEU on the efficiency of EU law and the fact that the EU FRs are to be interpreted in line with the ECHR[493], there are very few cases where national courts permit themselves to compromise convergence with the EU law.

The Constitutional Courts of the EU countries in an attempt to ensure the highest level of protection of FRs have not stepped back from choosing the ECHR against the EU level, if the former was considered as the one ensuring the highest possible standard – see the Romanian Constitutional Court in the Data Retention judgment[494], but also *inter alia* the German Constitutional Court Judgment[495], or pending Slovak one[496] declaring unconstitutional the national legislation implementing the Data Retention Directive.

The choice of national courts to make enhancement prevail over convergence in some instances can be overturned by supreme courts as it was the case in *Radu (Close Up 7)*. Unfortunately, such instances mark the ultimate limit of judicial interaction techniques and prove that some legal developments need to wait until their time comes.

From the perspective of a national judge pointing to the alleged discrepancy between the two standards is also a permissible strategy that could be chosen by a national judge in order to arrive at the compatible (at least with one of the European legal systems) solution, as long as it does lead to a higher protection of fundamental rights standard (see the *Radu* case in *Close Up 7*). However to be recognized as a permissible strategy, the national court needs to have a thorough understanding of the

[493] See Art. 52(3) EU Charter.
[494] Decision No. 1258 of 8 October 2009
[495] Urteil des Ersten Senats vom 2. März 2010 in den Sachen - 1 BvR 256/08, 1 BvR 263/08 , - 1 BvR 586/08.
[496] Available at http://www.eisionline.org/index.php/projekty-m/data-retention-m/49-sl .

supranational courts' and national courts' precedents, otherwise, it might fail to implement them properly and justify its choice for enhancement on correct legal interpretation of precedents.[497]

## *II. Comparative overview of the specific use of Judicial Interaction Techniques in relation to the principle of non-discrimination, right to fair trial and freedom of expression*

In this section we will outline the specificity of the principle of non-discrimination, right to a fair trial and freedom of expression and their impact on the availability and choices of Judicial Interaction Techniques. Some of these techniques are more appropriate than others depending on the fundamental rights at issue, the identity of the parties (e.g., public or private), or the constitutional functioning of the domestic judiciary.

### a) Non-discrimination

Adjudication in the area of this right, preliminary referencing and disapplication are the tools that most enhance the powers of the judge. This is because of EU law's primacy, whereas the ECHR's guarantees on non-discrimination are very limited in scope. Clear examples can be seen in the *Elbal Moreno, Kücükdeveci, Firma Feryn* and *ACCEPT* cases, where the preliminary reference to the Court of Justice was the most efficient way to obtain leave to set aside domestic law if needed. Another specificity of this area is the frequency of horizontal disputes, i.e. claims brought by individuals (e.g. employees) against other individuals (e.g. employers). This may also have an impact on the use of judicial interaction techniques: for example, consistent interpretation may be relied upon more frequently because EU directives do not have horizontal direct effect (see, on the other hand, *Kücükdeveci*, where the CJEU seems to require the direct application of EU law in these cases as well).

### b) Fair trial guarantees (consistent interpretation, mutual recognition, comparative reasoning and presumption of conformity with FRs)

In this field, consistent interpretation is the tool that is mostly used to accommodate the different version of due process rights under the ECHR standards, also in the framework of EU law. The most evident instances of dialogue (for instance between the UK court and the ECtHR) revolve around the compatibility of certain practices with Art. 6 ECHR (see the UK Supreme Court in *Tariq* and *Horncastle*, but also the Austrian ruling on asylum seekers and the Croatian judgment *DAPT*). It is no surprise that when the consistent interpretation falls short there is no further space for accommodation, when the effectiveness of EU law is challenged by discrepancies created by national FR standards (see *Melloni*). In addition, the use of comparative techniques is particularly apt in this field, where the tension always takes place between public powers and personal guarantees: it is reasonable to expect that all jurisdictions have subscribed to certain general principles of procedural fairness, and other legal orders may serve as models (see for instance the *Assange* and *Legal Aid* cases). Finally, mutual recognition has been especially prominent in the adjudication of the right to a fair trial, for two reasons. Firstly, in some cases engaging in judicial interactions and thus recognizing the legitimacy of courts and legal systems other than one's own is inherent in providing a fair trial (see e.g. the duty to refer to the CJEU as established in the Spanish judgment *Metropole*). Secondly, EU instruments such as the Framework Decision on the European Arrest Warrant explicitly require mutual recognition, which can only in some circumstances conflict with national fair trial standards (e.g. the *Radu* case).

### c) Freedom of expression

Based on the case law collected for the Project representative for the area of freedom of expression, consistent interpretation and proportionality have been the most often used judicial interaction techniques. When solving conflicts between freedom of expression and the right to privacy, the consistent interpretation technique was mostly used to ensure conformity with the ECHR and the

[497] See the *Agrati* (Agrati and others v. Italy, Appl. Nos. 43549/08, 6107/09, 5087/09, Judgment of 7 June 2011) and *Belpietro* case (*Close Up 2*).

Strasbourg Court judgments. The *Hannover no. 1* judgment of the ECtHR has brought a revolutionary change in the judicial interpretation of the German court, but also in other national jurisdiction.

Because the right to freedom of expression is often balanced against other fundamental rights and public interests, the most important tools for the judge are the command of the proportionality analysis and the margin of appreciation. From the perspective of the national judge the correct application of the proportionality test (e.g. in line with the ECtHR guidelines) can avoid the results of the subsequent scrutiny before supranational courts (see the *Lewandowska-Malec v Poland* case). The margin of appreciation is the tool used by the ECtHR through which the Court can justify discrepancies in the level of fundamental rights at national level; however, in case of freedom of expression vis-à-vis the protection of privacy and the reputation of the others, a deeper attention was paid not only to the type of balancing exercise, (as in the von Hannover saga, where the ECHR was keen to provide guidance precisely on how to balance competing interests) but also to the type of sanctioning regime applied at national level (as in the *Cumpana and Mazare* case, where the ECtHR clarified the limited margin of appreciation available when criminal liability was to be applied to journalists). It must be borne in mind that the right to freedom of expression is often invoked in cases between individual parties: in these cases, the judge is not called upon to determine the scope of public powers, but to arbitrate between legitimate private interests (see for instance *Sabam v. Scarlet* and *Satamedia*).

## III. Conclusions

### a) On the objective of establishing a coherent and enhanced European level of protection of Fundamental Rights

It is clear that, even within the sample of EFRs that were chosen for the JUDCOOP Project, different Member States have different views on the implementation of each of them.

Diversity with respect to EFRs is sometimes tolerated by the ECtHR, which refrains from imposing a centralised interpretation of the Convention when the different country-specific practice are within the "margin of appreciation" of the Parties, often using the lack of European consensus to justify the deferential stance. The central concern of EU institutions, instead, is to preserve the unity of EU law and ensure its coherent application across the Member States. Therefore, when EFRs guarantees concern EU law instruments, State-specific conceptions will be allowed only insofar as they do not violate EU law.

Many of the EU FRs have their roots in the legal tradition of the Member States. However, as happening with EU legal concepts, the EU FRs are not just a sum of the Member States' legal traditions governing the application of fundamental rights.[498]

As regards fair trial guarantees, the cases of *Radu* and *Melloni* are instructive: they highlight a country-specific conception of fair trial that regards trials *in absentia* and pre-trial detention as serious breaches. The latter provides an example where national specificity was not permitted. In other countries, these aspects are regulated less rigidly. Other differences might relate to the importance attributed to legal aid and translation services, the protection of vulnerable categories, the presumption of innocence and the evidentiary value of silence during a trial.[499]

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[498] S. Rodin, "In the Classroom and the Courtroom", (2013) Maastricht Journal of European and Comparative Law, (4), editorial.

[499] For a couple of comparative studies highlighting the national provisions and practices in these and other respects, see EU DG-Research, *Right to Defence and Fair Legal Procedures: in the Member States and the Candidate Countries* (Dictus 2010). A previous version is available at http://www.uni-mannheim.de/edz/pdf/dg4/LIBE115_EN.pdf. See also the more recent study of

Likewise, the concept of privacy and its relationship with the freedom of expression can vary considerably from one Member State to another.[500] The long exchange between the German courts and the ECtHR in the *von Hannover* and *Axel Springer* cases revolved precisely on whether the German model could fit within the appreciation left by the Convention to the States. As regards EU law, the recent annulment of the Data Retention Directive is testimony of the severe standard adopted by the EU institutions, which cannot uphold disproportionate restrictions.[501]

In respect to non-discrimination, instead, it is more difficult to accommodate national idiosyncrasy: after all non-discrimination rights implement the right to equality, which is supposed to remove unjustifiable differences in treatment. Relevant differences between the Member States, therefore, depend on each State's record of compliance with EU law or ECHR law, rather than on a different conception of equality.[502] There are, however, certain exceptions: measures requiring employers to accommodate the needs of disabled workers are uneven across Member States, and there is some traceable difference in the concepts of equality endorsed by each jurisdiction, for instance as regards the cogency of the reasons advanced to show that a differential treatment is not arbitrary.[503] Another specific view on equality and non-discrimination is the one adopted in France[504:] protection of certain vulnerable groups from discrimination is in itself a form of inequality, as it creates disparities. The principle of equality should be instead inspired by universality: all citizens must enjoy it.

National remedies granted under national procedural law can take the form that the State considers more appropriate: a violation of a fundamental right can qualify as a crime, an administrative wrongful act or simply a tort giving rise to liability. The choice of the means is normally left to the national legislator, but some constraints such as the principle of proportionality are in place. One is the limit of the effective protection of EU-derived rights. If the remedy provided by the national procedural law is such as to diminish or frustrate the protection bestowed upon the individual by EU law, the Member State is in breach (see the discussion on the sufficiency of a warning as the sanction for homophobic statements, in *ACCEPT*). Moreover, sometimes the very imposition of criminal fines can, in itself, constitute a disproportionate measure, when the value protected is in tension with another fundamental right. For instance, the criminalisation of defamation by press is considered to be legal only in exception al circumstances (which involve incitement to hatred and violence). In all other scenarios, it will have by its very nature a chilling effect on the freedom of opinion and freedom of the press (*Cumpana and Mazara v Romania*). As a result, the State is bound to adopt a different regime of sanctions.

### b) On the role of national judges

The mandate of national courts[505] is constrained by their multiple loyalties; they are typically bound

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Fair Trials International, *Defence Rights in the EU* (2012), available at http://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf. Finally, see the Commission's study on the impact assessment regarding the *Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings*, see document SWD(2013) 478 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0478:FIN:EN:PDF.

[500] For an overview, see the report commissioned by the Commission, *Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality* (2009), document JLS/2007/C4/028, available at http://ec.europa.eu/justice/civil/files/study_privacy_en.pdf.

[501] See Joined Cases C-293/12 and C-594/12, *Digital Rights v Ireland* [2014], nyr.

[502] For a comprehensive study that supports these generalisations, see *Developing Anti-discrimination Law in Europe - The 27 EU Member States, Croatia, Former Yugoslav Republic of Macedonia and Turkey compared* (2011), available at http://www.non-discrimination.net/content/media/Comparitive%20EN%202011.pdf.

[503] See *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, report prepared by C. McCrudden and S. Prechal (2009), in particular pp. 11 ff.

[504] See Sénat, Résolution européenne sur la proposition de directive du Conseil relative à la mise en oeuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle, 17 November 2008.

[505] M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford, 2006.

to apply a law made up of sources belonging to different orders; their action is reviewable by the ECtHR and can give rise to State liability for breach of EU law[506]; their decisions are subject to the review of the higher national courts.[507] This calls national judges to a delicate exercise of interpretation and application of norms that ideally is designed to guarantee a better protection of human rights, but sometimes, in practice, it turns into ensuring coherent interpretation and application of fundamental rights at the expense of securing higher standards of protection of FRs.

Lack of coherence is undesirable, as it leads to different standards of protection, and consequently ineffectiveness of justice – especially in the joint area of justice under the auspices of the European Union. Lack of coherence can be even more detrimental to justice and confidence in HRs systems than an erred judicial methodology to HRs cases.

On the other hand, existence of coherence is not necessarily a good thing, if for the purpose of reaching coherent body of jurisprudence, adjudicatory bodies tend to share a *de minimis* protection of HRs.

Judicial application of European Fundamental Rights should aim for more than just unity and/or coherent application of EU law/EUCHR and ECHR, since uniform application of minimum standards of European fundamental rights is not necessarily in the benefit of the individuals, but primarily in the benefit of the EU executive bodies. It should ideally aim towards ensuring both *coherent* and *higher* standards of fundamental rights.

There is however substantial proof of national courts going beyond minimum standards and being concerned about the protection of FRs beyond the minimum secured level under the EU legal framework, as presented in Chapter II of the present Handbook: *Radu* case, *Jeremy F*, *Satamedia*, *Austrian Constitutional Court U466/11* and others, and Slovak Administrative Court, I U 377/2011, 28 March 2011.[508] The area where national courts have mostly pushed for a higher standard of protection of fundamental rights than the one established at the EU level is the Area of Freedom, Security and Justice, mostly in regard to issues related to the protection of the fair trial guarantees. For example, the Spanish Constitutional Tribunal proposed the doctrine of an absolute right to a fair trial whereby an individual trialled in absentia would always have guaranteed the right to ask for retrial of his case in his presence (*Melloni*). The referring Romanian Court of Appeal of Bucharest in its follow-up decision to the CJEU preliminary ruling in the *Radu* case refused to surrender a Romanian citizen convicted by German courts on grounds of the principle of *ne bis in idem* and the long period of time elapsed since the date of the alleged crime. And these are just some of the instances where by way of strategic use of the judicial interaction techniques the national judges have ensured both convergence and enhancement of the EFRswithin the national jurisdictions. National courts should thus feel free to engage in interactions with the CJEU o the issue of level of protection of fundamental rights under the scope of EU law, and present their choices of interpretation to the Luxembourg Court. It is only from such continuous judicial conversations with the CJEU and possibly with other national courts that EFRs will benefit of an enhanced and coherent application.

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506 Case C-224/01, *Köbler* [2003] ECR I-10239; Case C-173/03 *Traghetti del Mediterraneo* [2006] I-5177.

507 According to *Cartesio* and *Elchinov* judgments of the CJEU, 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,* [2008] ECR I-9641; Case C‑173/09, *Elchinov*, [2010] ECR I‑0000.

508 In this judgment the Slovak Court said that even though Article 78 of the TFEU provides that the Union shall "*develop a common policy on asylum, subsidiary protection and temporary protection [...]"* it has to follow higher standards for protection of human rights of the national law. This is in accordance with a 'wide margin of appreciation' doctrine and principle of subsidiarity.

# ANNEX I

# The use of judicial interaction techniques by national courts in cases involving fundamental rights issues: some practical guidelines*

CONTENTS: Introduction – 1. The logical path of adjudication in fundamental rights cases before national courts: an outline – 2. The process of adjudicating fundamental rights in national courts: a discussion

## Introduction

These guidelines refer to "judicial interaction"[509] as a set of techniques that *are* and *can* be used by European courts and judges in order to promote coherence and coordination (or at least minimize the risk of conflicts) in the field of fundamental rights protection. They constitute an integral part of the Final Handbook prepared in the framework of the Project "European Judicial Cooperation in Fundamental Rights Practice of National Courts", but are also meant to be a standing-alone, ready-to-be-used document.

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. 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 and EU 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 (*juges naturels*) of both EU law and the ECHR. Therefore, whenever they are called to adjudicate on fundamental rights, they 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); (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

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* These guidelines have been prepared by *Filippo Fontanelli*, *Nicole Lazzerini* and *Madalina Moraru*, and revised by the other legal experts of the Project Team.

[509] For the purpose of this Handbook, we have preferred the more neutral and wider concept "judicial interaction" to "judicial dialogue". "Judicial interaction" embraces *all episodes of contacts (either intentional or casual)* between courts, whereas "judicial dialogue" mostly refers to episodes of intentional, formal contacts between courts. The single instances of interaction may differ in intensity, outcome, and typology. In a broader sense, "judicial interaction" can be understood as *a set of techniques used by courts and judges to promote coherence and coordination (or, at least, minimize the risk of conflicts) among different legal and judicial systems in the safeguard of some constitutional goods* – such as human rights – that are protected at different levels of governance (the national, international and supranational normative layers).

must also engage with the complex issue of the relationships between the two systems (and their courts).

Through the use of judicial interaction techniques, national courts therefore seek to ensure a more effective and coherent level of protection of fundamental rights in Europe, while possibly reducing the length of judicial proceedings. If no supranational source applies, the case has to be solved under domestic law, but judicial interaction might still occur at the national level, with similar beneficial outputs.[510]

National judges may use different techniques to solve conflicts between domestic, European and international sources related to fundamental rights. The techniques available to national judges in a specific case and their order of use are conditioned by factors such as the *number of applicable sources*, and the *existence (or not) of a veritable conflict between a national provision and a supranational norm* (meaning, a conflict that cannot be solved by way of interpretation).

As regards the first factor (*number of applicable sources of law*), the present guidelines provide the logical path which a national judge would usually need to follow when adjudicating on fundamental rights cases, when at least one supranational source is applicable. In line with the general structure of the Final Handbook, they consider two supranational sources: the EU Charter of Fundamental Rights (CFR or Charter), and the European Convention on Human Rights and Fundamental Freedoms (ECHR). The sequence then bifurcates depending on whether the case falls within the scope of Union law (***Scenario 1***) or not (***Scenario 2***). Since the Charter only applies to cases falling within the scope of EU law,[511] Scenario 2 concerns situations where the ECHR applies, but the Charter does not.[512] By contrast, both the Charter and the ECHR might apply to situations of Scenario 1. This is because the High Contracting Parties to the ECHR "shall secure to everyone within their jurisdiction the rights and freedoms defined [in the Convention]" (Article 1 ECHR). In other words, the Convention does not suffer from the limitations *ratione materiae* that apply to the Charter.[513]

The decision to focus on cases where the Charter and/or the ECHR are applicable in addition to national law implies that the following Judicial Interaction Techniques will be usually available to national judges: **consistent interpretation, preliminary reference (only when EU law is applicable), the proportionality test, margin of appreciation, comparative reasoning, mutual recognition, disapplication, and deference**.[514] As anticipated, their order of use is mostly conditioned by the *existence (or not) of a veritable 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, there is room for consistent interpretation. If this were not the case, she might decide to refer a preliminary question to

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[510] On interaction between domestic courts, see *amplius* section 4.a of Part II of the Final Handbook. Note also that, according to established case law, the CJEU has jurisdiction to give preliminary rulings also in a limited set of situations falling outside the scope of Union law, notably when national law refers to the content of certain provisions of EU law, making them directly and unconditionally applicable to purely internal situations: cf., for instance, Case C-482/10 *Cicala* [2011] nyr., and Case C-313/12 *Romeo* [2013], nyr.

[511] See the blue-box "When do EU fundamental rights apply to national law?" in Section 1 below.

[512] More precisely, the Charter does not apply as a matter of EU law. The Member States may nonetheless decide to extend the scope of application of the Charter, under domestic law, to situations that would in principle escape from its scope: see footnote 2 above; cf. also the judgment by the Austrian Constitutional Court in Cases U 466/1 and U 1836/11, 14 March 2012, where the Charter was regarded as a parameter in the context of the judicial review of constitutionality of domestic legislation.

[513] Additionally, there are also some fundamental right-specific limitations. For more details on the specific scope of application of the ECHR compared to the EU and national law regarding the fundamental rights addressed by the Project, see the Final Handbook, Part I, b. i. "Overlapping fundamental rights sources", at p.9 and ff.

[514] For a discussion on the legal bases of these techniques, their function, strategic use and consequences of it see the Final Handbook, section 2 of Part II, "List of existent judicial interaction techniques as tool(s) for solving conflicts concerning FRs", which also provides concrete examples of their application in the fields of non-discrimination, fair trial and freedom of expression.

the CJEU (as a rule, national courts of last instance must make a reference)[515]. Conversely, a preliminary question will be the first option when the meaning of the EU law provision is unclear, thus making it difficult to assess the EU-lawfulness of the national provision. Accordingly, these guidelines single out alternative available courses of action (A, B, C, etc.) depending on whether: the domestic provision is clearly compatible with the supranational norm(s) involved, clearly incompatible therewith, or there exist doubts on its compatibility. A further distinction is made, where appropriate, depending on the nature of the national judge's doubts.

The guidelines consist of two parts. Section 1 provides an outline of the process of adjudicating fundamental rights in national courts, which takes into account the two scenarios referred to above. Section 2 discusses the two scenarios in greater depth, providing additional insights and indications that should assist national judges when dealing with cases involving European fundamental rights.

[515] Art. 267(3) TFEU.

## 1. The logical path of adjudication in fundamental rights cases before national courts: an outline

### A. Does the case fall within the scope of EU law?

This question must be answered in the affirmative if there is a provision of EU law (primary or secondary) other than the Charter that applies to the facts of the case: cf. box below.

**NO** → The case might nonetheless fall within the scope of the ECHR. If so, see below, part C. Otherwise, the case must be solved under national law.

**YES** → The Charter is applicable to the case. In addition, the ECHR might also apply. See below, part B.

**When do EU fundamental rights apply to national law?**

According to Article 51, par. 1, of the EU Charter of fundamental rights, titled "Field of application", the rights and principles therein are binding on the Member States "only when they are implementing Union law". In its judgement of 26 February 2013 on Case C-617/10 *Åkerberg Fransson*, nyr., the CJEU interpreted this provision as meaning that "the fundamental rights granted by the Charter must (…) be complied with *where national legislation falls within the scope of European Union law*" (para. 21, emphasis added). In two more recent judgments (respectively, 6 March 2014, Case C-206/13, *Cruciano Siragusa* [2014], nyr., and 27 March 2014, Case C-265/13, *Emiliano Torralbo Marcos*, nyr.), the CJEU pointed out that "the concept of «implementation» in Article 51 of the Charter requires a certain degree of connection [with EU law]" (para. 24), and that, "[w]here 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" (para. 30). It follows that the Charter applies *where a EU rule other than the Charter provision allegedly violated applies to the case* pending before the national judge. In the words of Allan Rosas,

"*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*"[1] Below is a list of situations, drawn from the case law of the CJEU, where the Charter is applicable, because the case involves the application of a

[1] https://www.mruni.eu/lt/mokslo.../st/.../dwn.php?...%E2%80%8E

different EU rule (trigger):

- cases concerning national measures adopted in order to enforce a EU Regulation (e.g. Case C-5/88 *Wachauf* [1989] ECR 2609; Case C-292/97 *Kjell Karlsson* [2000] ECR I-2737) or EU primary law (TEU/TEFU provisions);

- cases concerning national measures adopted in order to implement a Directive (e.g. Joined Cases C-20/00 and 64/00, *Booker Aquacultur and Hydro Seafood* [2003] ECR I-7411; Case C-176/12 *Association de médiation sociale* [2014], nyr, Case C-385/11, *Elbal Moreno*, [2012], nyr.), or national measures which substantially act as implementing measures, though not specifically adopted on that purpose (Member States do not need to pass specific measures in order to implement a Directive if the domestic legal order is already in conformity with that Directive), or national measures which in any event have the effect to implement an obligation of the Member States under EU law, even if adopted before the EU provision that places the specific obligation on Member States (e.g. the obligation to adopt sanctions aimed to ensure the effective collection of VAT: *Åkerberg Fransson*, cit.);

- cases concerning national measures falling within the scope *ratione materiae* and *personae* of a Directive, before the expiry of the transposition period (but note that this is not yet an established case law: cf. Case C-1444/04 Mangold);

- cases concerning national measures which derogate from EU law provided by EU primary or secondary law based on reasons of public interest (e.g., Article 36 TFEU/mandatory requirements, Article 45(3) TFEU, Article 4 of the EAW Framework Decision, limits to free movement of EU citizens and their familiars laid down by Directive 2004/38/EC; cf. C-260/89 *Elliniki Tiléorassi AE* (*ERT*) [1991], ECR I-2925; Case C-208/09 *Sayn-Wittgenstein* [2010], ECR I-13693); when the national measure seeks to derogate from EU law in order to protect a fundamental right, then one needs to strike the balance between the EU fundamental freedom affected and the fundamental right in question (cf. Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609);

- cases concerning national provisions of procedural law that affect or govern the exercise of (ordinary) rights granted by EU law (such as the right to have the Member State making good damages caused to legal or natural person by not having implemented in time a Directive: see Case C-279/09 *DEB* [2010] ECR I-13849.

Note also that, according to established case law, the CJEU has jurisdiction to give preliminary

rulings also in a limited set of situations falling outside the scope of Union law, notably when national law refers to the content of certain provisions of EU law, making them directly and unconditionally applicable to purely internal situations: cf., for instance, Case C-482/10 *Cicala* [2011] nyr., and Case C-313/12 *Romeo* [2013], nyr.

**B. Situations falling within the scope of EU law**

This corresponds to Scenario 1 of Section 2 of these guidelines.

In order to answer Question 1(***Is the domestic provision compatible with EU law?)*** below, the national judge must take into account that:

- there are specific techniques for the interpretation of EU law, and the Charter in particular;
- If the Charter provision allegedly violated corresponds to a fundamental right granted by the ECHR, attention must be paid to Article 52, par. 3, CFR (duty of parallel interpretation with the ECHR/case law of the ECtHR);[1]
- The requirements for compatibility vary depending on the relationship between the domestic provision and the provision of EU law that brings the situation within the scope of EU law.

Some guidelines on how to address these points are provided in the first blue-box in Section 2 "Interpretation of the Charter and requirements for compatibility of the domestic provision with the Charter".

***Question 1: Is the domestic provision compatible with EU law?***

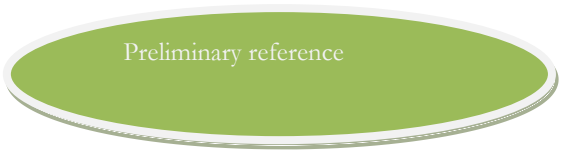
**YES:** the judge can apply domestic law.

**UNCLEAR:**

i –Where the interpretation of the relevant *EU law provision is unclear*

The national judge may (last instance courts must – Art. 267(3) TFEU) refer a preliminary question to the CJEU, and ask for the interpretation of the EU law provision whose

[1] Art. 52(3) EU Charter reads as follows: "*Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*"




meaning is unclear. Preliminary reference is unnecessary when the CJEU already clarified the meaning of the provision.[2]

Once established the correct interpretation of the EU law provision, the national judge must verify whether the national provision is clearly compatible or, in any event, there exists the possibility to interpret it in conformity with EU law (see point ii below).


ii –Wherethe *national provision is open to different meanings*

Unlike what happens under i), here the judge has no doubts as regards the meaning of the applicable EU law provision. If there is a construction of the domestic provision that makes it compatible with EU law, also in light of the case law of the CJEU, this must be adopted.


If there is no such construction available, there is a conflict: see Question 2.

iii- Wherethe *domestic measure restricts a fundamental right* granted by the Charter

The domestic provision is compatible with EU law if the test of proportionality is satisfied. The domestic restriction must be: *provided for by law*, *respect the essence of the fundamental right restricted*, *pursue a legitimate aim*; *be suitable and necessary to achieve it*.

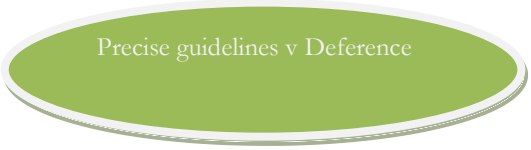

In order to assess the proportionality of the measure, it might be useful to take a look to:


[2] For more details on how to establish whether a certain EU legal provision has been clarified by the CJEU, the steps to be followed as established by the CJEU in *CILFIT* (Case 283/81 *Srl CILFIT and Lanificio di Gavardo* v. *Ministry of Health* [1982] ECR 3415), please see the Final Handbook, Part II, section 2, "Exemption from the obligation to raise a preliminary reference".

- The case law of the CJEU
- The case law of other national courts


However, if the national judge cannot solve his/her doubt, he/she may refer a preliminary question to the CJEU, asking whether the relevant provision of the Charter does admit a restriction such as that at issue. A duty to make the reference only exists for national courts of last instance and only if the issue has not yet been clarified by the CJEU.


The CJEU might either provide the national judges with precise guidelines, or rather accord them a significant margin of manoeuvre in conducting the proportionality assessment.




**NO**: There is a clear conflict, see below Question 2.

***<u>Question 2:</u> Is it possible to disapply the domestic provision conflicting with EU law?***

The affirmative answer requires that the relevant provision of EU law has direct effect, i.e. the EU provision is clear, precise and unconditional


**YES:** The judge must apply EU law and set aside the domestic norm.

<u>N.B:</u> when the conflict is with an EU directive, disapplication is possible only if the case is brought against a public authority; (*for more info on horizontal effect of EU Fundamental Rights please see the second blue-box of Section 2 ("Direct effect of the provisions of EU law and of the provisions of the Charter in particular").*

**NO:** under EU law, there might be room for an action for responsibility of the Member State for breach of EU law (according to the *Francovich* case law of the CJEU). However, if the case falls also within the scope of the ECHR, it might be necessary to consider the effects of the Convention under domestic law. If the domestic legal order admits the disapplication of national

provision in conflict with the ECtHR, then the national norm can be set aside. See *amplius* under Question 2 of part C.

## C. Situations falling outside the scope of EU law but within the scope of ECHR

This corresponds to Scenario 2 of Section 2 of these guidelines.

***Question 1: Is the domestic provision compatible with the relevant provision of the ECHR, also in light of the case law of the ECtHR?***

**YES:** the national judge can apply it.

**NO:** there is a conflict. See Question 2 below.

**UNCLEAR:**

i- Where the *domestic provision restricts a fundamental right* granted by the ECHR

If the fundamental right in question is among those that admit limitations, the domestic provision is compatible if it satisfies the test of proportionality, as shaped by the ECtHR. The domestic provision must: **be prescribed by law, pursue a legitimate aim, be necessary in a democratic society, be proportionate in the narrow sense**.


In order to assess the proportionality of the measure, it is particularly useful to take a look to the case law of the ECtHR. This because the room of manoeuvre that national courts might enjoy in conducting the proportionality test varies depends on whether there is a European consensus on the matter of the limitation of the fundamental right, on the basis of which the ECtHR determines the space for manoeuvre that it is willing to leave to the High Contracting Parties and their courts (for more details on proportionality, margin of appreciation and vertical cooperation between national courts and the ECtHR, see Scenario 2 in Section 2).

ii- Where the *domestic provision is open to different meanings*

The national judge must opt for the construction(s) of national law ensuring conformity with the ECHR, also in light of the case law of the ECtHR, if there is any.


***Question 2: Is it possible to disapply the national norm conflicting with the ECHR?***

The national judge needs to verify whether his/her legal order admits the disapplication of national provisions conflicting with the ECHR.

**YES:** The national judge can set aside the domestic provision.


**NO:** Maybe it is possible to raise a question of constitutionality which will revolve around the breach of the ECHR (either directly, with the ECHR serving as standard of review or indirectly, with the Convention being used to interpret the relevant constitutional provision).

## 2. The process of adjudicating fundamental rights in national courts: a discussion

### ***First Scenario***

The case pending before a national court falls within the scope of Union law and involves a fundamental right granted by the Charter. In some cases, the dispute may also involve the application of the ECHR.

In order to understand whether the national measure is compatible with the Charter, a national judge needs to take into account two elements. Firstly, s/he has to determine the meaning of the Charter provision in question.[1] In order to do so, s/he should proceed in accordance with the rules of interpretation applicable to EU law (for instance, *effet utile* principle) and the Charter in particular (see Article 52 CFR). If the meaning of a provision of EU law (including the provisions of the Charter) is ambiguous, a national judge can ask the CJEU to clarify it through a **preliminary reference** (last instance courts must refer the question, unless the CJEU has already decided on the point, under Art. 267(3) TFEU). Secondly, the requirements for compatibility of national law with the Charter vary depending on the relationship between national law and EU law at stake. These two points, which are functional to establishing whether the national provision is compatible with EU law, are addressed in the following box, respectively under **a)** and **b)**.

[1] The national judge may have doubts on the interpretation of a provision of the Charter, but also on the meaning of another provision of EU law in light of the Charter. In both cases, the interpretation requested to the CJEU is functional to establishing the compatibility of the domestic provision with EU law. For instance, in Case C-279/09, *DEB* [2010] ECR I-13849, the national judge asked (in essence) an interpretation of Article 47 of the Charter. He/she doubted the compatibility with Article 47 of a domestic provision under which the pursuit of a *Francovich*-type action for responsibility of the Member State was subject to the making of an advance payment of the costs of the proceedings, and legal persons were excluded from legal aid. By contrast, in Case C-149/10, *Chatzi* [2010], ECR I-8489, the national judge asked the CJEU to clarify the interpretation of Article 2(2) of the Framework Agreement on Parental Leave (set out in an annex to Directive 96/34/EC), in light of Article 24 of the Charter on the rights of the child. The referring court doubted the compatibility with the Framework Agreement of the national implementing legislation, which granted to mothers of twins a single period of parental leave. Since the Charter has the same status as the Treaties (Article 6(1) TEU), EU legislation must be compatible with the fundamental rights therein. This implies that, insofar as is possible, EU legislation must be interpreted in compliance with the Charter.

**Interpretation of the Charter (a) and requirements for compatibility of the domestic provision with the Charter (b)**

**(a)** In order to determine the content of the provisions of the Charter, account must also be taken of the Explanations to the Charter,[2] and of the case law of the CJEU on the interpretation of that provision.

According to Article 52, par. 3, CFR, the meaning and scope of the fundamental rights of the Charter that correspond to rights granted by the Convention shall be the same as those of the latter. A national judge should therefore also establish whether the relevant provision of the Charter corresponds to a fundamental right granted by the ECHR. If so, he/she should take into account also the case law of the ECtHR concerning the interpretation of the corresponding provision of the ECHR. However, Article 52, par. 3, CFR also adds that the rule of parallel interpretation with the ECHR "*shall not prevent Union law providing more extensive protection*". Accordingly, a national judge should not follow the case law of the ECtHR when it affords a lower protection than granted by the CJEU.

The explanation of Article 52, par. 3, of the Charter provides a list of provisions of the Charter that correspond (totally or in part) to fundamental rights granted by the ECHR.

**(b)** The Charter applies if a domestic measure falls under the scope of EU law.[3] Depending on the relationship between the facts of the case and EU law, one can list three scenarios:

i) **The action of the Member States is "entirely determined by EU law" (*Melloni*, *N.S.*):** in this scenario, the national measure implements EU measures (or a provision therein) that already determine the exact level of protection that must be granted to the fundamental right(s) involved. In other words, the EU legislator took care of balancing – through the EU measure or provision in question – two conflicting fundamental rights, or a fundamental right and an objective of general interest (e.g. the right of the accused v the efficiency of the European Arrest Warrant system [*Melloni*][4]; the right of the asylum-seeker v burden-sharing between the EU Member States (the interest of the requested State to defer requests to the State of entry) [*N.S.*][5]). Clearly, the EU measure must comply with the Charter. Therefore, if the national judge considers that the standard of protection endorsed by the EU measure does not comply with the

[2] The Explanations can be seen at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF

[3] Cf. the blue-box "When do EU fundamental rights apply to national law?" at p. 5.

[4] Case C-399/11, *Melloni* [2013], nyr., para. 59.

[5] Case C-411/10, *N.S.* [2011], ECR I-13905.

Charter, it can question the validity of the EU measure through the preliminary reference. In particular, a national judge that doubt the validity of the EU measure/provision cannot set it aside without preliminary asking the CJEU, even when the judge *a quo* is not a last instance court. By contrast, if the validity of the EU measure is not in question, the national judge must ensure that the domestic provision is in line with the level of protection established by the EU measure/provision. If it lowers that level, the domestic measure is not compatible with the Charter (*N.S.*). Similarly, the domestic provision is not EU-legal if it provides the fundamental right(s) involved with a higher level of protection than that endorsed by the EU measure and as a consequence it undermines the effective application of the EU measure (*Melloni*).

ii) **The action of the Member States is "not entirely determined by EU law" (*DEB*, *Fransson*, *ACCEPT*):** in this scenario, the domestic provision is connected with a EU measure that leaves to the Member States to determine the level of fundamental rights protection (e.g., national provisions of procedural law governing the exercise of (ordinary) rights conferred by EU law before domestic courts [*DEB*],[6] or national provisions laying down sanctions aimed to ensure that the objectives pursued/rights conferred by a EU measure are adequately achieved/protected [*Fransson*, *ACCEPT*][7]). In these cases, the Member States (including judges) must ensure that the domestic measure complies with the Charter or, which is the same, provides for restriction to the fundamental rights therein that satisfy the test of proportionality laid down by Article 52, par. 1, CFR. Unlike in the previous scenario, Member States can decide to enhance the level of protection established by the Charter (for instance, because the domestic Constitution grants broader protection to the fundamental right(s) involved). However, the EU measure must still be complied with[8] and, in case, competing fundamental rights must not be unjustifiably restricted. Furthermore, in the case of national sanctions for violation of EU rights (*ACCEPT*, *Fransson*), the former need to respect two fundamental principles of EU law: equivalence and effectiveness. The principles of equivalence requires national judges to set aside national procedural rules which establish more disadvantageous conditions for the exercise of rights derived from EU law as compared to equivalent rights granted by national law; under the

[6] Cit. fn. 10.

[7] Case C-81/12 *ACCEPT* [2013], nyr.; *Fransson*, first blue-box.

[8] At para. 29 of *Fransson*, the CJEU pointed out that "where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or a measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, 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 European Union law are not thereby compromised".

principle of effectiveness, national procedural provisions must not make it impossible or excessively difficult to protect (also ordinary) rights granted by EU law.[9] The impossible or excessively difficult character of a national procedural rules is established "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."[10]

iii) **Member States seek to implement a legitimate derogation from EU law (*ERT*, *Sayn Wittgenstein*)**: domestic measures implementing derogations provided by EU primary or secondary law (cf. the first blue-box for examples) must be proportionate: they must strike a fair balance between their (legitimate) purpose pursued and the non-application of the EU law rule. All national measures derogating from EU law must respect the Charter. Therefore, any restriction to the fundamental rights granted therein in view of a legitimate interest must satisfy the test of proportionality (Article 52, par. 1, CFR).

***Question 1:* Is the domestic provision compatible with EU law?**

**A)** If **the domestic provision is compatible** with EU law (within the meaning under points i), ii), or iii) of box 1 above), the national judge can apply it.

Note that a national provision that is compatible with EU law might be incompatible with the ECHR, or with the obligations flowing from other international treaties that bind the Member State considered. Although the CJEU and the ECtHR have been increasingly referring to each other over the last years, divergences might nonetheless exist or emerge.[11] In this case, the national judge might be obliged to choose between compliance with EU law and compliance with other international obligations.

**B) It is unclear whether the domestic provision is compatible with the relevant EU law provision(s).** For instance, the national judge may have doubts concerning the meaning of the

[9] Case C- 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 353595.

[10] Joined cases C-43430-431431431/93 *Van Schijndel* [1995] ECR I-4736, para 19, Case C-312312312/93 *Peterbroeck* [1995] ECR I-454599, para 1414, Case C-276/01 *Joachim Steffensen* [2003] ECR I-373535, para 66, Case C-125125125/01 *Peter Pflücke and Bundesanstalt für Arbeit* [2003] ECR I-9375, para 3333, C-63/01 *Samuel Sidney Evans and The Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau* [2003] ECR I-1417, para 46.

[11] On this point, see the examples on the conflict of interpretation between the CJEU and ECtHR in relation to the principle of non-discrimination, right to a fair trial and freedom of expression at pp.20-22 and section 4.b in Part II of this Final Handbook.

applicable provisions of EU law.[12] In this case, s/he may ask the CJEU to interpret the relevant provision of the Charter (or the EU law provision/measure that brings the situation within the scope of EU law) through a preliminary question (Article 267 TFEU).[13] If the case is pending before a national court (a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law) there is a duty to refer a preliminary question (**preliminary reference**). By contrast, it is not necessary to refer a preliminary question is the CJEU already clarified the meaning of the provision(s) in question. Thus, before making the reference, it is worth taking a look to the previous case law of the CJEU (**vertical cooperation**). Once established the meaning of the EU law provision(s), the national judge will assess whether the national provision is compatible, or in any event there is room for **consistent interpretation.** If this is not the case, there is a conflict, and Question 2 below must be addressed.

The national judge may doubt the compatibility of EU law with a national provision that restricts a fundamental right granted by the Charter. Note that a measure that restricts a right of the Charter can nevertheless be compatible with it (see points ii) and iii) of box 1, at the end of this Scenario), subject to the requirements of Article 52, par. 1, CFR which lays down the **test of proportionality**. The following questions need to be answered:

- Is the limitation provided for by law?
- Does the domestic provision safeguard the essence of the EU fundamental right whose exercise is limited?
- If so, does the measure envision an objective of general interest recognised by the Union, or is it necessary to protect the rights and freedoms of others? (*legitimate interest*)
- If so, is the domestic provision suitable to achieve the aim pursued? (*suitability*)
- If so, is the domestic provision the least restrictive available to achieve that aim (with respect to the EU Charter right restricted)? (*necessity*)

[12] Or with another provision of EU law, that must be interpreted in light of the Charter: see fn. 5.

[13] Think, for instance, of the case where the relevant EU law provision is open to different meanings, and the viability of consistent interpretation depends on which interpretation of the EU law provision must be embraced. Since the CJEU is the ultimate interpreter of EU law (cf. Article 19(1) TEU), the national judge cannot opt, on its own motion, for the interpretation of EU law that ensures the conformity of the domestic legal order.

- If so, the restriction to the fundamental right must be justified by the importance of satisfying the competing interest (*proportionality in the narrow sense*)

If any of the strands of the test of proportionality are not satisfied, the domestic provision is not compatible with EU law: see section **D)**.[14]

In order to determine the proportionality of the domestic provision, it is useful to look at the interpretation of the same EU fundamental right in previous decisions of the CJEU (**vertical cooperation**), or of other national courts (**comparative reasoning**).

If the national judge cannot solve his/her doubts by looking at the case law of other courts, he/she may refer a question to the CJEU ((a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law must), asking whether the relevant provision of the Charter admits a limitation such as that at in question (**preliminary reference**). Although the final decision on the proportionality of the domestic measure is always left to the national judge, the case law shows that the degree of the scrutiny exercised by the CJEU varies. On some occasions, the CJEU provides very precise guidelines, and basically indicates whether the domestic provision was proportionate or not. By contrast, on other occasions it leaves significant room for manoeuvre to the national court in conducting the proportionality test (**deference**).[15]

**C)** The national judge has no doubts as regards the meaning of the applicable EU law provision(s), but **the domestic provision is open to different meanings**. When available, the national judge must adopt the interpretation that makes the domestic provision compatible with EU law, also in light of the case law of the CJEU (**consistent interpretation**). If consistent interpretation is not viable, there is a conflict (see Question 2 below).

**D)** If **the domestic measure is clearly not compatible with EU law**: see Question 2 below.

[14] For a recent decision of the CJEU applying Article 52, par. 1, CFR see Joined Cases C-293/12 and C-594/12, *Digital Rights* [2014], nyr.

[15] Cf., for instance, ECtHR, App. no. 30141/04, *Schalk and Kopf v Austria* [2010]. For more insights and examples on the test of proportionality and the doctrine of the margin of appreciation: http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp.

If the national judge cannot solve the conflict by way of interpretation, she needs to establish whether the relevant EU law provision has direct effect, thus allowing disapplication of the conflicting national provision.

**Direct effect of EU law and of the provisions of the Charter in particular**

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. Note that the CJEU endorsed a broad notion of "State" for the purpose of vertical direct effect: as stated in case C-282/10 *Dominguez* [2012], para. 39, "*the entities against which the provisions of a directive that are capable of having direct effect may be relied upon include 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.*"

**As regards horizontal effect**, there exist some limitations. In particular, provisions of EU directives (and EU decisions) cannot be relied on in the context of disputes between privates in order to set aside conflicting national legislation (e.g., *Dominguez*, cit., para, 37). By contrast, the technique of consistent interpretation can be relied on also in order to ensure, in the context of a dispute between private parties, the conformity of national law with a Directive. However, "*the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem*" (e.g., Case C-268/06 *Impact* [2008] ECR I-2483).

When consistent interpretation cannot be relied on in a dispute involving private parties in order to solve a conflict between a Directive and national law, the only remedy available to individuals under EU law individuals is an action for liability of the State in accordance with the *Francovich* jurisprudence (Case C-479/93 *Francovich* [1995] ECR I-3843). Some requirements need to be satisfied: the aim of the provision of EU law that was not implemented under domestic law must be that to confer a right on an individual, the content of the right must be clear, and there must be a causal link between the State's violation and the damaged suffered by the applicant. The violation must also be sufficiently serious, but this requirement is always

satisfied when the violation of a Directive is at stake.

**As regards the Charter,** Article 52, par. 5, CFR substantially excludes the direct effect of the provisions of the Charter that enshrine 'principles'. However, neither the Charter nor the Explanations provide an exhaustive list of provisions laying down "principles". Only for illustrative purposes, the explanation of Article 52, par. 5, CFR, refers to Articles 25, 26, and 37 as *examples* of Charter "principles". The same 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. 23, 33 and 34". It might therefore be useful to ask the CJEU (through a preliminary question) to clarify the nature of the provision of the Charter that is relevant in the case.

**Note that**, in the recent judgment of 15 January 2014 in Case C-176/12 *Association de médiation sociale*, the CJEU confirmed that at least some provisions of the Charter can have direct effect, including in disputes between private parties (provided that the case falls within the scope of EU law).[1] In order to have direct effect, the provision of the Charter must be *"sufficient in itself to confer on individuals an individual right which they may invoke as such*". The CJEU also affirmed that the prohibition of age-discrimination in Article 21, par. 1, CFR, satisfies this test, whereas Article 27 on the right of workers to information and consultation within the undertaking does not. If the pending case involves a different provision of the Charter, it might be useful to ask the CJEU to clarify whether it has direct effect or not through the preliminary reference.

***Question 2: Is it possible to disapply the domestic provision conflicting with EU law?***

**A)** If **the relevant provision of EU law has direct effect**, a national judge must apply it and set aside the conflicting domestic norm (**disapplication**).

**B)** If **it is unclear whether the relevant provision of EU law has direct effect**, it might be worth referring the issue to the CJEU through a preliminary question.

**C)** If **the relevant provision of EU law has no direct effect** and consistent interpretation is not viable, under EU law the only remedy abstractly available to individuals is an action for liability of the State in accordance with the *Francovich* jurisprudence.[2] However, if the case falls also under the scope of the ECHR, it might be necessary to consider the effect of the ECHR within the domestic legal order. If

[1] See the first blue-box "When do EU Fundamental rights apply?".

[2] See the blue-box on direct effect above. Case C-479/93 *Francovich* [1995] ECR I-3843.

the domestic legal order admits the disapplication of national provision in conflict with the ECtHR, then the national norm can be set aside (see below, Q2 of Scenario 2).

Note that the EU rule might be in contrast with the domestic Constitution. From the EU-side, it is established case law of the CJEU that, "*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*".[3]

[3] *Melloni*, cit. fn. 8, para. 59.

## ***Second Scenario***

The case pending before the national court does not fall within the scope of Union law and involves a fundamental right granted by the ECHR or a Protocol binding the Member State of the judge *a quo*.[1]

***Question 1: Is the domestic measure compatible with the relevant provision of the ECHR (or of a Protocol to it)?***

In order to answer this question, the national judge has to establish the meaning of the provision of the ECHR (or of a Protocol to it) that is relevant in his/her case. In order to do so, he/she must take into account also the case law of the ECtHR.

**A)** If **the domestic measure complies with the ECHR**, it can be applied/upheld.

Note that a domestic measure that entails a limitation to a fundamental right granted by the ECHR is compatible with the latter if two conditions are satisfied: the fundamental right in question admits limitations, and the test developed by the ECtHR to check the admissibility limitations is satisfied. This test requires that the restriction:

- is prescribed by law;
- pursues a legitimate aim (note that, unlike what happens under the Charter, the provisions of the ECHR enshrining fundamental rights that admit limitations establish themselves which aims can be regarded as legitimate; those aims therefore form an exhaustive list);
- is necessary in a democratic society, i.e., there exists a pressing social need for the interference;
- is proportionate, in particular, **proportionality** requires that: 1) the domestic measure it is appropriate to achieve its stated aim; 2) no less intrusive measures exist; 3) the essence of the fundamental right affected is safeguarded.

[1] The status of ratifications of the Protocols to the ECHR can be monitored at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG

In order to assess the proportionality of the national measure, it might be useful to take a look to the case law of the ECtHR in similar cases (**vertical cooperation**). This because, under the ECHR system, the primary responsibility for applying the Convention is assigned to national public authorities, including national courts. Furthermore, the ECtHR sometimes leaves to the High Contracting Parties a certain **margin of appreciation** as regards the identification of the proper balance to be struck between a fundamental right and an objective of public interest/a competing fundamental right. In these cases, national public authorities must identify the most appropriate solution to satisfy the fundamental right whose protection takes priority in a specific case, while not unreasonably restricting the conflicting interest/fundamental right. The extent, if not the very existence, of the margin of appreciation varies depending on whether there exists a consensus in the law and practice of the High Contracting Parties as regards the protection that must be afforded to a Convention fundamental right with regard to specific issues ("European Consensus"). A corollary of the doctrine of margin of appreciation is that the application of the ECHR is not necessarily uniform across all the High Contracting Parties. This marks the distance with the Charter and EU law in general, whose application is less concerned with local peculiarities, in light of the principle of EU primacy. At the same time, it must be pointed out that the margin of appreciation is a mechanism of deference of the ECtHR to the national legal systems and/or practices, but it does not guarantee immunity from the Convention. The acknowledgment of a margin of appreciation to the Member States does not exclude the supervision of the ECtHR [2]

[2] This was clarified by the ECtHR many times. For instance, in the case of *Attila Vajnai v Hungary*, judg. of 8 July 2008, app. no. 33629/06, the Court considered the following: "The test of «necessity in a democratic society» requires the Court to determine whether the interference complained of corresponded to a «pressing social need». The High Contracting Parties have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a «restriction» is reconcilable with freedom of expression as protected by Article 10 of the Convention. […] In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were «relevant and sufficient», and whether the measure taken was «proportionate to the legitimate aims pursued». In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10".

**B)** If **the meaning of the domestic provision remains open to different interpretations**, the national judge must opt for the interpretation (when available) that ensures compliance with the ECHR, also in light of the case law of the ECtHR (**consistent interpretation**).

**C)** If **the domestic provision is not compatible with the ECHR**, and there is no room for consistent interpretation, there is a conflict and the national judge must address question 2.

***Question 2: Is it possible to disapply the national norm conflicting with the ECHR?***

Note that the answer to this question varies from State to State, as it depends on the formal rank and effects assigned to the ECHR under national law.

**A)** If **the domestic legal order allows disapplication of a domestic provision conflicting with the ECHR**, the domestic provision must be set aside (**disapplication**).

**B)** If **the domestic legal order does not allow disapplication of a domestic provision conflicting with the ECHR**, maybe it is possible to raise a question of constitutionality. This will revolve around the breach of the ECHR, either directly (with the ECHR serving as standard of review) or indirectly (with the Convention being used to interpret the relevant constitutional provision) (**consistent interpretation**).

## ANNEX II- Grouping of the collected case law based on the fundamental right

Cases dealing primarily with the interaction between legal provisions

- Supreme Court (UK), *Home Office v Tariq* [2011] UKSC 35, 13 July 2011, and related cases
- Constitutional Court (Croatia), judgment U-III/5270/2012, *D.A.P.T. (plaintiff) v Republic of Croatia*, and judgment U-III / 464 /2013, *A. Z. (plaintiff) v Republic of Croatia*
- Constitutional Court (Austria), judgment *U466/11and others*, 12 March 2012;
- The *Pinto Act* Saga (Italy): EctHR, appl. no. 36813/97, *Scordino v Italy* [2004], 29 July 2004, and appl. no. 69789/01, *Brusco v Italy* [2001], 6 September 2001; Supreme Court (Italy), n. 1338 – 1341, 26 January 2004 (plenary session) , and n. 14, 18 April 2008 (first section, civil);
- High Court (Ireland), *P.M. (Botswana) v Minister for Justice and Law Reform, Attorney General and Ireland* [2012] IEHC 34, 31 January 2012;
- Tribunal of Milan (court of first instance, Italy), judgment 9 August 2007 (pregnancy-related dismissals; discrimination on grounds of gender);
- Tribunal Pavia (court of first instance, Italy), order of 9 September 2009, Manara v. INPS (discrimination on grounds of disability);
- Constitutional Court (Spain), STC 198/2012, 6 November 2012 (same-sex marriage; discrimination on grounds of sexual orientation);
- Constitutional Court (Poland), Judgment K 63/07, 15 July 2010 (retirement age; discrimination on grounds of age);

Cases showing strategic use of vertical interaction techniques between courts, or where the preliminary reference was prominent:

- Constitutional Court (Spain), STC 199/2009, *Wilson Adran John*, 28 September 2009, and ATC 86/2011, *Melloni* (Order, reference to CJEU), 9 June 2011; CJEU, C-399/11, *Stefano Melloni v Ministerio Fiscal* , 26 February 2013
- CJEU, Case C-396/11, *Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu*, 29 January 2013; Judgment of the Court of Appeal of Constanţa (Romania) following the preliminary ruling of the CJEU in *Radu*, as well as the judgment of the High Court of Romania by Decision of 17 July 2013;

- CJEU, Case C-168/13 PPU, *Jeremy F v Premier ministre*, 30 May 2013, and Conseil Constitutionnel (France), n° 2013-314, *Jeremy F. against Prime Minister*, 14 June 2013;
- Supreme Court (UK), *R v Horncastle & Ors* [2009] UKSC 14, 9 December 2009, and Court of Appeal (UK) *R v Ibrahim* [2012] EWCA Crim 837, 27 April 2012;
- Supreme Court of Cassation and Justice (Romania), decision no. 5043/2012, *Circul Globus Bucureşti*;
- CJEU, Case C-366/99, *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation*, 29 November 2001;
- CJEU, Case C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, 30 September 2010;
- CJEU, Case C-555/07, *Seda Kücükdeveci contro Swedex GmbH & Co. KG.*, 19 January 2010;

Cases where comparative reasoning has been used:

- Constitutional Court (Poland), Judgment in case SK 26/08, 5 October 2010 (the *improper implementation of the EAW Framework Decision* case);
- Constitutional Court *(Croatia),* judgment U-I/722/2009, 15 April 2011 (the *Legal Aid Act* case);
- Supreme Court (UK), *Assange v Swedish Prosecutor Authority* [2011] EWHC 2849, 30 May 2012;
- Court of Appeal of Bucharest (Romania), case no. 3374/2/2012 *R.M.* (This case is placed in this category for its similarities with *Assange*, rather than its use of comparative reasoning)
- Court of appeal (Employment Appeal Tribunal, UK) *Falkirk Council v Whyte* [1997] IRLR 560, 30 June 1997;

Cases demonstrating the centrality of judicial dialogue to the content of the right to a fair trial – e.g. the duty to engage in certain forms of judicial dialogue like the preliminary reference, or mutual recognition:

- Constitutional Court (Italy), judgment n. 227, 21 June 2010 (constitutionality of the EAW implementing legislation);
- ECtHR, appl. no. 39594/98, *Kress v France*, 7 June 2001, and appl. no. 54984/09, *Marc-Antoine v. France* , 4 June 2013;
- Constitutional Court (Spain), STC 145/2012, *Iberdrola*, 2 July 2012, and STC 78/2010, *Metropole*, 20 October 2010;

Cases demosntrating the importance of the proportionality test and/or doctrine of the margin of appreciation in the field of non-discrimination:

- Constitutional Court (Croatia), judgment U-I / 4170 / 2004, *Damir Jelušić (plaintiff) v Republic of Croatia*, 29 September 2010;
- Supreme Court (UK), *Seldon (Appellant) v Clarkson Wright and Jakes (A Partnership) (Respondent)* [2012] UKSC, 16, 30 April 2012.

Cases dealing with conflict between fundamental rights:

1) Balance between the different guarantees under the freedom of expression: freedom of media, in the context of the protection of journalistic sources:

- ECtHR, *Ernst and o. v Belgium*, App. no. 33400/96, 15 July 2003;

2) Freedom of expression and right to privacy and family life:

- ECtHR, *Von Hannover v Germany I*, App. no. 59320/00, 24 June 2004;
- ECtHR, *Von Hannover v Germany II*, Appl. nos. 40660/08, and 60641/08, 7 February 2012;
- ECtHR, *Von Hannover v Germany III*, Appl. no. 8772/1019, September 2013;
- ECtHR, *Axel Springer AG v Germany*, Appl. no. 39954/08, 7 February 2012;

3) Reputation and honour between fundamental rights and public interest (the case of defamation):

- ECtHR, *Cumpana and Mazare*, Appl. no. 33348/9615, March 2004;
- ECtHR, *Belpietro v* Italy, Appl. no. 43612/10, 24 September 2013;
- ECtHR, *Lewandowska-Malec v Poland*, Appl. no. 39660/07, 18 September 2012;
- Constitutional Court (Croatia), Judgment in case U-III/2858/2008.

4) Freedom of expression and data protection:

- CJEU, Case C-73/07 *Satamedia*, 16 December 2008;
- Tribunal of Milan (court of fisrt instance, Italy), judgment no. 5820/2013, 26 April 2013;
- CJEU, Case C-131/12 *Google Spain* (Opinion of AG Jääskinen, 25 June 2013);

5) Freedom of expression with intellectual property rights:

- CJEU, Case C-70/10 *Scarlet Extended NV*, 24 November 2011;
- CJEU, Case C-283/10 *Circul Globus Bucureşti* (2011), 24 November 2011,
- Supreme Court of Cassation and Justice (Romania), decision no. 5043/2012, *Circul Globus Bucureşti*;
- CJEU, Case C-112/09 P *Sociedad General de Autores y Editores de España*, 14 January 2012.

## ANNEX III – Grouping of case law based on the Use of Judicial Interaction Type(s) and Technique(s)

| Case | Interaction | | Technique |
|---|---|---|---|
| FREEDOM OF EXPRESSION | | | |
| Ernst v Belgium | V | ECtHR v national court | Deference<br>consistent interpretation |
| Satamedia | V | ECtHR v national court | Consistent interpretation |
| | V | CJEU v national court | Preliminary reference/Disapplication<br>Proportionality in ECtHR v CJEU |
| Von Hannover Saga | V | ECtHR v national courts | Proportionality test |
| | H | National courts in various MS | Marigin of appreciation |
| | V | National courts within one MS | EctHR consistent interpretation |
| Cumpana and Mazare v Romania | V | ECtHR v national courts | Proportionality test |
| | V | National courts within one MS | |
| Belpietro v Italy | V | ECtHR v national courts | Consistent interpretation with the ECtHR standard |
| Lewandowska Malec v Poland | V | ECtHR v national courts | Consistent interpretation with the ECtHR standard |
| Croatian | V | ECtHR v national courts | Consistent interpretation with the ECtHR standard |
| Sabam v Scarlet | | CJEU v national courts | Consistent interpretation with the CJEU standard<br>Preliminary reference |
| Collecting Societies | V | CJEU v national courts | Preliminary reference |
| **FAIR TRIAL** | | | |

| | | | |
|---|---|---|---|
| Home Office v Tariq and related cases | V | CJEU v ECtHR | Denial of dialogue |
| | V | National courts | consistent interpretation with the ECtHR standard |
| | H | National courts | |
| The extradition cases: AZ v Croatia, D.A.P.T. v Croatia ("flagrant denial of a fair trial", Croatian Constitutional Court) | V | ECtHR v national courts | |
| The Austrian Constitutional Court, U466/11 and others (translating Art 47 of the EU Charter into the domestic constitutional fair trial standard) – migration/asylum | V | ECtHR v national courts | Consistent interpretation<br>Disapplication<br>Preliminary reference |
| | H | CJEU v ECtHR | Consistent intrepretation |
| The Pinto Act saga: Brusco, Scordino and Corte di Cassazione judgments No 1339/2004, and 14/2008 (Italy) | V | ECtHR v national courts | Consistent interpretation |
| | V | National courts | |
| Ireland - P.M. (Botswana) v Minister for Justice and Law Reform, Attorney General and Ireland (judicial review of extradition decisions) | V | CJEU v national courts | Consistent interpretation |
| Wilson Adran John and Melloni – the Spanish EAW cases on trials in absentia (Spanish Constitutional Court / CJEU) | V | CJEU v national courts | Disapplication |

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| | | | Preliminary Reference<br>STC Consistent interpretation with the CJEU preliminary ruling in Melloni judgment STC 26/2014 |
| | H | CJEU v ECtHR | Consistent interpretation |
| Radu – fundamental rights review under the EAW Framework Decision in extradition proceedings | V | CJEU v national courts | Preliminary Reference<br>Proportionality |
| Jeremy F. against Prime Minister - effective legal remedies in case of an extension of the effects of an European Arrest Warrant | V | CJEU v national courts | Preliminary Reference<br>Proportionality |
| UK – from Horncastle to Ibrahim and Riat | V | ECtHR v national courts | Consistent interpretation |
| | V | National courts | |
| Polish Constitutional Tribunal | V | ECtHR v national courts | References to case law |
| | H | National courts | |
| "European standards" and the provision of legal aid – the Croatian Constitutional Court review of the constitutionality of the Legal Aid Act – civil/regulatory law | V | ECtHR v national courts | Consistent interpretation |
| | H | National courts | |

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| Assange v Swedish Prosecutor Authority (UK Supreme Court) | V | ECtHR v national courts | Consistent interpretation |
| | H | National courts | Comparative reasoning |
| R.M. (Court of Appeal of Bucharest) | V | Internal/external vertical | Consistent interpretation |
| Italian legislative measures | V | CJEU v national courts | Consistent interpretation |
| Kress v. France n°39594 and related cases (right to fair trial and administrative justice proceedings; France) – administrative law | V | ECtHR v national courts | Consistent interpretation |
| Iberdrola (Spanish Constitutional Court – duty to disapply national legislation contrary to EU law) | V | CJEU v national courts<br><br>Constitutional v national courts | Disapplication<br><br>Strategy – national court |
| Metropole (Spanish Constitutional Court – refusal to address a preliminary reference to the CJEU as a violation of the right to fair trial) | V | CJEU v national courts | Preliminary reference |
| **NON-DISCRIMINATION** | | | |
| Griesmar and the follow up | V | CJEU v national courts | Preliminary reference(s) |
| | V | National courts | |
| | H | National courts | |
| Italian Reactions to Schalke and Kopf | V | ECtHR v national courts | Consistent interpretation (change of case law) |
| Spanish reactions to Schalke and Kopf | V | ECtHR v national courts | Consistent interpretation<br><br>comparative reasoning |
| | | National courts | |
| Spanish Constitutional Tribunal on same sex discrimination | V | ECtHR v national courts<br><br>National courts | Consistent interpretation |

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| Roca Alvarez | V | CJEU v national courts | Preliminary reference<br>disapplication |
| Falkirk Council and others v Whyte and others (non-discrimination on grounds of gender; UK) | V | CJEU v national courts | Consistent interpretation |
| | H | National courts | Comparative reasoning |
| Pregnancy-related dismissals (non-discrimination on grounds of gender; Italy) | V | CJEU v national courts | Consistent interpretation |
| | H | National courts | Comparative reasoning |
| Kücükdeveci (discrimination on grounds of age; Germany) | V | CJEU v national courts | Preliminary reference<br>Disapplication<br>Proportionality testing |
| Seldon v Clarkson Wright and Jakes (non-discrimination on grounds of age; UK) | V | CJEU – national courts (SC)<br>National courts (SC v ordinary) | Consistent interpretation<br>margin of discretion<br>proportionality testing |
| Jelušić v. Croatia (non-discrimination on grounds of age; Croatia) | V | ECtHR v national courts | Consistent interpretation |

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| | | | Margin of appreciation |
| Retirement age (discrimination on grounds of age; Poland) | V | CJEU v national courts<br><br>National courts (CC v ordinary) | Consistent interpretation |
| Italian collective contracts (non-discrimination on grounds of age; Italy) | V | CJEU v national courts | Disapplication |
| Disability (non-discrimination on grounds of disability; Italy) | V | CJEU v national courts | Disapplication |
| ACCEPT (non-discrimination on grounds of sexual orientation; Romania) | V | CJEU v national courts | Consistent interpretation<br><br>CJEU - Setting guidelines<br>Referring Court departing from the CJEU guidelines in the judgment following the CJEU preliminary ruling |
| NGOs v. Mamić (non-discrimination on grounds of sexual orientation; Croatia) | V | CJEU v national courts | Consistent interpretation |
| | V | ECtHR v national courts | |
| Same-sex couples (non-discrimination on grounds of gender; Poland) | V | ECtHR v national courts | Consistent interpretation |
| Burden of Proof (non-discrimination on grounds of gender and political views; Croatia) | V | ECtHR v national courts<br><br>CJEU v national courts | Consistent interpretation (lack of it for the EU rule) |

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| Sindicatul Liber (non-discrimination on grounds of gender; Romania) | V | CJEU v national courts<br><br>ECtHR v national courts | disapplication |
| Sindicatul Liber (non-discrimination on grounds of gender; Romania) | V | CJEU | Preliminary reference<br>Disapplication<br>Consistent interpretation |

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